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Index 1

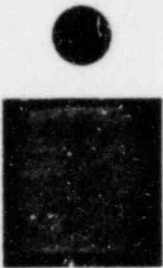
INDEXES TO NUCLEAR REGULATORY COMMISSION ISSUANCES

July - September 1982



U. S. NUCLEAR REGULATORY COMMISSION

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**INDEXES TO
NUCLEAR REGULATORY
COMMISSION ISSUANCES**

July - September 1982

U.S. NUCLEAR REGULATORY COMMISSION

Foreword

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

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

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

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

1. Case Name Index

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

2. Digests and Headers

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

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

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

3. Legal Citations Index

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

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

4. Subject Index

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

5. Facility Index

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

CASE NAME INDEX

ARIZONA PUBLIC SERVICE COMPANY, et al.

OPERATING LICENSE; MEMORANDUM AND ORDER; Docket Nos. STN-50-528-OL, STN-50-529-OL, STN-50-530-OL; LBP-82-62, 16 NRC 565 (1982)

ARMED FORCES RADIOBIOLOGY RESEARCH INSTITUTE

BYPRODUCT MATERIALS LICENSE RENEWAL; DECISION; Docket No. 30-6931 (Renewal of Byproduct Materials License No. 19-08330-03); ALAB-682, 16 NRC 150 (1982)

BOSTON EDISON COMPANY

OPERATING LICENSE MODIFICATION; ORDER; Docket No. 50-293 (EA-81-63); CLI-82-16, 16 NRC 44 (1982)

CINCINNATI GAS & ELECTRIC COMPANY, et al.

OPERATING LICENSE; MEMORANDUM AND ORDER; Docket No. 50-358-OL; LBP-82-54, 16 NRC 210 (1982); LBP-82-68, 16 NRC 741 (1982)

OPERATING LICENSE; ORDER; Docket No. 50-358; CLI-82-20, 16 NRC 109 (1982)

CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.

OPERATING LICENSE; MEMORANDUM AND ORDER; Docket Nos. 50-440-OL, 50-441-OL; LBP-82-53, 16 NRC 196 (1982); LBP-82-53A, 16 NRC 208 (1982); LBP-82-69, 16 NRC 751 (1982); LBP-82-79, 16 NRC 1116 (1982)

OPERATING LICENSE; ORDER; Docket Nos. 50-440-OL, 50-441-OL; LBP-82-67, 16 NRC 734 (1982)

COMMONWEALTH EDISON COMPANY

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER; Docket No. 50-10-OLA; LBP-82-52, 16 NRC 183 (1982)

SHOW CAUSE; DIRECTOR'S DECISION UNDER 10 CFR 2.206; Docket Nos. 50-373, 50-374; DD-82-9, 16 NRC 396 (1982)

SPENT FUEL POOL AMENDMENT; FINAL INITIAL DECISION; Docket Nos. 50-237-SP, 50-249-SF; LBP-82-65, 16 NRC 714 (1982)

SPENT FUEL POOL MODIFICATION; DECISION; Docket Nos. 50-237, 50-249; ALAB-695, 16 NRC 962 (1982)

CONSOLIDATED EDISON COMPANY OF NEW YORK

SPECIAL PROCEEDING; MEMORANDUM AND CERTIFICATION; Docket No. 50-247-SP; LBP-82-61, 16 NRC 560 (1982); CLI-82-15, 16 NRC 27 (1982); CLI-82-24, 16 NRC 865 (1982); CLI-82-25, 16 NRC 867 (1982)

CONSUMERS POWER COMPANY

MODIFICATION ORDER AND OPERATING LICENSE; MEMORANDUM AND ORDER; Docket Nos. 50-329-OM&OL, 50-330-OM&OL; ALAB-684, 16 NRC 162 (1982)

MODIFICATION ORDER AND OPERATING LICENSE; PREHEARING CONFERENCE ORDER; Docket Nos. 50-329-OM&OL, 50-330-OM&OL; LBP-82-63, 16 NRC 571 (1982)

REMAND; DECISION; Docket Nos. 50-329-CP, 50-330-CP; ALAB-691, 16 NRC 897 (1982)

SCHEDULING; MEMORANDUM; Docket No. 50-155-OLA; LBP-82-51A, 16 NRC 180 (1982)

SPENT FUEL POOL AMENDMENT; INITIAL DECISION; Docket No. 50-155-OLA; LBP-82-60, 16 NRC 540 (1982); LBP-82-77, 16 NRC 1096 (1982); LBP-82-78, 16 NRC 1107 (1982)

VACATION OF DECISION; MEMORANDUM AND ORDER; Docket No. 50-255-SP; CLI-82-18, 16 NRC 50 (1982)

DAIRYLAND POWER COOPERATIVE

OPERATING LICENSE; MEMORANDUM AND ORDER; Docket Nos. 50-409-FTOL, 50-409-SC; LBP-82-58, 16 NRC 512 (1982)

CASE NAME INDEX

DUKE POWER COMPANY

CONSTRUCTION PERMIT; MEMORANDUM AND ORDER AUTHORIZING WITHDRAWAL OF APPLICATION FOR CONSTRUCTION PERMIT WITHOUT PREJUDICE; Docket Nos. STN-50-488, STN-50-489, STN-50-490; LBP-82-81, 16 NRC 1128 (1982)

DUKE POWER COMPANY, et al.

LIMITED WORK AUTHORIZATION; MEMORANDUM AND ORDER; Docket Nos. 50-413, 50-414, ALAB-687, 16 NRC 460 (1982)
SPECIAL PROCEEDING; MEMORANDUM AND ORDER; Docket Nos. 50-413, 50-414; LBP-82-51, 16 NRC 167 (1982)

GENERAL ATOMIC COMPANY

RULEMAKING; DENIAL OF PETITION FOR RULEMAKING; Docket No. PRM-95-1 (10 CFR Part 95); DPRM-82-1, 16 NRC 861 (1982)

GENERAL ELECTRIC COMPANY

OPERATING LICENSE AMENDMENT; ORDER GRANTING MOTION TO WITHDRAW APPLICATION AND DISMISSING PROCEEDING WITHOUT PREJUDICE; Docket No. 70-1308 (Application to Modify License No. SNM-1265 to Increase Spent Fuel Storage Capacity; LBP-82-83, 16 NRC 1181 (1982)
SHOW CAUSE; INITIAL DECISION; Docket No. 50-70-SC; LBP-82-64, 16 NRC 596 (1982)

KERR-McGEE CORPORATION

MATERIALS LICENSE AMENDMENT; ORDER; Docket No. 40-2061; CLI-82-21, 16 NRC 401 (1982)

LONG ISLAND LIGHTING COMPANY

OPERATING LICENSE; MEMORANDUM AND ORDER; Docket No. 50-322-OL (Emergency Planning); LBP-82-82, 16 NRC 1144 (1982)
OPERATING LICENSE; MEMORANDUM AND ORDER; Docket No. 50-322-OL; LBP-82-73, 16 NRC 974 (1982) LBP-32-75, 16 NRC 986 (1982)
OPERATING LICENSE; ORDER; Docket No. 50-322-OL; CLI-82-17, 16 NRC 48 (1982)
SECURITY; MEMORANDUM, ORDER AND NOTICE OF SECOND IN CAMERA CONFERENCE OF COUNSEL; Docket No. 50-322-OL-2, ASLBP No. 82-478-05-OL; LBP-82-80, 16 NRC 1121 (1982)

LOUISIANA POWER AND LIGHT COMPANY

OPERATING LICENSE; MEMORANDUM AND ORDER; Docket No. 50-382-OL; LBP-82-66, 16 NRC 730 (1982)

REMAND; MEMORANDUM AND ORDER; Docket No. 50-382-OL; ALAB-690, 16 NRC 893 (1982)

METROPOLITAN EDISON COMPANY

RESTART; MEMORANDUM AND ORDER; Docket No. 50-289-SP; ALAB-685, 16 NRC 449 (1982)
RESTART; MEMORANDUM AND ORDER; Docket No. 50-289; LBP-82-86, 16 NRC 1190 (1982)
RESTART; ORDER; Docket No. 50-289; CLI-82-12, 16 NRC 1 (1982)
RESTART; PARTIAL INITIAL DECISION; Docket No. 50-289; LBP-82-56, 16 NRC 281 (1982)

METROPOLITAN EDISON COMPANY, et al.

OPERATING LICENSE AMENDMENT; DECISION; Docket No. 50-320-OLA; ALAB-692, 16 NRC 921 (1982)
RESTART; ORDER; Docket No. 50-289; CLI-82-13, 16 NRC 21 (1982)

NUCLEAR FUEL SERVICES, INC. and NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER; Docket No. 50-201-OLA; ALAB-679, 16 NRC 121 (1982)

OFFSHORE POWER SYSTEMS

MANUFACTURING LICENSE; MEMORANDUM AND ORDER; Docket No. STN 50-437-ML; ALAB-686, 16 NRC 454 (1982); ALAB-689, 16 NRC 887 (1982)

PACIFIC GAS AND ELECTRIC COMPANY

DECOMMISSIONING; DIRECTOR'S DECISION UNDER 10 CFR 2.206; Docket No. 50-133; DD-82-7, 16 NRC 387 (1982)

OPERATING LICENSE; DECLINATION OF REVIEW; Dockets 50-275-OL, 50-323-OL; CLI-82-12A, 16 NRC 7 (1982)

OPERATING LICENSE; DIRECTOR'S DECISION UNDER 10 CFR 2.206; Docket Nos. 50-275, 50-276; DD-82-10, 16 NRC 1205 (1982)

OPERATING LICENSE; INITIAL DECISION; Docket Nos. 50-275-OL 50-323-OL; LBP-82-70, 16 NRC 756 (1982)

CASE NAME INDEX

OPERATING LICENSE; MEMORANDUM AND CERTIFICATION TO THE COMMISSION; Docket Nos. 50-275-OL, 50-323-OL; ALAB-681, 16 NRC 146 (1982)

OPERATING LICENSE; MEMORANDUM IN RESPONSE TO NRC STAFF'S MOTION FOR CLARIFICATION OF THE LICENSING BOARD'S INITIAL DECISION DATED AUGUST 31, 1982; Docket Nos. 50-275-OL, 50-323-OL; LBP-82-85, 16 NRC 1187 (1982)

PHYSICAL SECURITY; ORDER; Docket Nos. 50-275-OL, 50-323-OL; CLI-82-19, 16 NRC 53 (1982)

PENNSYLVANIA POWER AND LIGHT COMPANY and ALLEGHENY ELECTRIC COOPERATIVE, INC. OPERATING LICENSE; MEMORANDUM AND ORDER; Docket Nos. 50-387-OL, 50-388-OL; ALAB-693, 16 NRC 952 (1982)

PHILADELPHIA ELECTRIC COMPANY
OPERATING LICENSE; MEMORANDUM AND ORDER; Docket Nos. 50-352, 50-353; LBP-82-71, 16 NRC 965 (1982); LBP-82-72, 16 NRC 968 (1982)

POWER AUTHORITY OF THE STATE OF NEW YORK
SPECIAL PROCEEDING; MEMORANDUM AND CERTIFICATION; Docket No. 50-286-SP; LBP-82-61, 16 NRC 560 (1982)

SPECIAL PROCEEDING; MEMORANDUM AND ORDER; Docket No. 50-286; CLI-82-15, 16 NRC 27 (1982)

SPECIAL PROCEEDING; ORDER; Docket No. 50-286; CLI-82-24, 16 NRC 865 (1982); CLI-82-25, 16 NRC 867 (1982)

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
SHOW CAUSE; DIRECTOR'S DECISION UNDER 10 CFR 2.206; Docket Nos. 50-443, 50-444; DD-82-8, 16 NRC 394 (1982)

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.
OPERATING LICENSE; MEMORANDUM AND ORDER; Docket Nos. 50-443-OL, 50-444-OL (ASLBP No. 82-471-02-OL); LBP-82-76, 16 NRC 1029 (1982)

PUGET SOUND POWER AND LIGHT COMPANY, et al.
CONSTRUCTION PERMIT; MEMORANDUM AND ORDER; Docket Nos. 50-522, 50-523; ALAB-683, 16 NRC 160 (1982); LBP-82-74, 16 NRC 981 (1982)

SOUTH CAROLINA ELECTRIC AND GAS COMPANY, et al.
OPERATING LICENSE; MEMORANDUM AND ORDER; Docket No. 50-395-OL; ALAB-694, 16 NRC 958 (1982); LBP-82-84, 16 NRC 1183 (1982)

OPERATING LICENSE; PARTIAL INITIAL DECISION; Docket No. 50-395-OL; LBP-82-55, 16 NRC 225 (1982)

OPERATING LICENSE; SUPPLEMENTAL PARTIAL INITIAL DECISION; Docket No. 50-395-OL; LBP-82-57, 16 NRC 477 (1982)

SOUTHERN CALIFORNIA EDISON COMPANY, et al.
OPERATING LICENSE; DECISION; Docket Nos. 50-361-OL, 50-362-OL; ALAB-680, 16 NRC 127 (1982)

OPERATING LICENSE; MEMORANDUM AND ORDER; Docket Nos. 50-361-OL, 50-362-OL; LBP-82-60A, 16 NRC 555 (1982)

OPERATING LICENSE; ORDER; Docket Nos. 50-361-OL, 50-362-OL; CLI-82-14, 16 NRC 24 (1982); CLI-82-27, 16 NRC 883 (1982)

TENNESSEE VALLEY AUTHORITY
OPERATING LICENSE AMENDMENT; ORDER; Docket Nos. 50-259-OLA, 50-260-OLA, 50-296-OLA; CLI-82-26, 16 NRC 880 (1982)

TEXAS UTILITIES GENERATING COMPANY, et al.
OPERATING LICENSE; ORDER DENYING RECONSIDERATION; Docket Nos. 50-445, 50-446; LBP-82-87, 16 NRC 1195 (1982)

SHOW CAUSE; ORDER TO SHOW CAUSE; Docket Nos. 50-445, 50-446; LBP-82-59, 16 NRC 553 (1982)

UNITED STATES DEPARTMENT OF ENERGY, PROJECT MANAGEMENT CORPORATION, TENNESSEE VALLEY AUTHORITY
CONSTRUCTION PERMIT EXEMPTION; MEMORANDUM AND ORDER; Docket No. 50-537 (Exemption request under 10 CFR 50.12); CLI-82-22, 16 NRC 405 (1982); CLI-82-23, 16 NRC 412 (1982)

CASE NAME INDEX

LIMITED WORK AUTHORIZATION; MEMORANDUM AND ORDER; Docket No. 50-537; ALAB-688, 16
NRC 471 (1982)
WELLS EDDLEMAN
OPERATING LICENSE; DENIAL OF PETITION FOR RULEMAKING; Docket No. PRM-2-11; DPRM-82-2, 16
NRC 1209 (1982)

DIGESTS

ISSUANCES OF THE NUCLEAR REGULATORY COMMISSION

CLI-82-12 METROPOLITAN EDISON COMPANY (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289; RESTART; July 16, 1982; ORDER

- A The Commission denies a request by the Appeal Board for authority to hear three safety issues raised by the Board sua sponte, and decides that the issues will be dealt with by the staff and the Commission outside the context of this adjudicatory proceeding.

CLI-82-12A PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Dockets 50-275-OL, 50-323-OL; OPERATING LICENSE; March 18, 1982; DECLINATION OF REVIEW

CLI-82-13 METROPOLITAN EDISON COMPANY, et al (Three Mile Island, Unit 1), Docket No. 50-289; RESTART; July 16, 1982; ORDER

- A The Commission denies a motion by the licensee asking the Commission to decide expeditiously whether (1) it intends to prepare a supplemental environmental impact statement (SEIS) on psychological health effects associated with the operation of this facility in accordance with the decision in *PANE v. NRC*, No. 81-1131 (D.C. Cir., May 14, 1982), and if so, (2) to proceed expeditiously with its preparation and circulation, and (3) to decide that no hearing would be permitted on the SEIS. The Commission determines that it does not at present have enough information to decide whether the terms of the court's decision require the preparation of an SEIS.

CLI-82-14 SOUTHERN CALIFORNIA EDISON COMPANY (San Onofre Nuclear Generating Station, Units 2 and 3), Docket Nos. 50-361-OL, 50-362-OL; OPERATING LICENSE; July 16, 1982; ORDER

- A On the basis of its immediate effectiveness review pursuant to 10 CFR 2.764(f), the Commission concludes that resolution of the issues covered by the Licensing Board's decisions in this operating license proceeding (LBP-82-3, 15 NRC 61 (1982); LBP-82-39, 15 NRC 1163 (1982); LBP-82-46, 15 NRC 1531 (1982)) does not present the type of safety problem which would require a further stay of their effectiveness, and decides that these decisions may go into effect. The license authorized is made subject to the condition that for operation above 5% of rated power to continue beyond six months from the date of issuance of the full-power license, the offsite medical arrangements issue retained by the Licensing Board in LBP-82-39 must be resolved or further operation above 5% must be justified under 10 CFR 50.47(c)(1). The Commission explains that its decision does not authorize issuance of the requested full-power license for Units 2 and 3 of this facility and further that they will not be issued until the staff has briefed the Commission on other, uncontested, issues and the Commission has voted on whether to authorize the licenses.

CLI-82-15 CONSOLIDATED EDISON COMPANY OF NEW YORK (Indian Point, Unit 2) and POWER AUTHORITY OF THE STATE OF NEW YORK (Indian Point, Unit 3), Docket Nos. 50-247, 50-286; SPECIAL PROCEEDING; July 27, 1982; MEMORANDUM AND ORDER

- A Upon consideration of a series of pleadings by licensees concerning the Commission's plan to conduct a discretionary hearing on the possible suspension of Units 2 and 3 of the Indian Point facility, the Commission denies: (1) an appeal by a licensee from the order of the Licensing Board (established at the direction of the Commission to determine, inter alia, the issues which the forthcoming hearing are to address) admitting certain intervenors to the hearing; (2) a petition by a licensee for directed certification of its request for stay or dismissal of the proceeding; and (3) a petition by the two licensees for directed certification of their charges that the Board exceeded or misapplied its jurisdiction in admitting contentions. The Commission, inter alia, provides further guidance on the admission of contentions and the formulation of issues for hearing, and remands the matter to the Board for expeditious reconsideration of its rulings on the admissibility of the contentions in light of the additional guidance.

- B There is nothing in 10 CFR 2.714 or the case law interpreting that rule which permits licensing boards to exclude certain groups from a licensing proceeding because of their opinions on nuclear power, either generally or as related to certain plants, or because of their conduct outside the proceeding.

DIGESTS

ISSUANCES OF THE NUCLEAR REGULATORY COMMISSION

- C The Commission has an inherent supervisory power over the conduct of its adjudicatory proceedings, including the authority to provide guidance on the admissibility of contentions before licensing boards. See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-17 (1977); *United States Energy Research and Development Administration* (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 75-76 (1976).
- CLI-82-16 BOSTON EDISON COMPANY (Pilgrim Nuclear Power Station), Docket No. 50-293 (EA-81-63); OPERATING LICENSE MODIFICATION; July 30, 1982; ORDER
- A The Commission denies a petition by the Attorney General of Massachusetts for a hearing and intervention on an order of the NRC Office of Inspection and Enforcement modifying the operating license for this facility, on the ground that the petition presents concerns outside the scope of the proceeding.
- B Section 189a of the Atomic Energy Act does not provide a non-discretionary right to a hearing on all issues arguably related to an acknowledged enforcement problem without regard to the scope of the enforcement action actually proposed or taken by the Commission. In order to obtain leave to intervene in an NRC proceeding, a petitioner must demonstrate an interest affected by the licensing action, as required by 10 CFR 2.714. *BPI v. Atomic Energy Commission*, 502 F.2d 424 (D.C. Cir. 1974).
- C The Commission may limit the issues in enforcement proceedings to whether the facts as stated in the order are true and whether the remedy selected is supported by those facts. *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441-42 (1980).
- CLI-82-17 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL; OPERATING LICENSE; July 30, 1982; ORDER
- A In response to a request by counsel for the applicant, the Commission directs that applicant's and intervenor's counsel be given access to those portions of the Appeal Board's opinion in the Diablo Canyon operating license (physical security) proceeding (ALAB-653) (Restricted) dealing with the definition of the design basis threat and the interpretation of the Commission's regulations regarding the appropriate number of armed responders, subject to the prior deletion of any classified information contained therein and the execution of appropriate non-disclosure affidavits. In response to a further request by intervenor's counsel for access by intervenor's consultants and for access to the entire Diablo Canyon security file, the Commission: (1) refers the request for access by intervenor's consultants to the Licensing Board with a direction to authorize access only upon a showing of need; and (2) denies access to the other portions of the opinion and the underlying record in the absence of a showing of need for such access.
- CLI-82-18 CONSUMERS POWER COMPANY (Palisades Nuclear Power Facility), Docket No. 50-255-SP; VACATION OF DECISION; July 30, 1982; MEMORANDUM AND ORDER
- A The Commission vacates on grounds of mootness the Appeal Board's and the Licensing Board's earlier decisions (ALAB-670, 15 NRC 493 (1982); LBP-81-26, 14 NRC 247 (1981)) concerning the holding of a hearing on a confirmatory order by the Director of the Office of Inspection and Enforcement restricting licensed operator overtime work at Palisades.
- B Under established NRC practice, unreviewed judgments are vacated when their appellate review becomes unavailable because of mootness. See, e.g., *Boston Edison Company* (Pilgrim Nuclear Power Station, Unit 2), ALAB-656, 14 NRC 965 (1981); *Rochester Gas & Electric Corp.* (Sterling Power Project, Nuclear Unit No. 1), ALAB-596, 11 NRC 867 (1980).
- CLI-82-19 PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275-OL, 50-323-OL; PHYSICAL SECURITY; July 30, 1982; ORDER
- A In response to a motion by the representative of an interested state requesting that portions of ALAB-653 (Restricted) and his petition for review of that decision which do not contain protected information be made public, the Commission releases versions of both documents with all protected information deleted. The Commission determines that the meaning of "several" as used in the design basis threat of 10 CFR 73.1(a)(1) is safeguards information under Section 147 of the Atomic Energy Act.
- CLI-82-20 CINCINNATI GAS AND ELECTRIC COMPANY, et al. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), Docket No. 50-358; OPERATING LICENSE; July 30, 1982; ORDER
- A The Commission directs the Licensing Board to dismiss certain contentions from this operating license proceeding which the Board admitted as Board issues pursuant to its sua sponte authority under 10 CFR 2.760a.
- B After the record is closed in an operating license proceeding, where parties proffering new contentions do not meet the legal standards for further hearings, that the contentions raise serious issues is insufficient

DIGESTS

ISSUANCES OF THE NUCLEAR REGULATORY COMMISSION

justification to reopen the record to consider them as Board issues when they are being dealt with in the course of ongoing NRC investigation and staff monitoring.

CLI-82-21 KERR-McGEE CORPORATION (West Chicago Rare Earths Facility), Docket No. 40-2061; MATERIALS LICENSE AMENDMENT; August 6, 1982; ORDER

A The Commission delegates to the Director of the Office of Nuclear Material Safety and Safeguards (NMSS), or such NMSS Branch Chief or above as he may designate, the authority to conduct an informal adjudicatory proceeding on petitioner's contentions concerning licensee's application for an amendment to its 10 CFR Part 40 materials license authorizing it to perform certain work at its now-inactive thorium ore milling facility. The Commission additionally sets forth the parties to the informal proceeding and the procedures by which it will be conducted.

B A petitioner is not entitled, under either the Atomic Energy Act or NRC regulations, to a formal, trial-type hearing on materials licensing actions. Kerr-McGee Corp. (West Chicago Rare Earths Facility). CLI-82-2, 15 NRC 232 (1982).

CLI-82-22 UNITED STATES DEPARTMENT OF ENERGY, PROJECT MANAGEMENT CORPORATION, TENNESSEE VALLEY AUTHORITY (Clinch River Breeder Reactor Plant), Docket No. 50-537 (Exemption request under 10 CFR 50.12); CONSTRUCTION PERMIT EXEMPTION; August 12, 1982; MEMORANDUM AND ORDER

A The Commission considers a petition by intervenors for investigation into allegations that Applicants attempted to conceal certain crucial safety information from the Commission in connection with their application for a license for the Clinch River Breeder Reactor Plant. Upon review of the response of the Department of Energy to the allegations and to certain questions earlier posed by the Commission, the response of the NRC Staff to questions separately addressed to it, and the response of the intervenors, the Commission concludes that the allegations are without foundation. The Commission, therefore, denies the petition for investigation.

CLI-82-23 UNITED STATES DEPARTMENT OF ENERGY, PROJECT MANAGEMENT CORPORATION, TENNESSEE VALLEY AUTHORITY (Clinch River Breeder Reactor Plant), Docket No. 50-537 (Exemption request under 10 CFR 50.12); CONSTRUCTION PERMIT EXEMPTION; August 17, 1982; MEMORANDUM AND ORDER

A The Commission grants in part and denies in part the Department of Energy's request for an exemption pursuant to 10 CFR 50.12 from the provision of 10 CFR 50.10(c) prohibiting the commencement of certain site or construction work prior to obtaining a construction permit or Limited Work Authorization. The Commission authorizes the applicants to conduct non-safety related site preparation activities in connection with the Clinch River facility but denies the exemption request as it pertains to safety-related activities.

B 10 CFR 50.10(c) generally prohibits any person from clearing or excavating a nuclear power reactor site or otherwise commencing construction of a nuclear power reactor until a construction permit or a limited work authorization has been obtained following the holding of an adjudicatory hearing.

C 10 CFR 50.12(a) provides for the case-by-case granting of exemptions from the prohibition of 10 CFR 50.10(c) if specified criteria are met.

D The Commission may apply 10 CFR 50.12 to a "first of a kind" project: there is no indication in the regulations or past practice that exemptions for conduct of site preparation activities are to be confined to typical, commercial light water nuclear power reactors or that an exemption can be granted only if a limited work authorization under 10 CFR 50.10(e)(1) and (2) ("LWA-1") can also be granted or only if justified to meet electrical energy needs.

E The common-law rules regarding res judicata do not apply, in a strict sense, to administrative agencies.

F Res judicata need not be applied by an administrative agency where there are overriding public policy interests which favor relitigation.

G When an agency decision involves substantial policy issues, an agency's need for flexibility outweighs the need for repose provided by the principle of res judicata.

H A change in external circumstances is not required for an agency to exercise its basic right to change a policy decision and apply a new policy to parties to whom an old policy applied.

I An agency must be free to consider changes that occur in the way it perceives the facts, even though objective circumstances remain unchanged.

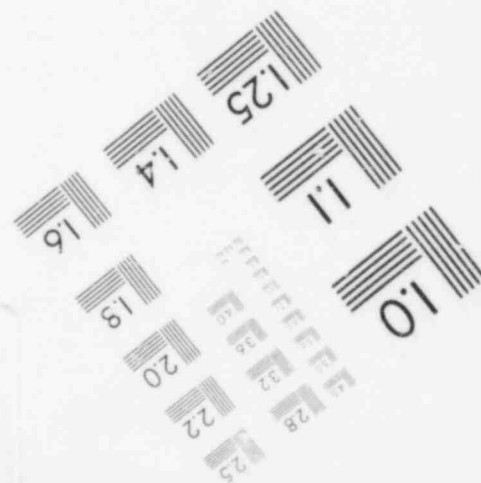
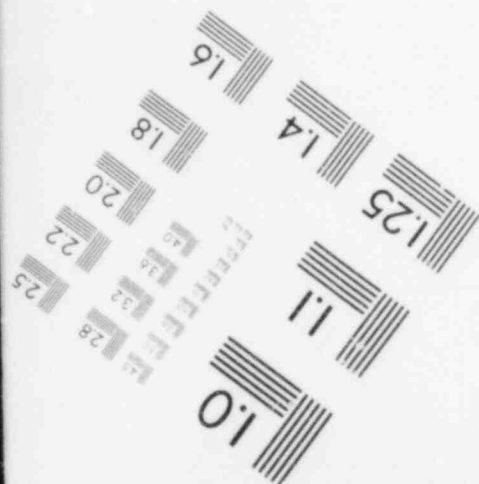
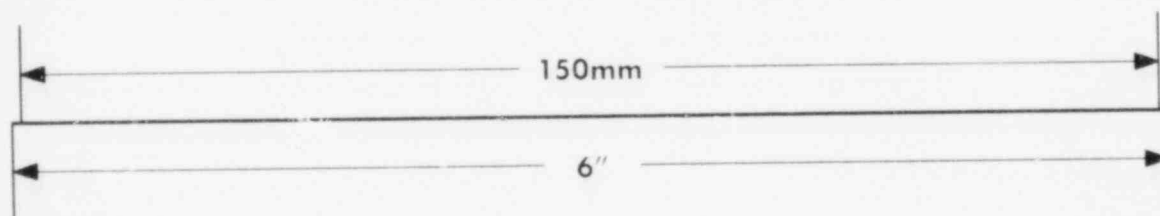
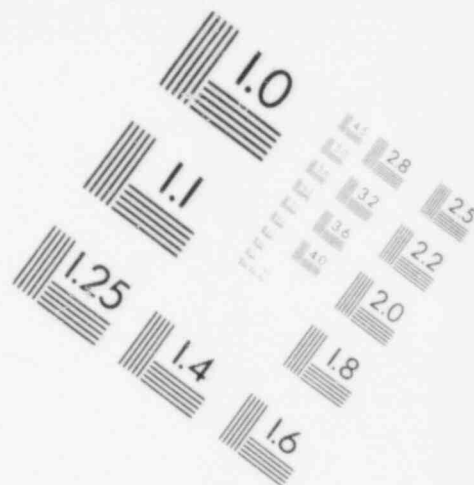
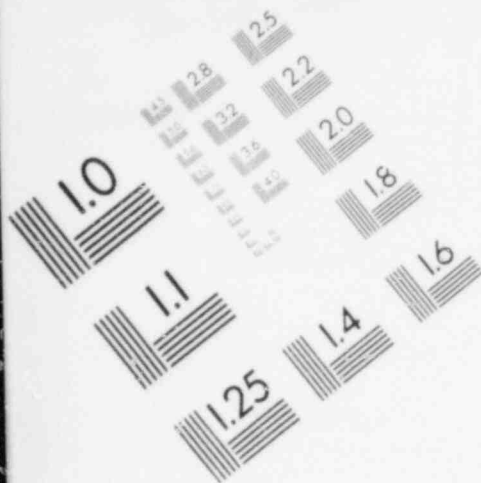
J For there to be any right to a hearing under Section 189b of the Atomic Energy Act on the grant of an exemption, such a grant must be part of a proceeding for the granting, suspending, revoking, or amending of a license or construction permit under the Atomic Energy Act.

DIGESTS

ISSUANCES OF THE NUCLEAR REGULATORY COMMISSION

- K The Atomic Energy Act does not require a license or a construction permit, or an adjudicatory hearing, on site preparation activities.
- L The Commission is not required by NEPA to hold formal hearings on site preparation activities because NEPA did not alter the scope of the Commission's jurisdiction under the Atomic Energy Act. *Gage v. United States Atomic Energy Commission*, 479 F.2d 1214, 1220 n 19 (D.C. Cir. 1972); 39 Fed. Reg. 14506, 14507 (April 24, 1979).
- M 10 CFR 50.12(a) provides that any exemption from the licensing requirements of 10 CFR Part 50 must be authorized by law, not endanger life or property or the common defense and security, and be in the public interest. For an exemption from 10 CFR 50.10, the Commission considers the public interest by weighing the factors set out in 10 CFR 50.12(b).
- N An exemption from Commission regulations must be consistent with the Atomic Energy Act, the National Environmental Policy Act, and other applicable law.
- O The limited work authorization procedure under 10 CFR 50.10(e)(1) and (2) ("LWA-1") and the 10 CFR 50.12(b) exemption procedure are independent avenues for applicants to begin site preparation in advance of receiving a construction permit.
- P The National Environmental Policy Act (NEPA) requires that the Commission prepare an environmental impact statement only for major actions significantly affecting the environment.
- Q A federal agency may consider separately under NEPA the different segments of a proposed federal action under certain circumstances. Where approval of the segment under consideration will not result in any irreversible or irretrievable commitments to remaining segments of the proposed action, the agency may address the activities of that segment separately.
- R The public interest criterion for granting an exemption from 10 CFR 50.10, under 10 CFR 50.12(b), is a stringent one: exemptions of this sort are to be granted sparingly and only in extraordinary circumstances.
- CLI-82-24 CONSOLIDATED EDISON COMPANY OF NEW YORK (Indian Point, Unit 2) and POWER AUTHORITY OF THE STATE OF NEW YORK (Indian Point, Unit 3), Docket Nos. 50-247, 50-286; SPECIAL PROCEEDING; September 15, 1982; ORDER
- A Following the resignation of the Chairman of the Licensing Board for this special proceeding, the Commission, pursuant to 10 CFR 2.721(b), by a 3-2 vote, reconstitutes the Licensing Board.
- CLI-82-25 CONSOLIDATED EDISON COMPANY OF NEW YORK (Indian Point, Unit 2) and POWER AUTHORITY OF THE STATE OF NEW YORK (Indian Point, Unit 3), Docket Nos. 50-247, 50-286; SPECIAL PROCEEDING; September 17, 1982; ORDER
- A The Commission responds to several questions certified to it by the Licensing Board that seek clarification of previous guidance provided by the Commission on the conduct of this special proceeding.
- CLI-82-26 TENNESSEE VALLEY AUTHORITY (Browns Ferry Nuclear Plant, Units 1, 2 and 3), Docket Nos. 50-259-OLA, 50-260-OLA, 50-296-OLA; OPERATING LICENSE AMENDMENT; September 15, 1982; ORDER
- A In view of the Appeal Board's declaration in ALAB-677, 15 NRC 1387 (1982), that its previous decision in ALAB-664 (15 NRC 1 (1982)) might have been different had it been timely presented with new information concerning licensee's application to store low-level radioactive waste at Browns Ferry, the Commission (1) dismisses its earlier grant of review of ALAB-664; (2) vacates that decision; and (3) remands the case to the Appeal Board for further proceedings.
- B The Commission may dismiss its grant of review of an Appeal Board decision even though the parties have briefed the issues. See, e.g., *Jones v. State Board of Education*, 397 U.S. 31 (1970).
- CLI-82-27 SOUTHERN CALIFORNIA EDISON COMPANY, et al. (San Onofre Nuclear Generating Station, Units 2 and 3), Docket Nos. 50-361-OL, 50-362-OL; OPERATING LICENSE; September 24, 1982; ORDER
- A The Commission directs the Appeal Board to certify to the Commission the question whether the phrase "contaminated injured individuals" as used in 10 CFR 50.47(b)(12) requires applicants for nuclear power plants to provide arrangements for medical services only for members of the public who have suffered traumatic injury and are also contaminated with radiation, and if not, to what extent that regulation requires advance and specific arrangements and commitments for medical services for the general public, as opposed to the general knowledge that facilities and resources exist and could be used on an ad hoc basis. The Commission states that it will not review the Appeal Board's decision (ALAB-680, 16 NRC 127 (1982)), denying intervenor's motion for a stay of the issuance of full-power licenses and that the license condition imposed by the Licensing Board concerning medical arrangements for the general public shall remain in effect. LBP-82-40, 15 NRC 1293 (1982); LBP-82-39, 15 NRC 1163 (1982).

IMAGE EVALUATION
TEST TARGET (MT-3)



DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

ALAB-679 NUCLEAR FUEL SERVICES, INC. and NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY (Western New York Nuclear Service Center), Docket No. 50-201-OLA; OPERATING LICENSE AMENDMENT; July 8, 1982; MEMORANDUM AND ORDER

A The Appeal Board affirms a Licensing Board order (LBP-82-36, 15 NRC 1075 (1982)) denying an intervenor's request for a hearing on an amendment to the operating license for a spent fuel reprocessing and waste disposal center in light of special statutory provisions governing administration of the center (the amendment had set conditions for the termination of the co-licensee's responsibilities).

B The Appeal Board will allow amicus participation in a hearing where the Board believes it will assist resolution of the issues and will not prejudice the rights of the parties. See, e.g., Consumers Power Company (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, n.2 (1981).

C Under the West Valley Demonstration Project Act, Pub. L. No. 96-368, 94 Stat. 1347 (1980), the Commission's review of the Department of Energy's (DOE's) demonstration waste solidification plan at West Valley is limited to informal, consultative procedures; the Commission cannot therefore explore DOE's administration of the waste solidification project in a formal evidentiary hearing.

ALAB-680 SOUTHERN CALIFORNIA EDISON COMPANY, et al. (San Onofre Nuclear Generating Station, Units 2 and 3), Docket Nos. 50-361-OL, 50-362-OL, OPERATING LICENSE; July 16, 1982; DECISION

A The Appeal Board denies intervenors' motion for a stay pending appeal of the Licensing Board's initial decision (LBP-82-39, 15 NRC 1163 (1982)) which authorized the issuance of a full power operating license for Units 2 and 3 of this facility.

B The determination whether an application for a stay of a licensing board decision should be granted is governed by the criteria in 10 CFR 2.788(e).

C In deciding whether to allow operation of a plant during appellate review of the pertinent licensing board decision, the standard to be applied is whether operation of the plant over the additional proceedings is consistent with the requirement that there be reasonable assurance that the public health and safety not be endangered. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2), ALAB-486, 8 NRC 9, 46 (1978). That standard does not call upon a party to show that a serious nuclear accident is likely during the pendency of the appeal; it would be enough to show that apparent inadequacies were sufficient to raise the question whether plant operation would present an undue risk to the public in the event of a serious nuclear accident. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 698 (1982).

D Under the Commission's emergency planning regulations, an applicant for a plant operating license has an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the emergency plans for the plant are not significant, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation. 10 CFR 50.47(c)(1).

E In reviewing a licensing board decision in the context of a motion for a stay pending its appeal, the normal deference that an appeal board owes to the trier of facts when reviewing a decision on the merits is even more compelling. See Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621, 629 (1977).

F An appeal board may disagree with a licensing board's interpretation on an issue even if no party presses an appeal on that issue. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245, 247 (1978).

G Where a party has not pursued a contention before the Licensing Board in the form of proposed findings of fact, the Appeal Board will not entertain it "for the first time on appeal — absent a 'serious substantive issue.' " Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981).

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

- H At the operating license stage, the NRC staff generally has the final word on all safety matters not placed into controversy by the parties. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1156 n.31 (1981).
- I An operating license may not issue unless and until the agency makes the findings specified in 10 CFR 50.57 — including the ultimate finding that such issuance "will not be inimical to . . . the health and safety of the public." As to those aspects of reactor operation not considered in an adjudicatory proceeding (if one is conducted), it is the staff's duty to insure the existence of an adequate basis for each of the requisite Section 50.57 determinations. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895-96 (1981), affirmed sub nom. Fairfield United Action v. Nuclear Regulatory Commission, No. 81-2042 (D.C. Cir., April 28, 1982).
- J Before a full power operating license issues for a plant, the Commission must complete its immediate effectiveness review of the pertinent licensing board decision pursuant to 10 CFR 2.764(f)(2).
- ALAB-681 PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275-OL, 50-323-OL; OPERATING LICENSE; July 16, 1982, MEMORANDUM AND CERTIFICATION TO THE COMMISSION
- A Prior to consideration of a motion by the intervenors to reopen the record in this operating license proceeding to hear assertedly new evidence regarding breakdowns on the quality assurance/quality control program for the plant, the Appeal Board seeks Commission guidance (by way of certification) on whether the Commission intended, in its November 19, 1981 order (CLI-81-30) suspending the Diablo Canyon low-power license and establishing an independent verification program, to deprive the adjudicatory boards of jurisdiction to consider quality assurance and quality control issues involving the plant.
- ALAB-682 ARMED FORCES RADIOBIOLOGY RESEARCH INSTITUTE (Cobalt-60 Storage Facility), Docket No. 30-6931 (Renewal of Byproduct Materials License No. 19-08330-03); BYPRODUCT MATERIALS LICENSE RENEWAL; July 16, 1982, DECISION
- A The Appeal Board reverses a Licensing Board decision (LBP-82-24, 15 NRC 652 (1982)) that held petitioner did not have standing to intervene in this materials license renewal proceeding. The Appeal Board grants the request to intervene, remands the proceeding to the Licensing Board with instructions to allow the petitioner to supplement its petition in accordance with 10 CFR 2.714(b), and orders the proceeding be consolidated with another proceeding involving renewal of the operating license for a research reactor of the same licensee, housed in the same building, if petitioner can present a litigable contention with regard to the materials license. The Appeal Board discusses the statutory requirements for notice in materials licensing cases and recommends that the Commission consider the issue in a rulemaking.
- B An intervention petitioner who resides near a nuclear facility need not show a causal relationship between injury to its interest and the licensing action being sought in order to establish standing. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 n.5 (1979).
- C In a materials license renewal proceeding under 10 CFR Part 30 — as in construction permit and operating license proceedings under 10 CFR Part 50 — proximity to a large source of radioactive material is sufficient to establish the requisite interest for standing to intervene. Whether a petitioner's stated concern is in fact justified must be left for consideration when the merits of the controversy are reached.
- D Official notice of information in another proceeding is permissible where the parties to the two proceedings are identical, there was an opportunity for rebuttal, and no party is prejudiced by reliance on the information. See *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 527-30 (1945); 10 CFR 2.743(i).
- ALAB-683 PUGET SOUND POWER AND LIGHT COMPANY, et al. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), Docket Nos. 50-522, 50-523; CONSTRUCTION PERMIT; July 27, 1982, MEMORANDUM AND ORDER
- A Acting under the authority of 10 CFR 2.787(b), the Appeal Panel Chairman dismisses an interlocutory appeal by intervenors of the Licensing Board's rejection of certain of their contentions.
- B A person may take an interlocutory appeal from an order entered on his or her intervention petition only where the order has the effect of denying the petition in its entirety. 10 CFR 2.714a.
- ALAB-684 CONSUMERS POWER COMPANY (Midland Plant, Units 1 & 2), Docket Nos. 50-329-OM&OL, 50-330-OM&OL; MODIFICATION ORDER AND OPERATING LICENSE; July 27, 1982, MEMORANDUM AND ORDER
- A The Appeal Board dismisses without prejudice an intervenor's purported appeal from a Licensing Board order, LBP-82-35, 15 NRC 1060 (1982), which authorized certain interim commitments to the Midland

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

construction permits pending subsequent issuance of the Board's partial initial decision. The Appeal Board construes the intervenor's filings as a complaint against staff's compliance with and implementation of the Licensing Board's order, rather than the order itself, and leaves the matter to the intervenor to present to the Licensing Board.

- B Issues relating to compliance with and implementation of a Licensing Board order, rather than the order itself, should be presented to the Licensing Board in the first instance, rather than to the Appeal Board.
- C Although the time limits established by the Rules of Practice with regard to appeals from Licensing Board decisions and orders are not jurisdictional, Appeal Board policy is to construe them strictly. Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 160 (1980). Hence, untimely appeals are not accepted absent a demonstration of "extraordinary and unanticipated circumstances." See 10 CFR Part 2, Appendix A, IX(d)(3).

ALAB-685 METROPOLITAN EDISON COMPANY (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289-SP; RESTART; August 2, 1982; MEMORANDUM AND ORDER

- A The Appeal Board suspends until further notice licensee's obligation to submit certain information requested as part of the Board's sua sponte review, and clarifies the scope of its appellate jurisdiction in this special proceeding.
- B The fact that the Three Mile Island restart proceeding is a special proceeding not specifically addressed by Commission regulations does not deprive the Appeal Board of its well-established right to review sua sponte an issue that was contested before the Licensing Board but not raised on appeal. See generally Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245, 247 (1978); Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 n. 6 (1981).
- C Authority to review the entire record of a proceeding independently of the parties' position is different from (1) the power in operating license application proceedings to consider serious safety, environmental, and common defense and security matters not otherwise placed in issue by the parties, and (2) seeking Commission approval in cases not involving operating license applications before pursuing new safety questions not previously put in controversy or otherwise raised by the parties.

ALAB-686 OFFSHORE POWER SYSTEMS (Manufacturing License for Floating Nuclear Power Plants), Docket No. STN 50-437-ML; MANUFACTURING LICENSE; August 11, 1982; MEMORANDUM AND ORDER

- A The Appeal Board (1) considers the applicability of the "immediate effectiveness" regulation (10 CFR 2.764) to the Licensing Board's June 30, 1982 initial decision (LBP-82-49, 15 NRC 1658 (1982)) in this manufacturing license proceeding and concludes that it is not obliged by the regulation to conduct such a review in manufacturing license proceedings; (2) announces that in the absence of exceptions to the initial decision, it has undertaken sua sponte review of it; and (3) reminds the parties that the initial decision shall not constitute final agency action until completion of that review by the Appeal Board and its further order.
- B The Commission's "immediate effectiveness" regulation, 10 CFR 2.764 (1982), as amended, 47 Fed. Reg. 2286 (January 15, 1982), requires in the case of construction permits, certain limited and immediate appeal board and Commission review — and, in the case of operating licenses, Commission review only — of an initial decision before it can become effective.
- C Under the Commission's "immediate effectiveness" regulation, an appeal board is not obliged to conduct an immediate effectiveness review in manufacturing license proceedings.
- D The only time an appeal board — as opposed to the Commission itself — is required to conduct an immediate effectiveness review is within 60 days of an initial decision authorizing the issuance of a reactor construction permit. 10 CFR 2.764(e)(2).
- E The starting point in interpreting a regulation is the language of the regulation itself. Cf. *Lewis v. United States*, 445 U.S. 55, 60 (1980). Depending on the circumstances, it may be appropriate to consider the underlying history of the regulation as well. Cf. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184-85 (1978).

ALAB-687 DUKE POWER COMPANY, et al. (Catawba Nuclear Station, Units 1 and 2), Docket Nos. 50-413, 50-414; LIMITED WORK AUTHORIZATION; August 19, 1982; MEMORANDUM AND ORDER

- A The Appeal Board accepts a Licensing Board referral, pursuant to 10 CFR 2.730(f), of a number of interlocutory Licensing Board rulings conditionally admitting certain contentions in this operating license proceeding. The Appeal Board concludes that a licensing board has no authority to admit conditionally, for any reason, a contention that falls short of meeting the specificity requirements of 10 CFR 2.714(a). The Appeal Board provides further interpretation of the governing Rules of Practice relating to contentions and leaves to the Licensing Board the application of that interpretation to the contentions.
- B Appeal boards are empowered to decline the acceptance of licensing board referrals.

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

- C Regardless of whether presented on "certification" pursuant to 10 CFR 2.718(i) or by referral pursuant to 10 CFR 2.730(f), the question of whether interlocutory appellate review of an issue should be undertaken turns on whether a failure to address that issue would seriously harm the public interest, result in unusual delay or expense, or affect the basic structure of the proceeding in some pervasive or unusual manner. *Consumers Power Co. (Midland Plant, Units 1 and 2)*, ALAB-634, 13 NRC 96, 99 (1981).
- D Under 10 CFR 2.714, a licensing board is not authorized to admit conditionally, for any reason, a contention that falls short of meeting the specificity requirements of the Section.
- E Neither Section 189a. of the Atomic Energy Act nor Section 2.714 of the Commission's Rules of Practice permits an intervention petitioner to file a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or the NRC staff. Rather, an intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable it to uncover any information that could serve as a foundation for a specific contention. *Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2)*, ALAB-107, 11 AEC 188, 192, (1973), affirmed CLJ-73-12, 6 AEC 241 (1973), affirmed sub nom. *BPI v. AEC*, 502 F.2d 424 (D.C. Cir. 1974).
- F The wording of a regulation generally takes precedence over any contradictory suggestion in its administrative history.
- G The hearing mandate of Section 189a. of the Atomic Energy Act does not confer the automatic right of intervention upon anyone; rather, the Commission may condition the exercise of that right upon the meeting of reasonable procedural requirements. *BPI v. AEC*, 502 F.2d 424, 428 (1974).
- H No procedural requirement can lawfully operate to preclude from the very outset a hearing under Section 189a. of the Atomic Energy Act on an issue both within the scope of the petitioner's interest and germane to the outcome of the proceeding.
- I The determination whether to accept an untimely contention which was susceptible of filing within the period prescribed by the Rules of Practice involves a consideration of all five 10 CFR 2.714(a) factors — and not just the reason (substantial or not as the case may be) why a petitioner did not meet the deadline.
- J In determining whether to accept an untimely contention under 10 CFR 2.714(a), if the contention could not have been asserted with sufficient specificity during the period prescribed by the Rules of Practice due to the non-existence or public unavailability of relevant documents, that factor must be deemed controlling; it is not amenable to being overridden by the other 2.714(a) factors such as that relating to the broadening of the issues.
- ALAB-688 UNITED STATES DEPARTMENT OF ENERGY, PROJECT MANAGEMENT CORPORATION, TENNESSEE VALLEY AUTHORITY (Clinch River Breeder Reactor Plant), Docket No. 50-537; LIMITED WORK AUTHORIZATION; August 25, 1982; MEMORANDUM AND ORDER
- A The Appeal Board denies a petition for directed certification of an unpublished Licensing Board order (August 5, 1982) which sets forth the scope of and schedule for evidentiary hearings in the limited work authorization proceeding for this facility.
- B A limited work authorization (LWA-1) allows preliminary construction work to be undertaken at the applicant's risk, pending completion of later hearings covering radiological health and safety issues. See 10 CFR 50.10(e)(1); *Public Service Co. of Oklahoma, et al. (Black Fox Station, Units 1 and 2)*, ALAB-573, 10 NRC 775, 778 (1979). Before an LWA-1 can be granted, the staff must have issued the final environmental impact statement relating to the construction of the facility. Moreover, the Licensing Board must have made all the environmental findings required for issuance of a construction permit and "determined that . . . there is reasonable assurance that the proposed site is a suitable location for a reactor of the general size and type proposed from the standpoint of radiological health and safety considerations." 10 CFR 50.10(e)(2).
- C Discretionary interlocutory review will be granted only sparingly, and then only when a licensing board's action either (a) threatens the party adversely affected with immediate and serious irreparable harm which could not be remedied by a later appeal, or (b) affects the basic structure of the proceeding in a pervasive or unusual manner. *Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1)*, ALAB-588, 11 NRC 533, 536 (1973). Especially in light of the paucity of construction permit applications, legal issues involving the timing of the admission of evidence at LWA hearings cannot be considered recurring issues of great importance to the proper functioning of the licensing process.
- D An appeal board will be particularly reluctant to grant a request for directed certification where the question for which certification has been sought involves the scheduling of hearings or the timing and admissibility of evidence, see *Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Unit 1)*, ALAB-314, 3 NRC 98, 99-100 (1976), and will be inclined to do so only to entertain a claim that a board abused its discretion by setting a hearing schedule that deprives a party of its right to procedural

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

due process. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 188 (1978). See generally Houston Lighting & Power Co., et al. (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367, 370-71 (1981).

ALAB-689 OFFSHORE POWER SYSTEMS (Manufacturing License for Floating Nuclear Power Plants), Docket No. STN 50-437-ML; MANUFACTURING LICENSE, September 1, 1982; MEMORANDUM AND ORDER

A The Appeal Board grants applicant's motion for clarification of its previous memorandum and order (ALAB-686, 16 NRC 454 (1982)) in which the Appeal Board (1) concluded that it is not obliged by the "immediate effectiveness" regulation (10 CFR 2.764) to conduct such a review in manufacturing license proceedings, and (2) announced that, in the absence of exceptions to the Licensing Board's initial decision (LBP-82-49, 15 NRC 1658 (1982)), it would undertake sua sponte review of it. In granting the motion for clarification, the Appeal Board explains, inter alia, the nature of its sua sponte review authority and its relationship to the effectiveness of licensing board initial decisions.

B An immediate effectiveness review of a licensing board decision is not a substitute for an appeal board's usual sua sponte review of the decision and its underlying record before the decision is accorded finality.

C Sua sponte review by an appeal board is a long-standing Commission-approved practice which is undertaken in all cases, regardless of their nature or whether exceptions have been filed. See 10 CFR 2.760(a), 2.785(a). This type of review extends to "any final disposition of a licensing proceeding that either was or had to be founded upon substantive determinations of significant safety or environmental issues." Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981), quoting Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-571, 10 NRC 687, 692 (1979). See also Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 304 (1980), and cases cited.

D Only the administrative finality of a licensing board's decision is deferred pending sua sponte review by an appeal board; the effectiveness of the decision is not stayed.

E If sua sponte review uncovers problems in a licensing board's decision or the record that may require corrective action adverse to a party's interest, the appeal board's consistent practice is to give the party ample opportunity to address the matter, as appropriate. See, e.g., Rancho Seco, supra, 14 NRC at 803-04, 817; Monticello, supra, 12 NRC at 309-13; Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-529, 9 NRC 153 (1979); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245, 249-50 (1978).

ALAB-690 LOUISIANA POWER AND LIGHT COMPANY (Waterford Steam Electric Station, Unit 3), Docket No. 50-382-OL; REMAND, September 7, 1982; MEMORANDUM AND ORDER

A The Appeal Board dismisses without prejudice a petitioner's appeal from a non-final order of the Licensing Board.

B The test of "finality" for appeal purposes before the Nuclear Regulatory Commission (as in the courts) is essentially a practical one. As a general matter, a licensing board's action is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate; rulings which do neither are interlocutory. Toledo Edison Co., et al. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975). Where a party has been given an opportunity to file a new petition for leave to intervene, the Licensing Board order that denied the prior petition is non-final and not immediately appealable.

ALAB-691 CONSUMERS POWER COMPANY (Midland Plant, Units 1 and 2), Docket Nos. 50-329-CP, 50-330-CP; REMAND, September 9, 1982; DECISION

A The Appeal Board dismisses an intervenor's appeal of the Licensing Board's decision in LBP-81-63, 14 NRC 1768 (1981), not to impose sanctions against the licensee for failure to disclose assertedly significant information in an earlier phase of this construction permit proceeding. The Appeal Board, however, pursuant to sua sponte review of the record affirms the Licensing Board's decision not to impose sanctions, but corrects certain of the Board's underlying legal conclusions.

B Requiring the submission to a licensing board of proposed findings of fact or a comparable document is not a mere formality: it gives that board the benefit of a party's arguments and permits it to resolve them in the first instance — possibly in the party's favor, obviating later appeal.

C Unless there is a serious substantive issue as to which a genuine problem has been demonstrated, an appeal board ordinarily will not entertain an issue raised for the first time on appeal. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 348 (1978). See also Public Service Electric and Gas Co., et al. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981).

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

- D A party that fails to submit proposed findings as requested by a licensing board, relying instead on the submissions of others, assumes the risk that such reliance might be misplaced; it must be prepared to live with the consequence that its further appeal rights will be waived. Cf. Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642, 644-45 (1977).
- E Although parties not adversely affected by the ultimate outcome of a licensing board decision may not appeal that decision, they may defend a result in their favor on any ground presented in the record, including one rejected below. Public Service Co. of Oklahoma, et al. (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 789 (1979).
- F Regardless of whether there is an appeal, it is appeal board practice to review sua sponte any final disposition of a licensing proceeding that either was or had to be founded upon substantive determinations of significant safety or environmental issues. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981); Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-571, 10 NRC 687, 692 (1979).
- G Appeal boards do not ordinarily scrutinize licensing board rulings on economic issues, intervention requests, or procedural matters in the absence of a properly perfected appeal. Louisiana Power and Light Co. (Waterford Steam Generating Station, Unit No. 3), ALAB-258, 1 NRC 45, 48 n.6 (1975); Washington Public Power Supply System (Nuclear Projects No. 1 and No. 4), ALAB-265, 1 NRC 374, 375 n.1 (1975); Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 1), ALAB-231, 8 AEC 633-634 (1974).
- H An appeal board may undertake sua sponte review of a licensing board decision concerned with the integrity of the hearing process.
- I It is not the appeal board's function in a sua sponte review of a licensing board decision to undertake a detailed scrutiny of the entire record. Rather, the appeal board usually addresses only those portions of the licensing board's opinion that it believes deserve clarification or correction. Further, absence of appeal board comment on a particular licensing board statement should not be construed as either agreement or disagreement with it.
- J An applicant or a licensee has an obligation in NRC proceedings to provide accurate and timely information. Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 418 (1978). See also Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387 (1982). The source of this obligation is the Atomic Energy Act itself. See Section 186a, 42 U.S.C. 2236a.
- K Liability of an applicant or licensee for a material false statement in violation of Section 186a of the Atomic Energy Act does not depend on whether the applicant or licensee knew of the falsity. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480 (1976), aff'd sub nom. Virginia Electric and Power Co. v. Nuclear Regulatory Commission, 571 F.2d 1289 (4th Cir. 1978).
- L Under Section 186a of the Atomic Energy Act, the test for materiality is whether the information is capable of influencing the decisionmaker — not whether the decisionmaker would, in fact, have relied on it. Determinations of materiality require careful, common-sense judgments of the context in which information appears and the stage of the licensing process involved. North Anna, supra, 4 NRC at 487, 491.
- M A "material false statement" under Section 186a of the Atomic Energy Act encompasses omissions as well as affirmative statements. North Anna, supra, 4 NRC at 489.
- N In general, if a party has doubts about whether to disclose information, it should do so, as the ultimate decision with regard to materiality is for the decisionmaker, not the parties.
- O The mere existence of a question or discussion about the possible materiality of information does not necessarily make the information material.
- P Intent to deceive is irrelevant in determining whether there has been a material false statement under Section 186a of the Atomic Energy Act; a deliberate effort to mislead the NRC, however, is relevant to the matter of sanctions, once a material false statement has been found.
- Q Information concerning a licensee's or an applicant's intent to deceive may call into question its "character" — a matter the Commission is authorized to consider under Section 182 of the Atomic Energy Act, 42 U.S.C. 2232a — or its ability and willingness to comply with agency regulations, as Section 103b, 42 U.S.C. 2133b, requires.
- R The Commission's Rules of Practice require parties and their representatives to conduct themselves with honor, dignity, and decorum as they should before a court of law. 10 CFR 2.713(a).

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

- S The Commission generally follows the American Bar Association's Code of Professional Responsibility in judging lawyer conduct in NRC proceedings. See, e.g., Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 838 (1974).
- T Canon 7 of the ABA Code of Professional Responsibility — which exhorts lawyers to represent their clients "zealously within the bounds of the law" — and its associated Ethical Considerations and Disciplinary Rules provide the standards by which attorneys should abide in the preparation of testimony for NRC proceedings.
- U In judging the propriety of a lawyer's participation in the preparation of testimony of a witness, the key factor is not who originated the words that comprise the testimony, but whether the witness can truthfully attest that the statement is complete and accurate to the best of his or her knowledge.
- V Gamesmanship and sporting conduct between or among lawyers and parties is not condoned in Nuclear Regulatory Commission proceedings.
- ALAB-692 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit No. 2), Docket No. 50-320-OLA; OPERATING LICENSE AMENDMENT; September 14, 1982, DECISION
- A Following the conduct of additional evidentiary hearings by the Appeal Board on the probability of a heavy aircraft (one weighing more than 200,000 pounds) crashing into the TMI-2 plant, the Board finds the analyses performed by the NRC Staff and the applicants produced acceptable results based upon data then at hand (pre-1978 data). As to any future return of the plant to service, the Appeal Board requires an updated analysis of the crash probability prior to its operation (and at least once every three years thereafter), and such protective action as the analysis might indicate.
- B The following technical issues are discussed: Aircraft crash probability; Bayesian Theory; Confidence limits (precision, uncertainty).
- ALAB-693 PENNSYLVANIA POWER AND LIGHT COMPANY and ALLEGHENY ELECTRIC COOPERATIVE, INC. (Susquehanna Steam Electric Station, Units 1 and 2), Docket Nos. 50-387-OL, 50-388-OL; OPERATING LICENSE; September 28, 1982; MEMORANDUM AND ORDER
- A The Appeal Board dismisses an intervenor's appeal from the Licensing Board's initial decision (LBP-82-30, 15 NRC 771 (1982)) authorizing the issuance of full-power operating licenses for Units 1 and 2 of this facility. The Appeal Board notes that the initial decision does not constitute final agency action until it completes sua sponte review of it.
- B A party's brief must (1) specify the precise portion of the record relied upon in support of the assertion of error, 10 CFR 2.762(a), and (2) relate to matters raised in the party's proposed findings of fact and conclusions of law. An appeal board will not ordinarily entertain arguments raised for the first time on appeal, absent a serious substantive issue. Public Service Electric and Gas Co., et al. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 348 (1978). See also Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 906-07 (1982).
- C An appeal may be dismissed when a party's brief contains only conclusory assertions without sufficient information to dispose of its arguments intelligently. Public Service Co. of Oklahoma, et al. (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 786-87 (1979). See also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 413 (1976).
- D Prior to issuing an operating license, the Director of Nuclear Reactor Regulation must find that Commission regulations (including those implementing NEPA) have been satisfied and that the activities authorized by the license can be conducted without endangering the health and safety of the public. See 10 CFR 50.4(d), 50.57; Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 44 (1978), remanded on other grounds sub nom. Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979).
- E Lay representatives generally are not held to the same standard for appellate briefs that is expected of lawyers. Salem, supra, 14 NRC at 50 n.7. Nonetheless, NRC litigants appearing pro se or through lay representatives are in no way relieved by that status of any obligation to familiarize themselves with the Commission's rules. To the contrary, all individuals and organizations electing to become parties to NRC licensing proceedings can fairly be expected both to obtain access to a copy of the rules and refer to it as the occasion arises. Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-563, 10 NRC 449, 450 n.1 (1979).

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

F An intervenor in NRC licensing proceedings has a basic obligation to "structure [its] participation so that it is meaningful, so that it alerts the agency to [its] position and contentions." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978).

ALAB-694 SOUTH CAROLINA ELECTRIC & GAS COMPANY, et al. (Virgil C. Summer Nuclear Station, Unit 1), Docket No. 50-395-OL; OPERATING LICENSE; September 28, 1982; MEMORANDUM AND ORDER

A The Appeal Board dismisses exceptions filed by the applicants to the Licensing Board's partial initial decision in this operating license proceeding (LBP-82-55, 16 NRC 225 (1982)). The Appeal Board announces it will undertake sua sponte review of that decision and a later Licensing Board partial initial decision (LBP-82-57, 16 NRC 447 (1982)), authorizing the issuance of an operating license for the plant, and reminds the parties that neither initial decision shall be deemed to have achieved administrative finality pending the completion of that review and further order.

B Exceptions are not necessary to defend a decision in one's favor. Only where a party is aggrieved by or dissatisfied with the action taken below and invokes the Appeal Board's jurisdiction to change the result need exceptions be filed — or are they permitted. *Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2)*, ALAB-459, 7 NRC 179, 202 (1978). See also *Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3)*, ALAB-478, 7 NRC 772, 773 (1978); *Consumers Power Co. (Midland Plant, Units 1 and 2)*, ALAB-282, 2 NRC 9, 10 n.1 (1975); *Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2)*, ALAB-252, 8 AEC 1175, 1177, affirmed, CLI-75-1, 1 NRC 1 (1975); *Toledo Edison Co. (Davis-Besse Nuclear Power Station)*, ALAB-157, 6 AEC 858, 859 (1973).

ALAB-695 COMMONWEALTH EDISON COMPANY (Dresden Station, Units 2 and 3), Docket Nos. 50-237, 50-249; SPENT FUEL POOL MODIFICATION; September 29, 1982; DECISION

A On completion of its sua sponte review of the Licensing Board's two initial decisions in this spent fuel pool modification proceeding (LBP-81-37, 14 NRC 708 (1981); LBP-82-65, 16 NRC 714 (1982)) (undertaken in the absence of any exceptions to either decision), the Appeal Board affirms the Licensing Board's decisions permitting (1) the modification of Unit 3's spent fuel pool; and (2) allowing the sought increase in spent fuel pool storage capacity for Units 2 and 3.

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

LBP-82-51 DUKE POWER COMPANY, et al. (Catawba Nuclear Station, Units 1 and 2), Docket Nos. 50-413, 50-414; SPECIAL PROCEEDING; July 8, 1982; MEMORANDUM AND ORDER

- A The Licensing Board overrules various objections to its Order issued following a prehearing conference pursuant to §10 CFR 2.751a. The Board also denies requests for referral of certain issues to the Appeal Board.
- B Where an Intervenor seeking to challenge an Applicant's security plan does not produce a qualified expert to review the plan and declines to submit to a protective order, its vague contentions must be dismissed for failure to meet conditions that could produce an acceptably specific contention.

LBP-82-51A CONSUMERS POWER COMPANY (Big Rock Point Plant), Docket No. 50-155-OLA; SPENT FUEL POOL AMENDMENT; July 8, 1982; MEMORANDUM AND ORDER

- A The Licensing Board affirms, over objections of the NRC Staff, a phased schedule for the filing of findings of fact and conclusions of law subsequent to an evidentiary hearing. Under the schedule, all parties are required to make simultaneous filings of findings of fact and conclusions of law on each of the contentions and all parties have simultaneous rights of reply.
- B A Board may require phased findings of fact and conclusions of law subsequent to an evidentiary hearing in order to expedite the decision process by permitting the Board to begin analyzing the record efficiently. Under a phased schedule, early findings may be required prior to the 30 days allowed for applicants under the procedural regulations. The Board may also require simultaneous filing of these phased findings, in order to expedite the proceeding and to encourage staff to develop an independent position.

LBP-82-52 COMMONWEALTH EDISON COMPANY (Dresden Nuclear Power Station, Unit No. 1), Docket No. 50-10-OLA; OPERATING LICENSE AMENDMENT; July 12, 1982; MEMORANDUM AND ORDER

- A Pursuant to a Memorandum and Order of the Commission directing its establishment (CLI-81-25, 14 NRC 616 (1981)), the Licensing Board rules that one individual and two organizations have standing to intervene in this proceeding concerned with chemical decontamination of Dresden Unit 1 but, because it finds that none of the contentions advanced by Petitioners are acceptable under 10 CFR §2.714 and CLI-81-25, the Board denies the petitions.
- B An organization petitioning to intervene as a representative of its members must demonstrate that it has at least one member with personal standing who has authorized the organization to represent his or her interest.
- C Purely academic interest in a problem is not an interest encompassed by 10 CFR §2.714. In order to satisfy 10 CFR §2.714, an injury in fact must be alleged.
- D In order to be admitted for litigation, a contention must inform the Board and the parties of the matters sought to be litigated. Particularly where substantial technical information is available indicating the bases for the applicant's proposal and the Staff's position, Petitioners' contentions must indicate the specific respects in which they quarrel with that information.

LBP-82-53 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 & 2), Docket Nos. 50-440-OL, 50-441-OL; OPERATING LICENSE; July 12, 1982; MEMORANDUM AND ORDER

- A The Board admits late-filed contentions on psychological stress, the degradation of electrical wiring from radiation-induced embrittlement of electrical insulation, and the impropriety of considering local economic effects as benefits for purposes of the Draft Environmental Statement, but requires intervenors to further particularize two of the contentions prior to hearing.
- B The Board refuses to admit a late-filed contention that the plant's closed-cycle cooling system should be replaced by a radial well system, such as has been employed at Grand Gulf Nuclear Station, in order to reduce the number of fish, fish eggs and larvae destroyed through impingement and entrainment. The Board also refuses to admit a contention that the environmental analysis must consider the possible use of nuclear fuel for nuclear

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

weapons, should the government subsequently decide to permit the use of laser isotope separation techniques to accomplish this purpose.

C In addition, the Board rules that the decision in *Natural Resources Defense Council v. NRC*, Civil Action No. 74-1586 (April 27, 1982), which has not been accompanied by a mandate, does not provide grounds for reconsidering an earlier ruling excluding a contention on the safe disposal and storage of radioactive materials.

D Intervenor may be excused for lateness in filing if they keep current with reputable sources of information such as *Science*, *Science News*, and the *Bulletin of the Atomic Scientist*. They need not keep up with all NRC literature and all technical literature concerning nuclear reactors.

E The Commission is required to consider psychological stress in its environmental analysis providing that there is proof that a nuclear plant will cause people in the vicinity of the plant to suffer anxieties of such severity as to be medically recognized impairments of psychological health.

F A court decision purporting to strike down a portion of the Commission's rules on the consideration of waste disposal issues in NEPA analyses does not invalidate those rules until the court issues its mandate. Prior to the issuance of a mandate, the rule is valid and a contention contradicting the rule cannot be admitted.

G A contention that fuel stored in a spent fuel pool might subsequently be used to manufacture nuclear weapons is not cognizable under NEPA because weapons manufacture is not part of the proposed action and would require either federal legislation or further federal administrative action.

H When the Commission has decided to implement a rule on the environmental qualification of electrical equipment but has not yet decided when to make the rule effective, it is appropriate to admit a contention on the subject. Provision may be made for applicant or staff to stay discovery on the contention if they wish.

I The following technical issues are discussed: Embrittlement of electrical insulation; environmental qualification of electric wiring; radiation, effects on polymers; polymer degradation due to radiation; psychological stress, legal standard for NEPA consideration; impingement of fish, minimum standard for NEPA consideration; entrainment of fish, minimum standard for NEPA consideration.

LBP-82-53A CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 & 2), Docket Nos. 50-440-OL, 50-441-OL; OPERATING LICENSE, July 19, 1982; MEMORANDUM AND ORDER

A The Licensing Board revises its earlier decision (LBP-82-53) and dismisses a psychological stress contention based on a statement of policy issued by the Commission.

LBP-82-54 CINCINNATI GAS & ELECTRIC COMPANY, et al. (Zimmer Nuclear Power Station, Unit 1), Docket No. 50-358-OL; OPERATING LICENSE, July 15, 1982; MEMORANDUM AND ORDER

A Licensing Board rules that an intervenor proposing eight untimely contentions challenging applicants' quality assurance procedures and character and competence to operate a nuclear facility failed to meet the standards of 10 CFR 2.714. In light of the seriousness of the issues, the Board adopts them sua sponte.

B When untimely contentions are advanced on the eve of an initial decision which ordinarily would conclude Licensing Board consideration of an application, the proponent must furnish substantial justification for the delay.

C When untimely proposed contentions raise issues so serious that a decision adverse to the applicant might require denial of an operating license, the Licensing Board may exercise its authority under 10 CFR §2.718(j) and 2.760a to reopen the record and admit the contentions as Board-raised issues.

D It is a clear requirement for representational standing that an organization seeking to represent the interests of its members submit evidence of authorization to do so from at least one member with standing to participate in the proceeding.

LBP-82-55 SOUTH CAROLINA ELECTRIC AND GAS COMPANY, et al. (Virgil C. Summer Nuclear Station, Unit 1), Docket No. 50-395-OL; OPERATING LICENSE, July 20, 1982; PARTIAL INITIAL DECISION

A In this Partial Initial Decision the Licensing Board resolves the seismic issues in controversy in favor of plant safety concluding that the seismic safety of the Summer Nuclear Plant will be assured if the operating license is made subject to two conditions: (1) that seismic monitoring be continued at least until December 31, 1983, and that the NRC Staff reevaluate at that time the need for further monitoring; and (2) that Applicants successfully complete within the first year of operation a confirmatory program to demonstrate to the NRC Staff's satisfaction that explicit safety margins exist for each component necessary for shutdown and continued heat removal in the event of the maximum potential shallow earthquake.

B The following technical issues are discussed: Reservoir-induced seismicity — occurrence after impoundment, shallow earthquakes and near-source earthquakes; Ground motion — peak accelerations,

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

- amplification from bedrock (soil, topographical, soil-pad interaction), response spectra, theoretical models and empirical data; Magnitude potential — deep vs. shallow earthquakes, source dimension, deviatoric stress; Seismic structural capacity — engineered structures, equipment and components, natural frequencies and reduction of motion (imbedment of foundation).
- LBP-82-56 METROPOLITAN EDISON COMPANY (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-285; RESTART, July 27, 1982; PARTIAL INITIAL DECISION
- A The Licensing Board issues its third and concluding partial initial decision which resolves the special restart proceeding in favor of restarting TMI Unit 1 subject to certain recommendations, conditions and a monetary penalty.
- B Technical issues discussed: utility's responsibility to train and examine candidates for NRC operator licenses; utility's responsibility to certify only competent candidates for NRC operator licenses; standards for maintaining and renewing operator licenses; the NRC operator licensing responsibilities; auditing of utility's operator training and examination program; the method of validating NRC operator license examination for specific plants; proctoring and grading NRC operator licensing examinations; quality assurance applied to training and testing operators; redundant assurance of reactor operator competence; reactor coolant chemistry; reactor coolant pump bearing and seals.
- C Licensing Board appointed Special Master pursuant to 10 CFR 2.722(a)(2) and specified issues to be heard by Special Master.
- D Licensing Board adopts as its own the evidentiary record made before Special Master.
- E The Board, not the Special Master, is authorized by Notice of Hearing, regulations and statute to render Administrative Procedure Act initial decision. Special Master's report is advisory only. Board must render decision based on its own understanding of the reliable, probative and substantial evidence.
- F Licensing Board affords weight to Special Master's reported direct observations of witness demeanor, but where Special Master's conclusions are materially affected by witness demeanor, Licensing Board must give especially careful consideration to whether or not other more objective witness credibility standards are consistent with Special Master's conclusions.
- G Where inferences and factual conclusions depend upon the ethical orientation and expectations of the fact-finder, Licensing Board relies upon its collegial judgment but accepts Special Master's conclusions as informed advice.
- H Results of hearing before Special Master and its effect upon the entire proceeding before the Board are exclusively within the jurisdiction of the Board vis-a-vis the jurisdiction delegated to the Special Master.
- I Licensing Board does not endorse Special Master's recommendation that NRC examination cheaters be referred for criminal prosecution, because criminal prosecution has not been shown to relate to jurisdiction granted by Notice of Hearing.
- J Licensing Board has no jurisdiction and authority to direct the NRC Staff to conduct future investigation into alleged false material statement under ruling of Carolina Power and Light Company (Shearon Harris, Units 1-4), CLI-80-12, 11 NRC 514 (1980).
- K Although not presiding over a proceeding noticed as a civil penalty case, Licensing Board nevertheless imposes a monetary penalty on licensed utility of \$100,000 for negligent failure to safeguard the integrity of the utility's operator examination process, failure to instill an attitude of respect for the utility- and NRC-administered examinations, failure to assure the quality of operator training instruction and negligence in the certification of candidates for NRC operator licensing. Board's jurisdiction to impose monetary penalty flows from authority set out in Notice of Hearing to require long-term measures necessary to provide reasonable assurance that Three Mile Island Unit 1 can be operated without endangering the public health and safety.
- L Upon issuing a partial initial decision, Licensing Board retained jurisdiction over a portion of the subject matter of that decision because of new information on cheating on the NRC operator licensing examination.
- M NRC investigator's testimony that operator licensing examination candidate told him that another operator licensing examination candidate attempted to cheat, particularly in light of uncertain memories of investigator and the informing candidate, is unreliable hearsay.
- N Rumors that an employee of Licensee cheated are the worst kind of hearsay (United States v. Mandel, 591 F.2d 1347 (4th Cir. 1980), cert. denied 100 S. Ct. 1647, 445 U.S. 961; 64 L. Ed. 236 (1980)) and not worthy of evidentiary weight as to the truth of the matter. Rumors may be considered, however, in assessing thoroughness of investigation and may be pursued as a complete evidentiary record.

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

- O The Board finds that it is fair to draw an inference unfavorable to a suspected cheater where, as a voluntary witness, suspected cheater alone has solution to mystery surrounding his activities and fails to explain his activities despite opportunity to do so.
- P Certification to the NRC's Operator Licensing Branch that licensed operator has requalified based upon the known improper assistance of another operator is a false material statement under the Atomic Energy Act.
- Q Licensing Board finds that two licensed operators cheated on company-administered license qualification examination but, because operators have not had notice of charges against them or opportunity to confront evidence because of sequestration, no action may be taken against their personal operator licenses without further proceeding. However, findings that the operators cheated are findings against the licensed utility.
- LBP-82-57 SOUTH CAROLINA ELECTRIC AND GAS COMPANY, et al. (Virgil C. Summer Nuclear Station, Unit 1), Docket No. 50-395-OL; OPERATING LICENSE; August 4, 1982; SUPPLEMENTAL PARTIAL INITIAL DECISION
- A In this Supplemental Partial Initial Decision the Licensing Board authorizes the issuance of a full-term operating license subject to certain conditions relating to seismic safety, emergency preparedness and steam generator tube problems. The Board considered issues involving anticipated transients without scram (ATWS), emergency preparedness, quality assurance/quality control, and health effects from the operation of the facility and from the uranium fuel cycle.
- B The following technical issues are discussed: Health effects — risk estimators, linear model, and super linear model
- LBP-82-58 DAIRYLAND POWER COOPERATIVE (La Crosse Boiling Water Reactor), Docket Nos. 50-409-FTOL, 50-409-SC; OPERATING LICENSE; August 2, 1982; MEMORANDUM AND ORDER
- A The Licensing Board grants the motions of the NRC Staff and Applicant for summary disposition of all environmental contentions and concludes its consideration of other environmental questions which had arisen during the course of this full-term operating license proceeding.
- B The Commission and Appeal Board have encouraged the use of summary disposition to resolve contentions where an intervenor has failed to establish that a genuine issue exists.
- C The Commission's summary disposition procedures have been analogized to Rule 56 of the Federal Rules of Civil Procedure. Decisions arising under the Federal Rules thus may serve as guidelines to licensing boards in applying the Commission's summary disposition procedures.
- D The burden of proof lies upon the movant for summary disposition, who must demonstrate the absence of any issue of material fact. If a movant fails to make the requisite showing, its motion may be denied even in the absence of any response by the proponent of a contention.
- E Where a movant for summary disposition fails to include the requisite "separate, short and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard," or where the statement is inadequate, a Board may dismiss the motion for summary disposition as procedurally defective or, alternatively, can decline to give the statement the effect it would otherwise be accorded.
- F Compliance with the design objectives set forth in 10 CFR Part 50, Appendix I, establishes that the doses to offsite individuals are as low as reasonably achievable.
- G To warrant consideration of alleged environmental effects of plant operation at an evidentiary hearing, more must be shown than that those effects are theoretically possible.
- H Unless a nuclear plant has environmental disadvantages in comparison to reasonable alternatives, differences in financial costs do not enter into the NEPA process and, hence, into NRC's cost-benefit balance. Only after an environmentally superior alternative has been identified do economic considerations become relevant.
- I Issues concerning alternative energy sources in general may no longer be considered in operating license proceedings.
- J Issues raising need for power in general may no longer be considered in operating license proceedings. Lack of a previous NEPA review would not be the type of "special circumstance" needed to justify such consideration.
- K In proceedings instituted prior to June, 1980, serious (Class 9) accidents may be considered only upon a showing of "special circumstances."

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

- LBP-82-59 TEXAS UTILITIES GENERATING COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445, 50-446; SHOW CAUSE; August 4, 1982; ORDER TO SHOW CAUSE
- A The Licensing Board orders the NRC Staff to show cause why sanctions should not be imposed for the Staff's refusal to obey a Board order to identify by name individuals interviewed in connection with an investigation and to provide unexpurgated copies of signed statements taken from them. The investigation concerned allegations by a former quality control inspector that he had been wrongfully discharged for reporting defects in construction which he had identified in the performance of his job and the investigation report had been introduced as an exhibit by the Staff.
- B A qualified informer's privilege exists in NRC practice only for informers who have been given promises and pledges of anonymity.
- C Informer's privilege must yield when, in the context of an ongoing hearing on safety issues, a Board needs the protected information to determine the credibility of witnesses on contested matters.
- LBP-82-60 CONSUMERS POWER COMPANY (Big Rock Point Plant), Docket No. 50-155-OLA; SPENT FUEL POOL AMENDMENT; August 6, 1982; INITIAL DECISION
- A This is the first of a series of initial decisions concerning an amendment to permit 441 fuel assemblies to be stored in the spent fuel pool at Big Rock Point, compared to a current authorization for only 193 assemblies. This decision directs that certain changes be made in the emergency planning pamphlet that is distributed within the Emergency Planning Zone for the purpose of informing people about procedures to follow in case of an emergency at the nuclear plant. The decision also finds that there is as yet no adequate plan to distribute the pamphlet in public places or to inform transients, including large numbers of skiers and summer tourists, of appropriate steps to take in an emergency.
- B Applicant must demonstrate that a satisfactory prompt notification system is in place.
- C A satisfactory emergency plan must provide an adequate opportunity for both the permanent and transient adult population to become aware of appropriate steps to take in an emergency.
- D The requirement that there be an emergency planning pamphlet is an intrinsic part of the regulatory scheme requiring a prompt notification system. Its purpose is to give residents and transients the information they need to respond to audible alarm systems and to be sufficiently knowledgeable to understand the importance of responding.
- LBP-82-60A SOUTHERN CALIFORNIA EDISON COMPANY, et al. (San Onofre Nuclear Generating Station, Units 2 and 3), Docket Nos. 50-361-OL, 50-362-OL; OPERATING LICENSE; August 6, 1982; MEMORANDUM AND ORDER
- A The Licensing Board decides that the utility of the further proceedings it had contemplated on the need for medical arrangements in the offsite emergency planning has been called into question by an Appeal Board ruling indicating that such arrangements are not necessary. The Board calls for comments from the parties on whether further proceedings may actually produce a better record on the question of need for medical services offsite.
- LBP-82-61 CONSOLIDATED EDISON COMPANY OF NEW YORK (Indian Point, Unit No. 2) and POWER AUTHORITY OF THE STATE OF NEW YORK (Indian Point, Unit No. 3), Docket Nos. 50-247-SP, 50-286-SP; SPECIAL PROCEEDING; August 9, 1982; MEMORANDUM AND CERTIFICATION
- A The Licensing Board seeks further Commission guidance concerning the Commission's July 27, 1982 Memorandum and Order (CLJ-82-15, 16 NRC 27) directing the Board to reconsider its rulings on contentions.
- B The Licensing Board requests Commission guidance as to whether it should require that any proffered testimony on risk treat both the consequences and the probability of accidents; or whether it may admit testimony on consequences (or probability) alone if testimony on probability (or consequences) is received from some other source.
- C The Licensing Board requests Commission guidance as to whether it should continue to hear evidence on certain emergency planning questions posed by the Commission in light of the decision of the NRC Regional Administrator to require licensees pursuant to 10 CFR §50.54 to cure significant deficiencies in their emergency plans as identified by the Federal Emergency Management Agency.
- LBP-82-62 ARIZONA PUBLIC SERVICE COMPANY, et al. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), Docket Nos. STN-50-528-OL, STN-50-529-OL, STN-50-530-OL; OPERATING LICENSE; August 12, 1982; MEMORANDUM AND ORDER
- A The Licensing Board issues a Memorandum and Order denying Intervenor's Petition for directed certification of two evidentiary rulings made during the operating license proceeding.

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

- B The availability of directed certification is an exception to the Commission's general rule against interlocutory appeals (10 CFR 2.730(f)) and, as such, is to be resorted to only in "exceptional circumstances." Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603, 606 (1977).
- C The D.C. Circuit's opinion in *Natural Resources Defense Council v. NRC*, 685 F.2d 459 (D.C. Cir. 1982) does not affect this proceeding in such a manner as to present a "novel question of policy or law" under 10 CFR Part 2, Appendix A(V)(4).
- LBP-82-63 CONSUMERS POWER COMPANY (Midland Plant, Units 1 and 2), Docket Nos. 50-329-OM&OL, 50-330-OM&OL, MODIFICATION ORDER AND OPERATING LICENSE, August 14, 1982; PREHEARING CONFERENCE ORDER
- A The Licensing Board issues a Prehearing Conference Order ruling on contentions submitted following issuance of the Staff's Safety Evaluation Report (SER) and Draft Environmental Statement (DES).
- B Where contentions are filed after 15 days prior to the special prehearing conference, those contentions are considered as late-filed and may be admitted only upon a balancing of all of the five factors listed in 10 CFR §2.714(a)(1). Where "good cause" for failure to file on time (factor i) has not been demonstrated, a contention may still be accepted, but the burden of justifying acceptance of a late contention on the basis of the other factors is considerably greater.
- C Newly arising information has long been recognized as providing "good cause" for acceptance of a late contention. *Indiana and Michigan Electric Co.* (Donald C. Cook Nuclear Plant, Units 1 and 2), CLI-72-75, 5 AEC 13, 14 (1972); *Cincinnati Gas and Electric Co., et al.* (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 574 (1980), appeal dismissed, ALAB-595, 11 NRC 860 (1980).
- D Where nontimely contentions arise from the Three Mile Island Unit 2 accident, or the Commission's regulatory response to that accident, a Licensing Board must not only balance the factors in 10 CFR §2.714(a)(1) but also must take into account the Commission's December 18, 1980 Statement of Policy on that subject. CLI-80-42, 12 NRC 654.
- E The proponent of a late-filed contention should affirmatively address the five factors in 10 CFR §2.714(a)(1) and demonstrate that, on balance, the contention should be admitted. In considering that showing, a Board may take into account the circumstance that a pro se intervenor is involved.
- F Insofar as timeliness is concerned, the standards for evaluating the acceptability of late-filed contentions are the same as those for evaluating the admissibility of an untimely intervention petition — i.e., the standards appearing in 10 CFR §2.714(a)(1).
- G Dissatisfaction with the performance of another party (including the Staff) upon whom one had been relying cannot serve as an acceptable justification for an untimely intervention or for the late filing of a contention.
- H In considering the admissibility of contentions, a Licensing Board cannot resolve factual questions going to the merits of a contention. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 547-49 (1980).
- I It is unreasonable to expect an intervenor to examine reports of incidents at various reactors and file contentions based on them at a time when it is not known how or whether the lessons of that incident are incorporated into the reactor under consideration.
- J When a matter is involved in rulemaking, the Commission may elect to require an issue which is part of that rulemaking to be heard as part of that rulemaking. Where it does not impose such a requirement, an issue is not barred from being considered in adjudications being conducted at that time. Furthermore, rulemaking does not preclude litigation of a contention questioning an applicant's compliance with an interim rule in effect during the pendency of the rulemaking proceeding.
- K "Sunk costs" are not appropriately considered in an operating license cost-benefit balance.
- L Effective March 31, 1982, the Commission eliminated entirely requirements for financial qualifications review for, inter alia, electric utilities applying for operating licenses. This amendment is applicable to ongoing proceedings and requires dismissal of previously accepted financial qualifications contentions.
- LBP-82-64 GENERAL ELECTRIC CO. (Vallecitos Nuclear Center — General Electric Test Reactor, Operating License No. TR-1), Docket No. 50-70-SC; SHOW CAUSE, August 16, 1982; INITIAL DECISION
- A In this Show Cause proceeding to establish seismic and geologic design bases for the site and to determine whether the shutdown GE test reactor can withstand them, the Licensing Board majority issues an initial decision accepting the design bases proposed by licensee and NRC Staff, and authorizes a restart of the facility as structurally modified. In a separate opinion, the Board Chairman disagrees with the geologic design basis, questions some of the expert evidence offered at hearing, and would authorize a restart of the facility only with a further modification.

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

- B The following technical issues are discussed: Ground faulting — evidence of offsets, estimates of surface offset, probability of offset, fault deflection; Ground motion — peak accelerations, effective peak acceleration, combined with surface offset, vertical accelerations; Structural capacity — cantilever loading, lack of containment integrity.
- LBP-82-65 COMMONWEALTH EDISON COMPANY (Dresden Station, Units 2 and 3), Docket Nos. 50-237-SP, 50-249-SP; SPENT FUEL POOL AMENDMENT; August 17, 1982; FINAL INITIAL DECISION
- A The Licensing Board's final initial decision authorizes the issuance of appropriate license amendments to permit replacement of the current spent fuel storage racks in each of the Dresden Units 2 and 3 spent fuel pools with 33 high-density storage racks. The conditions and commitments set forth in the partial initial decision (LBP-81-37, 14 NRC 708 (1981)) are carried forward with this decision. At present, reracking is the safest and least costly alternative for meeting requirements for spent fuel storage.
- B The following technical issues are discussed: Alternatives to reracking; relevance of unresolved safety issues to the spent fuel pool modification; validity of mathematical analyses of loads imparted to pool floor during postulated rocking of racks during seismic events.
- LBP-82-66 LOUISIANA POWER AND LIGHT COMPANY (Waterford Steam Electric Station, Unit 3), Docket No. 50-382-OL; OPERATING LICENSE; August 17, 1982; MEMORANDUM AND ORDER
- A The Licensing Board reopens the record in view of applicant's failure to submit as evidence an informational brochure, whose adequacy was in contention.
- B The pre-emergency public information program (10 CFR §50.47(b)(7)) is neither minor nor insignificant. A proper program will avoid chaotic public response to an emergency and minimize risk to the public. Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-39, 15 NRC 1163, 1203 (1982).
- C The form and content of informational brochures drafted to satisfy the pre-emergency public information requirement of NRC regulations (10 CFR §50.47(b)(7)) are not so clearly established by regulations that compliance therewith is a matter of course. See, e.g., Cincinnati Gas & Electric Company, et al. (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-82-48, 15 NRC 1509, 1602 (1982); Consumers Power Company (Big Rock Point Plant), LBP-82-60, 16 NRC 540, 545 (1982).
- D The opinions of applicant's witnesses that an informational brochure, not submitted as evidence, would meet the Commission's emergency planning requirements are not an adequate substitute for Licensing Board examination of the actual brochure; such secondary sources, even when bolstered by the NRC Staff's and FEMA's assurance of a subsequent review, do not constitute "reasonable assurance" that the pre-emergency public information program will be properly implemented. See Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-580, 11 NRC 227, 228-31 (1980).
- E The term "reasonable assurance" requires more than a mere checklist comparison against regulatory criteria. Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-81-36, 14 NRC 691, 699 (1981). The term connotes the existence of a reasonable plan. Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 18 (1978). The reasonableness of a plan cannot be determined when the essential elements of that plan are indeterminate.
- F The adequacy of the pre-emergency public information program is a significant issue that calls for subjective evaluation; delegation of this determination would be improper.
- LBP-82-67 CLEVELAND AND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 & 2), Docket Nos. 50-440-OL, 50-441-OL; OPERATING LICENSE; August 18, 1981; ORDER
- A The Licensing Board resolves a motion to compel answers to interrogatories. Applicants are not required to respond to interrogatories concerning the ingestion pathway emergency planning zone, which is not relevant to the admitted contention about the evacuation EPZ. However, applicants are required to respond to all questions relevant to evacuation, including: (1) the use of resources on-site that might also be needed off-site, (2) the ability of responsible individuals promptly to recognize emergency conditions, (3) the assignment of administrative responsibility for maintaining the prompt alert and notification system, (4) meteorological and radiation release monitoring, and (5) the qualification and training of individuals responsible for communicating with off-site agencies about emergency conditions.
- B Applicants must provide a reasonably complete response to interrogatories. Their answers should not require the sifting of materials to obtain a complete answer but they may describe precisely the portions of documents that contain the requested information.
- C Questions about applicant utility's financial qualifications for fulfilling its emergency planning responsibilities are beyond the scope of an operating license proceeding.

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

- D Under a contention concerning the possible need for an automatic standby liquid control system, applicant must answer questions about the comparative advantages and disadvantages of that system compared to a manual standby liquid control system.
- E Other interrogatories discussed by the Board concerned various aspects of emergency planning (NUREG-0654 criteria, initiating conditions, administrative responsibility, financial responsibility, meteorological monitoring, radiological monitoring, communications).
- LBP-82-68 THE CINCINNATI GAS & ELECTRIC COMPANY, et al. (Wm. H. Zimmer Nuclear Power Station, Unit 1), Docket No. 50-358-OL; OPERATING LICENSE; August 24, 1982; MEMORANDUM AND ORDER
- A Acting on Applicants' Motion for Reconsideration and Clarification of the June 21 Initial Decision, LBP-82-48, 15 NRC 1549 (1982), the Licensing Board: (1) authorizes the issuance of a license permitting fuel loading, low power testing, and operation not in excess of 5% of rated power subject to the condition that the authorization will be revoked should the Commission, on reconsideration, reverse its order in CLI-82-20, 16 NRC 109 (1982), which required the dismissal of eight safety-related contentions; and (2) denied Applicants' relief from further proceedings ordered in the Initial Decision with respect to emergency evacuation of schools and submission of FEMA findings.
- B Where a licensing board finds that all matters in contention, other than those relating to NRC and FEMA review of offsite emergency preparedness, have been resolved either favorably to applicant or through the issuance of appropriate license conditions, it may, pursuant to 10 CFR §50.47, as amended (47 Fed. Reg. 30232 [July 13, 1982]), authorize the Director of Nuclear Reactor Regulation to issue a license authorizing fuel loading and low power operations not in excess of 5% of rated power. Authorization of the issuance of such a license by the Director, upon his making all requisite findings, may be made even in the absence of a motion by the applicant pursuant to 10 CFR §50.57(c) for a low power license.
- C Pursuant to 10 CFR §50.47(a)(1), the NRC must find, prior to the issuance of a license for the full power operation of a nuclear reactor, that the state of onsite and offsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. In accordance with 10 CFR §50.47(a)(2) the Commission is to base its finding on a review of the Federal Emergency Management Agency's (FEMA's) "findings and determinations as to whether state and local emergency plans are adequate and capable of being implemented," and on a review of the NRC Staff assessment of applicant's onsite emergency plans.
- D Pursuant to 10 CFR §50.47(a)(2), a FEMA finding as to the status of offsite emergency planning preparedness will constitute a rebuttable presumption on the question of the adequacy of such plans. Based upon existing precedent, it is unclear whether this presumption attaches only to FEMA's final formal findings on the state of offsite emergency preparedness, or whether such a presumption may be accorded to preliminary or interim FEMA findings.
- E As a rebuttable presumption dissolves in the face of reliable and probative evidence to the contrary, the practical effect of any rebuttable presumption created by 10 CFR §50.47(a)(2) would be of little moment with regards to contested aspects of FEMA's findings, leaving a licensing board free to weigh the testimony of each party on its own merits. See Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), LBP-81-59, 14 NRC 1211, 1465 (1981).
- F A licensing board must base its findings on the status of offsite emergency preparedness, pursuant to 10 CFR §50.47(a)(2), on FEMA's testimony as to its review of those portions of the state and local plans related to the contentions, as viewed in light of other testimony adduced at hearing. While a licensing board may rely on testimony based on FEMA's interim findings in making its own findings, it need not be satisfied with testimony so preliminary and conclusory as to fail to meet the same standards expected of other testimony in Commission proceedings. To do so would deprive both the board and parties of any meaningful opportunity to cross-examine FEMA witnesses as to the bases for the Government's conclusions.
- G A licensing board may not delegate to the NRC Staff, or to FEMA, its obligation to resolve issues placed into controversy in an operating license proceeding, however conscientiously they may pursue their work. See Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-298, 2 NRC 730, 736-737 (1975); Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 318 (1978); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), LBP-81-59, 14 NRC 1211, 1419 (1981). To do so would be a clear violation of section 189 of the Atomic Energy Act of 1954, as amended, as it would render the hearing process a nullity.

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

H Where FEMA testimony based upon its interim findings as to the state of offsite emergency planning is so preliminary and conclusory as to fail to permit meaningful cross-examination of Government witnesses as to the bases for their conclusions, it is appropriate for a board to permit reopening of the record on offsite emergency planning matters upon a lesser showing of good cause than that which is ordinarily required to reopen a record. Such a showing shall be based upon particular parts of the final FEMA findings and the Staff's final supplement to its Safety Evaluation Report which relate to admitted contentions, and shall demonstrate that an opportunity for cross-examination, as distinguished, for example, from an opportunity for further written comment, is required for a full and true disclosure of the facts.

I A motion for reconsideration must state specifically the respects in which an initial decision is erroneous. See 10 CFR §2.771. It will not suffice to allege that a decision has had an unintended effect, without specifying how the board is supposed to have erred in reaching its findings. If reasons now exist justifying a different result, they must be presented on the record, not in the form of an unsworn memorandum of law from counsel, which is not evidence.

LBP-82-69 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al (Perry Nuclear Power Plant, Units 1 & 2), Docket Nos. 50-440-OL, 50-441-OL; OPERATING LICENSE; August 30, 1982; MEMORANDUM AND ORDER

A In this Memorandum and Order the Board rules that it cannot go beyond the Commission's Statement of Policy on psychological stress issues (47 Fed. Reg. 31762, July 16, 1982) because the Statement had the effect of depriving it of jurisdiction over the intervenor's psychological stress contention. It also ruled that certification of the issue to the Commission was not proper because intervenor had failed to show why interlocutory review was necessary rather than review, in due course, upon appeal.

B When a policy statement issued by the Commission orders licensing boards not to consider psychological stress contentions unless they meet specified criteria, boards are deprived of jurisdiction over such issues and are prohibited from inquiring into the procedural regularity of the policy statement.

C A party may not obtain certification of an issue unless it demonstrates that it will suffer substantial harm if it is deprived of interlocutory review and is compelled to await completion of the licensing board's action before it pursues an appeal.

LBP-82-70 PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-273-OL, 50-323-OL; OPERATING LICENSE; August 31, 1982; INITIAL DECISION

A In this Initial Decision, the Licensing Board authorizes the issuance of a full power operating license for the Diablo Canyon Nuclear Power Plant, Units 1 and 2, subject to certain conditions specified by the Board and with the caveat that the decision not impinge on the status of the Commission's previously ordered suspension of the plant's low-power license or on the independent design verification program ordered by the Commission.

B Pressurizer heaters are not required to be designed and constructed to "safety-grade" standards by either Commission requirements or by the standards of 10 CFR Part 100, Appendix A, III (a).

C Power-operated relief valves, when used to protect a system against low-temperature overpressurization, must be designed and constructed to "safety-grade" standards.

D State and local governments have the responsibility to set emergency planning zones around nuclear power plants. The zones may be geographically larger than those specified in the Commission's rules; however, Commission rules govern the test of adequacy of emergency planning.

E An early warning System must be capable of notifying essentially 100 percent of a population within 5 miles of a nuclear power plant within 15 minutes. Essentially 100 percent of the population within the entire EPZ must be notified within 45 minutes.

F Formal FEMA findings on the adequacy of offsite emergency planning are required prior to license issuance but are not required for the hearing.

LBP-82-71 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352, 50-353; OPERATING LICENSE; September 2, 1982; MEMORANDUM AND ORDER

A The Licensing Board denies a motion to admit a contention concerning psychological stress caused by viewing a cooling tower plume because the Licensing Board is not authorized by the Commission to admit such a contention, the contention is without basis, and the motion was not timely.

B As required by the Commission's policy statement of July 22, 1982 (47 Fed. Reg. 31762), a Licensing Board is without authority to admit a contention alleging that psychological stress will result from the operation of a nuclear plant when no serious nuclear accident has occurred at the site.

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

- C A contention alleging that psychological stress will result from operation of a nuclear power plant may not be litigated if it is without basis even if it otherwise satisfied the Commission's criteria for admitting psychological stress contentions.
- LBP-82-72 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352, 50-353; OPERATING LICENSE; September 3, 1982; MEMORANDUM AND ORDER
- A The Licensing Board reaffirms its holding that a preclusion clause in the Delaware River Basin Compact renders the Licensing Board without jurisdiction to reassess the impacts of an allocation of water from the Delaware River made by the Delaware River Basin Commission.
- B Pursuant to section 15.1(s)(1) of the Delaware River Basin Compact, the Licensing Board is precluded from reassessing the impacts of a decision by the Delaware River Basin Commission, concurred in by the Federal member of the Commission, allocating water from the Delaware River for the cooling of a nuclear plant.
- LBP-82-73 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station Unit 1), Docket No. 50-322-OL; OPERATING LICENSE; September 3, 1982; MEMORANDUM AND ORDER
- A Ruling on the effects of potential conflicts of interest which the Board had noted because applicant's contractor for its probabilistic risk assessment had also served as a subcontractor for the NRC Staff on certain aspects of the Staff's systems interaction program, the Licensing Board concludes that in the interest of fundamental fairness to all parties, the Staff should have noted the existence of such potential conflicts of interest on the record, together with a description of any steps taken to avoid or mitigate their effects. However, in the circumstances of this case, the Board holds that any defects in the fairness of this proceeding were cured by the Board's discovery and disclosure of this potential conflict of interest, which gave all parties the opportunity for cross-examination on this point, and by the Staff's obvious lack of reliance on its subcontractor's views in its testimony in this proceeding.
- B Parties to Commission proceedings have the obligation to disclose all potential conflicts of interest, whether or not a party believes them to be material and relevant to a licensing proceeding. Such disclosure permits other parties the opportunity to cross-examine opposing witnesses regarding any bias which may be alleged to exist as a result of a potential conflict of interest.
- C Fundamental fairness dictates that parties to Commission proceedings disclose all potential conflicts of interest, whether or not a party believes them to be material and relevant to a licensing proceeding. While the "materiality and relevance" of new information is required to be considered in determining whether a party has a duty to disclose such new information in an NRC proceeding, Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387 (1982); Duke Power Co. (McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625 (1973), these standards are not applicable in a situation where there is an issue as to the fundamental fairness of the conduct of parties to a proceeding. Fundamental fairness clearly requires the disclosure of potential conflicts of interest, such that, after opposing parties have had an opportunity for cross-examination, the Board may determine the materiality of such information.
- LBP-82-74 PUGET SOUND POWER AND LIGHT COMPANY, et al. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), Docket Nos. 50-522, 50-523; CONSTRUCTION PERMIT; September 3, 1982; MEMORANDUM AND ORDER
- A The Licensing Board rules on the disposition of two late-filed petitions to intervene in this proceeding, denying the petition filed by the Columbia River Inter-Tribal Fish Commission (CRITFC) for lack of standing and granting the petition filed by the Yakima Indian Nation, subject to the requirement that at least one contention acceptable under 10 CFR §2.714(b) be filed.
- B An organization may represent only its own members. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481, 483 (1977). The requirements for standing, injury in fact and an interest "arguably within the zone of interest" protected by the statute, must be fulfilled by the organization itself through its own membership. Portland General Electric Company, et al. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976).
- C An untimely petition to intervene may be granted if it is found that a balancing of the five factors set forth in 10 CFR §2.714(a)(1) favors intervention. Some weight may be attached to the fact that the lateness, though not justified, is not extreme and will not delay the proceeding. Duke Power Company (Amendment to Materials License SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 (1979).

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

- D 10 CFR §2.714(b) requires a petitioner for intervention to file a supplement containing at least one admissible contention. Cincinnati Gas and Electric Company, et al. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 571 (1980).
- LBP-82-75 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL; OPERATING LICENSE; September 7, 1982; SUPPLEMENTAL PREHEARING CONFERENCE ORDER
- A The Licensing Board issues its Supplemental Prehearing Conference Order ruling on intervenors' "Phase One Consolidated Emergency Planning Contentions," which primarily relates to Applicant's onsite emergency planning efforts.
- B Pursuant to 10 CFR §2.707, a licensing board is empowered on the failure of a party to comply with a prehearing conference order to "make such orders in regard to the failure as are just." Based upon the Appeal Board's ruling in Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400 (1982) the out-of-hand dismissal of intervenors' proposed contentions solely for failing to either further particularize certain contentions or to pursue settlement negotiations is unwarranted. A more appropriate course of action in such a case is to simply rule on intervenors' proposed contentions as they now stand, dismissing those which lack adequate bases and specificity.
- C Pursuant to 10 CFR §2.714, an intervenor must set forth those matters which it seeks to litigate "with reasonable basis and specificity." This power of the Commission to require that intervenors make such a threshold showing prior to the admission of a contention has been upheld by the Federal Courts. See *BPI v. Atomic Energy Commission*, 502 F.2d 424, 428-429 (D.C. Cir. 1973).
- D A contention alleging an entire emergency response plan to be inadequate, in that it fails to consider certain matters, is required pursuant to 10 CFR §2.714 to specify the way in which identified portions of the plan are alleged to be inadequate. In advancing such a contention, it is intervenors' obligation to assert how the identified portions of an emergency plan are rendered inadequate by its failure to consider such matters.
- E Pursuant to 10 CFR §50.47(b)(12), emergency response plans for nuclear power reactors must include arrangements for "contaminated injured" individuals. As interpreted by the Appeal Board in Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 137 (1982) "contaminated injured" is a distinct category of injury, encompassing potential patients whose traumatic (i.e., physical) injuries are complicated by radioactive contamination. People who suffer radiation injury, without accompanying traumatic injury, are unlikely to need emergency treatment because the clinical course of radiation injury unfolds over time and is seldom, if ever, life-threatening. Thus, for a serious nuclear accident to result in the hospitalization of large numbers of people, not only must an already unlikely accident be severe, but also the emergency response to protect the public must be ineffectual. But see Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-82-27, 16 NRC 883 (1982).
- LBP-82-76 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (ASLBP No. 82-471-02-OL); OPERATING LICENSE; September 13, 1982; MEMORANDUM AND ORDER
- A The Licensing Board rules on petitions to intervene and admission of contentions, and schedules further proceedings.
- LBP-82-77 CONSUMERS POWER COMPANY (Big Rock Point Plant), Docket No. 50-155; SPENT FUEL POOL AMENDMENT; September 14, 1982; INITIAL DECISION
- A In this Initial Decision, the Licensing Board holds that the applicant must carry the burden of proof in demonstrating that the off-site emergency plan has complied with the Commission's emergency planning rules and guidance. It must carry that burden whether or not it is primarily responsible for performing the functions involved in the plan. Because applicant did not carry that burden, it must demonstrate to the Board that the deficiencies in its plan have been remedied, are not serious, or are being remedied through adequate interim compensating actions. The deficiencies include failures of proof related to the training of local officials and school officials, the need for transportation of persons who lack personal vehicles, the availability of a satisfactory method of alerting school bus drivers who are not on duty, that there is adequate transportation for schoolchildren, that there is an adequate list of invalids being maintained and that there is an adequate method of establishing emergency bus routes.
- B Intervenor's contention that applicant had not implemented adequate administrative controls to prevent cask drops over the spent fuel pool was dismissed for lack of merit.

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

C Applicant has the burden of proof to demonstrate that the off-site emergency plan complies with Commission rules and guidance. The burden must be carried whether or not applicant is primarily responsible for carrying out a particular aspect of the plan.

D A Licensing Board prescribes procedures by which applicant may remedy deficiencies in its case concerning the adequacy of emergency planning.

E The following technical issues are discussed: Emergency planning (estimating training needs); emergency planning; administrative controls (cask drops).

LBP-82-78 CONSUMERS POWER COMPANY (Big Rock Point Plant), Docket No. 50-155; SPENT FUEL POOL AMENDMENT, September 15, 1982; INITIAL DECISION

A In this Initial Decision, the Licensing Board finds that an environmental impact assessment, prepared with respect to an amendment to expand the capacity of a spent fuel storage pool, was adequate. Intervenor did not successfully challenge its negative findings concerning the lack of any significant environmental impacts.

B Additionally, the Board finds that the environmental impact assessment adequately treated alternatives to the spent fuel when it found that the pool modification "will not result in any significant change in the commitment of water, land and air resources" and when it also found that the use of stainless steel to fabricate new fuel racks is an "insignificant" use of that resource. Intervenor also failed to make an effective challenge to this Staff's basis for this finding.

C An environmental impact appraisal prepared with respect to the expansion of the capacity of a spent fuel pool need not discuss further the alternatives to an expansion of the pool if the appraisal has an adequate basis for finding that the expansion would not cause any unresolved conflicts about alternative uses of resources.

D An environmental impact statement need not be prepared with respect to the expansion of the capacity of a spent fuel pool if the environmental impact appraisal prepared for the project had an adequate basis for concluding that the expansion of a spent fuel pool would not cause any significant environmental impact.

LBP-82-79 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 & 2), Docket Nos. 50-440-OL, 50-441-OL, OPERATING LICENSE, September 15, 1982; MEMORANDUM AND ORDER

A The Licensing Board denies admission of a contention on dose levels to human beings from routine emissions from the Perry plant because the intervenor failed to show good cause for late filing. Intervenor had argued that the issue could be raised because it had appeared for the first time in the Draft Environmental Statement for Perry, but intervenor had no answer for the opposing argument that the same matter had been raised in the Final Safety Analysis Report, issued months earlier.

B The Board also considered whether to raise this issue sua sponte but it concluded that the Commission had already considered the matter in several earlier proceedings and that sua sponte consideration was not appropriate.

C Discussion of an issue in the Draft Environmental Statement does not provide good cause for late filing of a contention, if the same material was included in the Final Safety Analysis Report (FSAR) filed by the applicant.

If a contention is excluded from a proceeding because there is no good cause for late filing, the Board should nevertheless consider whether to declare the issue to be an important safety or environmental issue and to raise that issue sua sponte.

LBP-82-80 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-2 (ASLBP No. 82-478-05-OL); SECURITY, September 16, 1982; MEMORANDUM, ORDER AND NOTICE OF SECOND IN CAMERA CONFERENCE OF COUNSEL

A Upon referral from the Commission, the Licensing Board authorized the release to two of intervenor's security consultants/experts of two portions of a restricted Appeal Board decision [Diablo Canyon, ALAB-653 (1981) (Restricted)] regarding the definition of design basis threat and interpretation of regulations concerning the appropriate number of armed responders.

B Intervenor county government established requisite need of two of its security consultants/experts for access to two portions of restricted Appeal Board decision regarding definition of design basis threat and number of armed responders, even though those portions also contain minimal amount of specific information concerning security plan at another nuclear plant.

C Where Commission previously authorized release of two portions of restricted Appeal Board decision to attorneys for intervenor county government, the same portions of that decision will be released to intervenor's consultants/experts who have filed testimony on the areas discussed in the Appeal Board decision.

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

D Release of portions of restricted Appeal Board decision to intervenor's consultants/experts will be conditioned upon their execution of affidavits of non-disclosure of the plant physical security information contained in that decision.

E Security plans for nuclear plants are deemed to be commercial or financial information pursuant to 10 CFR §2.790(d) and may only be disclosed to counsel and expert witnesses who have a need to know after application of a balancing of interests test.

LBP-82-81 DUKE POWER COMPANY (Perkins Nuclear Station, Units 1, 2 and 3, Docket Nos. STN-50-488, STN-50-489, STN-50-490; CONSTRUCTION PERMIT, September 20, 1982; MEMORANDUM AND ORDER AUTHORIZING WITHDRAWAL OF APPLICATION FOR CONSTRUCTION PERMIT WITHOUT PREJUDICE

A The Licensing Board authorizes the withdrawal without prejudice of the application for construction permits for the Perkins Nuclear Station, denies Intervenor's motion to dismiss the Perkins application with prejudice, and denies the Intervenor's request for attorney's fees and litigation expenses.

B Licensing Boards under 10 CFR 2.707(a) may authorize the withdrawal of an application after the notice of hearing has issued on such terms as it may prescribe, but any terms prescribed must be related to any legal harm to parties or the public that a withdrawal would cause.

C Federal rules favor withdrawal without prejudice where no party will be harmed thereby. The possibility of another hearing on the application standing alone does not constitute legal harm, and does not in itself justify a conditional withdrawal. Fed. R. Civ. P. 41(a)(1), (2); LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 604 (5th Cir. 1976).

D A Licensing Board may attach reasonable conditions on a withdrawal without prejudice to protect parties and public from legal harm; or if legal harm is unavoidable, the Licensing Board may order a dismissal with prejudice but only to the extent necessary to avoid legal harm.

E The Applicant would have the option of selecting reasonable conditions on a withdrawal without prejudice, including the payment of intervenors' attorney's fees, or a withdrawal with prejudice as to specific issues. Yoffe v. Keller Indus., Inc., 580 F.2d 126, 131, n.13 (5th Cir. 1978).

F A distinction must be made between the American rule which bars an award of attorney's fees to the prevailing party absent a specific statute authorizing payment, as reconfirmed in Alyeska Pipeline Serv. v. Wilderness Soc., 421 U.S. 240 (1975), and requiring the reimbursement of attorney's fees as a condition of withdrawal of an application without prejudice. The latter is not an award for winning anything, but is to save a party from the expense and effort of preparing a defense twice because of the withdrawal without prejudice.

G There is nothing about NRC practice and regulations which bars the payment of money as a condition for withdrawal of an application without prejudice.

H An unusual situation prevails in an NRC proceeding with respect to a dismissal in that (1) it is a mandatory licensing proceeding, not a simple adversary litigation, and (2) the dismissal is sought after a hearing and decision on the merits.

I Where an intervenor has lost on the merits of an issue, it will suffer no legal harm from a dismissal of an application without prejudice, because the worst that can beset an intervenor in that case is that it will be afforded an unearned second opportunity to prevail on the issue.

J Intervenor's have standing to seek a dismissal with prejudice and attorney's fees. Subsumed in the right to intervene with NRC proceedings is the right to enjoy the benefits of the ensuing litigation; to preserve any victory for later use in a renewed litigation, or to be saved from legal harm if the need arises again to litigate an issue upon which intervenors prevailed.

LBP-82-82 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL (Emergency Planning); OPERATING LICENSE; September 22, 1982; MEMORANDUM AND ORDER RULING ON LILCO'S MOTION TO COMPEL DISCOVERY OF SUFFOLK COUNTY EMERGENCY PLANNING DOCUMENTS

A The Licensing Board rules on claims of attorney-client, work product and executive privileges asserted by a governmental intervenor in opposition to two discovery requests from applicant for the production of certain emergency planning documents.

B Pursuant to 10 CFR §2.741(d), the party upon whom a request for the production of documents is served must serve upon the requesting party, within 30 days after service of the request, a response stating either that the requested inspection and copying will be permitted, or stating reasons why the requested discovery is objectionable. Pursuant to 10 CFR §2.740(f)(1), an evasive or incomplete answer or response shall be treated as a failure to answer or respond.

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

- C A party opposing a discovery request need not seek a protective order, pursuant to 10 CFR §2.740(c), so long as he does respond to the request by objecting. In ruling upon a motion to compel made in accordance with §2.740(f), however, a board is empowered to make such a protective order as it would make upon a motion made pursuant to §2.740(c). A party objecting to the production of a document on grounds of privilege therefore has the obligation to specify in its response to a document request those same matters which it would be required to set forth in attempting to establish "good cause" for the issuance of a protective order.
- D What constitutes "good cause" for the issuance of a protective order depends upon the kind of protective order being sought. In order to show good cause for the issuance of a protective order, pursuant to 10 CFR §2.740(c), to avoid the disclosure of documents for which an evidentiary privilege is claimed, a party must specifically designate and describe (1) the documents claimed to be privileged, (2) the privilege being asserted and (3) the precise reasons why the party believes the privilege to apply to such documents.
- E A party asserting certain documents to be privileged from discovery must bear the burden of proving that it is entitled to such protection, see *In re Fischel*, 557 F.2d 209 (9th Cir. 1977), and this includes pleading such claims adequately in its response. Claims of privilege must be specifically asserted with respect to particular documents, and may not be raised by blanket objection that all matters which could fit a particular document request are privilege. See *United States v. El Paso Company*, No. 81-2484 (5th Cir. August 13, 1982); *United States v. Davis*, 636 F.2d 1028, 1044, n. 20 (5th Cir. 1981). This is because discovery privileges are not absolute, and may or may not apply to a particular document, depending upon a variety of circumstances.
- F It is not sufficient for a party asserting certain documents to be privileged from discovery to await a motion to compel from the party seeking discovery prior to setting forth its assertions of privilege and identifying those matters which it claims to be privileged. Such a practice places an unfair burden upon the party seeking discovery and occasions unnecessary delays. Claims of privilege are untimely unless asserted in the response to the discovery request.
- G Pursuant to 10 CFR §2.740(b)(1), parties may generally obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter in the proceeding. . . ." While the only discovery privilege codified in the NRC regulations is the work product doctrine, the Commission decision to model §2.740(b) after Rule 26(b) of the Federal Rules of Civil Procedure implicitly adopted those privileges which have been recognized by Federal Courts interpreting Rule 26(b).
- H While the Federal Rules of Civil Procedure are not themselves directly applicable to practice before the Commission, judicial interpretation of a Federal Rule can serve as guidance for the interpretation of a similar or analogous NRC discovery rule. *Toledo Edison Company, et al. (Davis-Besse Nuclear Power Station)*, ALAB-300, 2 NRC 752, 760 (1975); *Cincinnati Gas & Electric Company, et al. (Wm. H. Zimmer Nuclear Power Station, Unit 1)*, LBP-82-47, 15 NRC 1538, 1542 (1982).
- I The purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). An attorney's involvement in, or recommendation of a transaction does not place a cloak of secrecy around all incidents of such a transaction. In *re Fischel*, 557 F.2d 209, 212 (9th Cir. 1977). The attorney-client privilege does not protect disclosure of the underlying facts communicated to the attorney. *Upjohn*, 449 U.S. at 395. A communication from the attorney to the client should be privileged only if the client had a reasonable expectation in the confidentiality of the statement, if it was necessary to obtain informed legal advice and might not have been made absent the privilege. *Ohio-Sealy Mattress Manufacturing Company v. Kaplan*, 9 F.R.D. 21, 28 (N.D. Ill. 1980).
- J The fact that a document is authored by in-house counsel, rather than by an independent attorney, is not relevant to a determination of whether such a document is privileged. In such cases, however, the privilege protects only communications revealing confidences of the client or seeking legal advice, not matters relating solely to the conduct of the client's business. *O'Brien v. Board of Education of City School District of City of New York*, 86 F.R.D. 548, 549 (S.D.N.Y. 1980); *In re Fischel*, 557 F.2d 209, 211 (9th Cir. 1977).
- K To be privileged from discovery by the work product doctrine, as codified in 10 CFR §2.740(b)(2), a document must be both prepared by an attorney, or by a person working at the direction of an attorney, and prepared in anticipation of litigation. "Ordinary work product," which does not include the mental impressions, conclusions, legal theories or opinions of the attorney or his agents, may be obtained by an adverse party upon a showing of "substantial need of the materials in preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." 10 CFR §2.740(b)(2). Opinion work product is not discoverable, so long as the material was in fact prepared by an attorney or his agent in

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

- anticipation of litigation, and not assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation. *In re Murphy*, 560 F.2d 326, 334-336 (8th Cir. 1977).
- L Cases decided under Exemption 5 of the Freedom of Information Act, which relates to inter-agency or intra-agency letters or memoranda, may be looked to for guidance in resolving claims of executive privilege in NRC proceedings related to discovery. While the discovery rules for "claims of executive privilege" can only be applied under Exemption 5 by way of rough analogies, "EPA v. Mink, 410 U.S. 73, 86 (1973), the similarities between these matters are sufficient such that Exemption 5 cases may be used as guidance, taking a common sense approach which recognizes any differing equities presented in FOIA cases. See *Mink*, 410 U.S. at 91. FOIA cases, for example, do not consider a party's need for requested documents. *NLRB v. Sears*, 421 U.S. 132, 149 n.16 (1975). NRC FOIA cases do consider the public interest of such disclosures, however. See *Consumers Power Company (Palisades Nuclear Power Facility)*, ALJ-80-1, 12 NRC 117, 122-126 (1980) and cases cited therein.
- M A governmental intervenor does not waive its claims of executive privilege by its participation as a litigant in an NRC proceeding. *Consumers Power Company (Palisades Nuclear Power Facility)*, ALJ-80-1, 12 NRC 117, 127-128 (1980).
- N The privilege against disclosure of intragovernment documents containing advisory opinions, recommendations and deliberations is a part of the broader executive privilege. Its purpose is to encourage frank discussions within the government regarding the formulation of policy and the making of decisions. Documents shielded by executive privilege remain privileged even after the decision to which they pertain has been effected, since such disclosure at any time could inhibit the free flow of advice. *Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340, 360, (1979).
- O The executive privilege is a qualified privilege, and does not attach to purely factual communications, or to severable factual portions of communications, the disclosure of which would not compromise military or state secrets. Furthermore, even communications which fall within the protection of the privilege may be disclosed upon an appropriate showing of need. An objective balancing test is used to determine a party's need for such documents, weighing the importance of the documents to the party seeking their production, and the availability elsewhere of the information contained in the documents, against the government interest in secrecy. *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 658-659 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977).
- LBP-82-83 GENERAL ELECTRIC COMPANY (General Electric Morris Operation), Docket No. 70-1308 (Application to Modify License No. SNM-1265 to Increase Spent Fuel Storage Capacity); OPERATING LICENSE AMENDMENT; September 21, 1982; ORDER GRANTING MOTION TO WITHDRAW APPLICATION AND DISMISSING PROCEEDING WITHOUT PREJUDICE
- LBP-82-84 SOUTH CAROLINA ELECTRIC AND GAS COMPANY, et al. (Virgil C. Summer Nuclear Station, Unit 1), Docket No. 50-395-OL; OPERATING LICENSE; September 24, 1982; MEMORANDUM AND ORDER
- A The Licensing Board denies intervenor's request for a stay of the initial decision authorizing the issuance of an operating license, and grants intervenor's further request for leave to reply to NRC Staff's and applicants' oppositions to intervenor's request to reopen proceeding.
- B In determining whether to grant a stay to reopen the proceeding after the initial decision has issued, the Licensing Board will consider the same four factors specified by 10 CFR § 2.788(e) relating to stays pending appeal.
- C If an intervenor cannot present his case, the proper method to institute a proceeding by which the NRC would conduct its own investigation is to request action under 10 CFR § 2.206. It is not the Licensing Board's function to assist intervenors in preparing their cases and searching for their expert witnesses.
- LBP-82-85 PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275-OL, 50-323-OL; OPERATING LICENSE; September 27, 1982; MEMORANDUM IN RESPONSE TO NRC STAFF'S MOTION FOR CLARIFICATION OF THE LICENSING BOARD'S INITIAL DECISION DATED AUGUST 31, 1982
- A In response to an NRC Staff motion, the Licensing Board clarifies certain matters pertaining to its Initial Decision of August 31, 1982.
- LBP-82-86 METROPOLITAN EDISON COMPANY (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289; RESTART; September 29, 1982; MEMORANDUM AND ORDER
- A The Licensing Board rules that it is without jurisdiction to rule on intervenor's motion to reopen the record after issuance of the Board's initial decision on the subject of the motion.

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

- B After the issuance of a licensing board's initial decision on a particular issue, exclusive jurisdiction over the issue lies with the appeal board. Section 2.717(a) of the Rules of Practice is reconcilable with §2.718(j) in that the identity of the presiding officer with exclusive jurisdiction over a particular issue changes as the proceeding moves up the appellate ladder. The parties should not be able to bestow jurisdiction on a presiding officer by selecting the tribunal for the relief sought by a motion.
- LBP-82-87 TEXAS UTILITIES GENERATING COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445, 50-446, OPERATING LICENSE; September 30, 1982; ORDER DENYING RECONSIDERATION
- A The Licensing Board directs the Staff to identify by name individuals identified by letter of the alphabet in an inspection report which the Staff introduced in evidence, and to produce unexpurgated copies of signed statements taken from those individuals. If the Staff fails either to comply with or seek appellate review of this order, the Licensing Board indicates it will impose sanctions upon Staff counsel.
- B Informer's privilege applies only to those who confidentially volunteer information to government officials charged with enforcing a law, not to everyone interviewed during the course of an ensuing investigation.
- C A single request for confidentiality cannot be used to shield an entire investigation from scrutiny in an adjudicatory setting.
- D It is improper for the NRC Staff to attempt to dictate to the Licensing Board what matters it may or may not consider. The Licensing Board is the sole judge of its informational needs and is not required to act merely as an umpire calling balls and strikes.
- E The Licensing Board has the right and duty to develop a full record for decision-making in the public interest. The independence and integrity of licensing boards is fundamental to due process.
- F Congress has authorized the NRC to provide hearings upon the request of any person whose interest may be affected by the licensing process and to establish licensing boards to conduct such hearings.
- G The Rules of Practice in Part 2 of 10 CFR are the method by which NRC ensures that all parties are provided procedural as well as substantive due process.
- H Parties and their representatives are expected to conduct themselves before a licensing board as they would before a court of law.
- I A licensing board is empowered to impose sanctions for a party's failure to obey or seasonably appeal from its order, even if the behavior is based upon the party's belief that the order is invalid.

DIGESTS

ISSUANCES OF DIRECTORS' DECISIONS

- DD-82-7 PACIFIC GAS & ELECTRIC COMPANY (Humboldt Bay Power Plant, Unit 3), Docket No. 50-133; DECOMMISSIONING; July 7, 1982; DIRECTOR'S DECISION UNDER 10 CFR 2.206
- A The Director of Nuclear Reactor Regulation denies a petition under 10 CFR 2.206 that requests action to revoke the operating license for the Humboldt Bay plant and to decommission the facility.
- DD-82-8 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE (Seabrook Nuclear Station, Units 1 & 2), Docket Nos. 50-443, 50-444; SHOW CAUSE; July 6, 1982; DIRECTOR'S DECISION UNDER 10 CFR 2.206
- A The Director of Nuclear Reactor Regulation denies a petition under 10 CFR 2.206 that requested initiation of show-cause proceedings on the basis of the licensee's alleged lack of financial qualifications.
- B In light of the elimination of the Commission's financial qualification requirements, the Director of Nuclear Reactor Regulation denies a request for initiation of show-cause proceedings in the absence of a connection between alleged financial constraints and a particular safety problem.
- DD-82-9 COMMONWEALTH EDISON COMPANY (LaSalle County Generating Station, Units 1 and 2), Docket Nos. 50-373, 50-374; SHOW CAUSE; July 19, 1982; DIRECTOR'S DECISION UNDER 10 CFR 2.206
- A The Director of Nuclear Reactor Regulation denies in part petitions filed under 10 CFR 2.206 by the Illinois Attorney General and the Illinois Friends of the Earth regarding deficiencies in construction of LaSalle Unit 1. Remaining matters concerning LaSalle Unit 2 are under investigation.
- DD-82-10 PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275, 50-276; OPERATING LICENSE; September 22, 1982; DIRECTOR'S DECISION UNDER 10 CFR 2.206
- A The Director of Nuclear Reactor Regulation denies a petition under 10 CFR 2.206 requesting the issuance of an order to Pacific Gas & Electric Co. to show cause why it should not be directed to file amendments to its pending operating license applications concerning the restructuring by PG&E of the Diablo Canyon Project organization and management.

DIGESTS

ISSUANCES OF DENIALS OF PETITIONS FOR RULEMAKING

DPRM-82-1 GENERAL ATOMIC COMPANY, Docket No. PRM-95-1 (10 CFR Part 95); RULEMAKING; August 26, 1982; DENIAL OF PETITION FOR RULEMAKING

- A The Nuclear Regulatory Commission is hereby denying a petition for rulemaking submitted by the General Atomic Company (GAC) in a letter to the Secretary of the Commission dated May 19, 1981. The petition requested that the Commission amend its regulation relating to the classification guidance provided by sub-topic 112 of Appendix A, "Classification Guide for Safeguards Information," to 10 CFR Part 95 to change the CONFIDENTIAL-National Security Information (CNSI) classification category to unclassified (U) or to delete sub-topic 112 from Appendix A.

DPRM-82-2 WELLS EDDLEMAN, Docket No. PRM-2-11; OPERATING LICENSE; September 30, 1982; DENIAL OF PETITION FOR RULEMAKING

- A The Commission denies a petition requesting that the Commission amend its rules of practice for domestic licensing proceedings to require a separate operating license hearing for each power reactor unit at a nuclear power plant site on the grounds that the requested amendments are unnecessary, contrary to sound administrative practice, and inconsistent with existing law.
- B There is no reason to believe that an amendment to NRC regulations to require an exclusive hearing on each reactor unit will result in or enhance the consideration of any issues which could not also have been considered and considered equally well in a hearing on two or more units.
- C There is no reason to believe that the class of persons who could be included or excluded from participating in an operating license hearing on two or more reactor units constructed on a multiunit site would be different from the class of persons who would be included or excluded from participating in an OL hearing devoted exclusively to any single reactor unit constructed on the same multiunit site.
- D A separate operating license is issued for each reactor unit constructed on a multiunit site even though a consolidated hearing is held on several reactor units. Before an operating license for a reactor unit is issued, the Commission must make the requisite findings and determinations required by the regulations in effect at the time of license issuance.
- E Rules of practice permit the Commission to consider two or more applications in the same licensing review and to consolidate two or more proceedings for hearing.
- F Although used infrequently, the Commission's rules of practice also provide procedures for severing a proceeding dealing with two or more reactor units and for holding a separate operating license hearing on each reactor unit.
- G The requested amendment would, if adopted, have the effect of requiring a mandatory OL hearing in connection with the issuance of an OL for each nuclear power reactor. In this respect, the requested amendment is contrary to the clear intent of Congress which, in 1962, amended section 189a. of the Atomic Energy Act of 1954 to eliminate the requirement for mandatory hearings in OL proceedings and to permit the Commission, in any case in which a hearing was not requested, to issue an OL without a hearing.
- H The OL hearing is limited to examining substantial changes or conditions which have occurred since the issuance of the construction permit and issues which were deferred for consideration at the OL stage of the proceeding.
- I It is inappropriate to consider the issue of sufficient NRC personnel in a licensing proceeding, including a hearing on an OL. Issues relating to Commission personnel involve the internal organization and management of the agency which is subject to Congressional authorization, and for which the Commission, not a license applicant or an intervenor, has sole responsibility.
- J The Commission has amended its regulations in 10 CFR Parts 2 and 50 to eliminate entirely requirements for financial qualifications review and findings for electric utilities that are applying for construction permits or operating licenses for production or utilization facilities.

LEGAL CITATIONS INDEX

CASES

- A. L. Meckling Barge Lines, Inc. v. United States, 368 U.S. 324 (1961)
remanding of case based on record that no longer represents case's actual situation; CLI-82-26, 16 NRC 881 (1982)
- Able Investment Company v. United States, 53 F.R.D. 485 (D. Neb. 1971)
material encompassed by attorney work product doctrine; LBP-82-82, 16 NRC 1161, 1162 (1982)
- Adickes v. Kress and Company, 398 U.S. 144, 157 (1970)
burden of proof in summary disposition motions; LBP-82-58, 16 NRC 519 (1982)
- Advisory Comm. Note to 1970 Amendments to Fed. R. Civ. Proc., 48 F.R.D. 459, 499 (1970)
adaptation of NRC discovery rules from Federal Rules; LBP-82-82, 16 NRC 1159 (1982)
- Aeschliman v. Nuclear Regulatory Commission, 547 F.2d 622 (D.C. Cir. 1976)
need to consider environmental impacts of nuclear fuel cycle; ALAB-691, 16 NRC 903 (1982)
- Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 216 (1974)
limitation on matters to be resolved in operating license proceedings; LBP-82-76, 16 NRC 1086 (1982)
- Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974)
analogy between summary disposition procedures and Rule 56 of Federal Rules of Civil Procedure; LBP-82-58, 16 NRC 519-20 (1982)
- Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203 (1974)
application of collateral estoppel; LBP-82-76, 16 NRC 1044, 1081 (1982)
- Alexander v. Hall, 64 F.R.D. 152, 155 (D.S.C. 1974)
definition of amicus curiae; ALAB-679, 16 NRC 125 (1982)
- Allied General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 5 NRC 420 (1976)
standing of petitioner in decontamination proceeding to litigate related waste disposal issues; LBP-82-52, 16 NRC 191 (1982)
- Allied General Nuclear Services, et al. (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976)
insufficiency of interest test alone to confer standing; LBP-82-74, 16 NRC 983 (1982)
- Alyeska Pipeline Serv. v. Wilderness Soc., 421 U.S. 240; 44 L.Ed.2d 141; 95 S.Ct. 1612 (1975)
basis for award of intervenors' attorney's fees; LBP-82-81, 16 NRC 1139 (1982)
- American Cyanamid Company v. McGhee, 317 F.2d 295 (5th Cir. 1963)
conditions that require payment of costs and attorney's fees; LBP-82-81, 16 NRC 1139 (1982)
- Associated General Contractors v. Otter Tail Power Company, 611 F.2d 684 (8th Cir. 1979)
ability of intervenor groups to represent their members adequately; CLI-82-15, 16 NRC 32 (1982)
- Austracan, (U.S.A.) Inc. v. M/V Lemoncore, 500 F.2d 237, 239-40 (5th Cir. 1974)
situations giving rise to appealable order; ALAB-690, 16 NRC 895 (1982)
- Black v. Sheraton Corp., 371 F.Supp. 97 (D.D.C. 1974)
burden to demonstrate entitlement to executive privilege; LBP-82-82, 16 NRC 1165 (1982)
- Boston Edison Company (Pilgrim Nuclear Power Station, Unit 1), ALAB-231, 8 AEC 633 (1974)
appellate review of Licensing Board rulings on economic issues, intervention requests, or procedural matters; ALAB-691, 16 NRC 908 (1982)
- extent of Appeal Board sua sponte review authority; ALAB-689, 16 NRC 890 (1982)
- Boston Edison Company, et al. (Pilgrim Nuclear Power Station, Unit 2), ALAB-656, 14 NRC 965 (1981)
remanding of case based on record that no longer represents case's actual situation; CLI-82-26, 16 NRC 881 (1982)
- vacation of unreviewed judgments because of mootness; CLI-82-18, 16 NRC 51 (1982)
- BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974)
intervention on enforcement actions; CLI-82-16, 16 NRC 45 (1982)

LEGAL CITATIONS INDEX

CASES

- BPI v. Atomic Energy Commission, 502 F.2d 424, 428-429 (D.C. Cir. 1973)
requirement for threshold showing of basis and specificity for admission of contention; LBP-82-75, 16 NRC 993 (1982)
- BPI v. Atomic Energy Commission, 502 F.2d 428 (D.C. Cir. 1974)
conditions to the right to a hearing; ALAB-687, 16 NRC 469 (1982)
- Burlington Industries v. Exxon Corp., 65 F.R.D. 26, 37 (D. Md. 1974)
communications encompassed by attorney-client privilege; LBP-82-82, 16 NRC 1158 (1982)
- Calvert Cliffs Coordinating Committee v. AEC, 449 F.2d 1109, 1119 (D.C. Cir. 1971)
Licensing Board responsibility to develop the record; LBP-82-87, 16 NRC 1199 (1982)
- Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 23-24, reversed in part on other grounds, CLI-80-12, 11 NRC 514 (1980)
standard for appeal by uninjured party; ALAB-694, 16 NRC 960 (1980)
- Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-74-22, 7 AEC 939 (1974)
Commission authority to allow construction activities prior to issuance of construction permit; CLI-82-23, 16 NRC 421 (1982)
- Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), LBP-78-2, 7 NRC 83 (1978)
jurisdiction of Licensing Board to reopen the record; LBP-82-54, 16 NRC 214 (1982)
- Cass v. United States, 417 U.S. 72 (1974)
determining intent of regulations; CLI-82-19, 16 NRC 62 (1982)
- Chamber of Commerce of the U.S.A. v. Occupational Safety and Health Administration, 636 F.2d 464 (D.C. Cir. 1979)
limits on agency prerogatives to interpret policy statements; LBP-82-69, 16 NRC 753 (1982)
- Chapman v. Pacific Tel. & Tel. Company, 613 F.2d 193 (9th Cir. 1979)
NRC Staff duty to obey Licensing Board orders; LBP-82-87, 16 NRC 1203 (1982)
- Chelsea Neighborhood Ass'n v. U.S. Postal Service, 516 F.2d 378, 388 (2d Cir. 1975)
consideration of psychological stress issues under NEPA; LBP-82-53, 16 NRC 203 (1982)
- Cherry v. Brown-Praizer-Whitney, 528 F.2d 965 (D.C. Cir. 1976)
persistence of applicant in seeking decision on the merits of its construction permit application as cause for dismissal with prejudice; LBP-82-81, 16 NRC 1136 (1982)
- Cincinnati Gas and Electric Company, et al. (William H. Zimmer Nuclear Power Station), LBP-80-14, 11 NRC 570, 571 (1980)
contention requirement for intervention; LBP-82-74, 16 NRC 985 (1982)
- Cincinnati Gas and Electric Company, et al. (William H. Zimmer Nuclear Power Station), LBP-80-14, 11 NRC 570, 574 (1980), appeal dismissed, ALAB-595, 11 NRC 860 (1980)
example of good cause for acceptance of late contention; LBP-82-63, 16 NRC 577 (1982)
- Cincinnati Gas and Electric Company, et al. (William H. Zimmer Nuclear Power Station), LBP-80-24, 12 NRC 231, 237 (1980)
importance of intervenor's ability to contribute to the record through late-filed contentions
standards for admitting late-filed TMI contentions; LBP-82-63, 16 NRC 578 (1982)
- Cincinnati Gas and Electric Company, et al. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-82-47, 15 NRC 1538, 1542 (1982)
use of interpretations of Federal Rules as guidance for interpreting similar NRC rules; LBP-82-82, 16 NRC 1157 (1982)
- Cincinnati Gas and Electric Company, et al. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-82-47, 15 NRC 1538, 1545-46 (1982)
objections to discovery requests; LBP-82-82, 16 NRC 1154 (1982)
- Cincinnati Gas and Electric Company, et al. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-82-48, 15 NRC 1602 (1982)
form and contents of emergency planning public information brochures; LBP-82-66, 16 NRC 732 (1982)
- Citizens to Save Spencer County v. EPA, 600 F.2d 844, 876 (D.C. Cir. 1979)
limits on agency prerogatives to interpret policy statements; LBP-82-69, 16 NRC 753 (1982)

LEGAL CITATIONS INDEX

CASES

- Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-298, 2 NRC 730, 736-737 (1975)
 delegation of Licensing Board authority to NRC Staff, LBP-82-68, 16 NRC 748 (1982)
- Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741 (1977)
 burdens met in Staff's and applicants' statements of material facts regarding ATWS contention, LBP-82-57, 16 NRC 482, 483 (1982)
- Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 752 (1977)
 Licensing Board responsibility to develop the record, LBP-82-87, 16 NRC 1199 (1982)
- Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977)
 analogy between summary disposition procedures and Rule 56 of Federal Rules of Civil Procedure, LBP-82-58, 16 NRC 519-20 (1982)
- Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113-14 (1982)
 interlocutory review to avoid unusual delay, ALAB-687, 16 NRC 464 (1982)
- Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 199-200 (1981)
 relitigation of issues at operating license stage by intervenors not parties to construction permit proceeding, LBP-81-24, 16 NRC 1087 (1982)
- Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-11, 15 NRC 348, 351-52 (1982)
 good cause for late filing, LBP-82-53, 16 NRC 200 (1982)
- Commissioner v. Sunnen, 333 U.S. 591, 599-600 (1948)
 exception to the rule of res judicata, CLI-82-23, 16 NRC 420 (1982)
- Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-659, 14 NRC 983, 985, n.2 (1981)
 exception to termination of Licensing Board jurisdiction under 2.718(j), LBP-82-86, 16 NRC 1191 (1982)
- Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400 (1982)
 determining sanctions to be imposed on NRC Staff, LBP-82-59, 16 NRC 538 (1982)
 imposition of sanctions for party's failure to comply with prehearing conference order, LBP-82-75, 16 NRC 989-90 (1982)
- Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1421, n.39 (1982)
 application of NEPA "rule of reason" to applicant's responses to interrogatories, LBP-82-67, 16 NRC 736 (1982)
- Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 460 (1974)
 adaptation of NRC discovery rules from Federal Rules, LBP-82-82, 16 NRC 1159 (1982)
- Conservation Society of Southern Vermont v. Secretary of Transportation, 531 F.2d 637 (2d Cir. 1976)
 conditions allowing segmentation of major federal actions, CLI-82-23, 16 NRC 424 (1982)
- Consolidated Edison Company of New York, Inc. (Indian Point, Units 1, 2 and 3), ALAB-304, 3 NRC 1 (1976)
 allegations of future harm from decontamination of other reactors not a basis for standing, LBP-82-52, 16 NRC 185 (1982)
- Consolidated Edison Company of New York, Inc. (Indian Point, Units 1, 2 and 3), ALAB-304, 3 NRC 1, 6 (1976)
 role of NRC Staff, LBP-82-87, 16 NRC 1200 (1982)
- Consolidated Edison Company of New York, Inc. (Indian Point, Units 1, 2 and 3), ALAB-319, 3 NRC 188, 190 (1976)
 limitation on matters to be resolved in operating license proceedings, LBP-82-76, 16 NRC 1086 (1982)
- Consumers Power Company (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312 (1981)
 need for discussion of alternatives to spent fuel pool expansion at Big Rock Point, LBP-82-78, 16 NRC 1109, 1111 (1982)
 need to consider continued plant operation resulting from grant of license amendment, LBP-82-52, 16 NRC 194 (1982)

LEGAL CITATIONS INDEX

CASES

- Consumers Power Company (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, note 2 (1981)
when amicus participation is allowed; ALAB-679, 16 NRC 126 (1982)
- Consumers Power Company (Big Rock Point Nuclear Plant), LBP-82-60, 16 NRC 540, 545-46 (1982)
form and contents of emergency planning public information brochures; LBP-82-66, 16 NRC 732 (1982)
- Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645 (1974)
exception to termination of Licensing Board jurisdiction under 2.718(j); LBP-82-96, 16 NRC 1191 (1982)
- Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645, 6-6 (1974)
time for filing objections to nonfinal decisions; LBP-82-72, 16 NRC 971 (1982)
- Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-270, 1 NRC 473, 476 (1975)
failure of intervenor to support its assertions on appeal; ALAB-693, 16 NRC 955 (1982)
- Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-282, 2 NRC 9, 10 n.1 (1975)
necessity for filing exceptions; ALAB-694, 16 NRC 959-60 (1982)
- Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-315, 3 NRC 101 (1976)
exception to rule placing burden of proof on proponent of show cause order; LBP-82-64, 16 NRC 655 (1982)
- Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603 (1977)
propriety of calling independent experts as Board witnesses; LBP-82-55, 16 NRC 277 (1982)
- Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603, 606 (1977)
circumstances in which directed certification is warranted; LBP-82-62, 16 NRC 567 (1982)
- Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603, 608 (1977)
discretion of Licensing Board to use independent experts as witnesses; LBP-82-55, 16 NRC 270 (1982)
- Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 161-63 (1978)
consideration of financial costs in NEPA cost-benefit balance; LBP-82-58, 16 NRC 526 (1982)
- Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96, 99 (1981)
appeal board authority to decline Licensing Board referrals; ALAB-687, 16 NRC 464 (1982)
- Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-673, 15 NRC 1101 (1982)
jurisdiction of Operating License Board to consider sufficiency of quality assurance at Seabrook; LBP-82-76, 16 NRC 1069 (1982)
- Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-674, 15 NRC 1101, 1102-03 (1982)
limitation on matters to be resolved in operating license proceeding; LBP-82-76, 16 NRC 1086 (1982)
- Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897 (1982)
censure of counsel for blanket assertions of privilege; LBP-82-82, 16 NRC 1154 (1982)
- Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 906-07 (1982)
standard for consideration of issues raised for first time on appeal; ALAB-693, 16 NRC 956 (1982)
- Consumers Power Company (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275 (1978)
practices and membership policies of intervenor groups; CLI-82-15, 16 NRC 32-33 (1982)
- Consumers Power Company (Midland Plant, Units No. 1 and 2), ALAB-33, 4 AEC 701 (1971)
disclosure of material protected by executive privilege; LBP-82-82, 16 NRC 1163 (1982)
- Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1 (Smith, J.), 12 NRC 117, 127-128 (1980)
waiver of claims of executive privilege by participation as a litigant; LBP-82-82, 16 NRC 1164 (1982)
- Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 121-26 (1980)
application of Exemption 5 of Freedom of Information Act to intragovernmental Communications; LBP-82-12, 16 NRC 1163 (1982)
- Consumers Power Company (Palisades Nuclear Power Facility), LBP-79-20, 10 NRC 108, 113 (1979)
satisfaction of interest test for standing; LBP-82-74, 16 NRC 983 (1982)
- Crest Auto Supplies, Inc. v. Ero Manufacturing Company, 360 F.2d 896, 899 (7th Cir. 1966)
favorability in viewing summary disposition motion; LBP-82-58, 16 NRC 519 (1982)
- Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-80-2, 11 NRC 44 (1980)
need for study of alternatives to spent fuel pool expansion; LBP-82-78, 16 NRC 1108 (1982)
- Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-80-2, 11 NRC 44, 47 (1980), affirmed (in pertinent part), ALAB-617, 12 NRC 430 (1980)
transferral of operating authority; LBP-82-58, 16 NRC 515 (1982)
- Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-80-2, 11 NRC 44, 73-77 (1980)
interpretation of the term "available resources"; LBP-82-78, 16 NRC 1112 (1982)

LEGAL CITATIONS INDEX

CASES

- Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-470, 7 NRC 473, 475 (1978)
 part-ownership of facility as standing to intervene; LBP-82-76, 16 NRC 1032 (1982)
- Duke Power Company (Amendment to Materials License SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 (1979)
 weight given to untimeliness of intervention petition, when lateness is not extreme; LBP-82-74, 16 NRC 985 (1982)
- Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAE-355, 4 NRC 397, 413 (1976)
 disposition of unsupported briefs; ALAB-693, 16 NRC 956 (1982)
- Duke Power Company (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642, 644-45 (1977)
 consequences of intervenor's failure to file proposed findings of fact; ALAB-691, 16 NRC 907 (1982)
 lack of justification for untimely intervention; LBP-82-63, 16 NRC 586 (1982)
- Duke Power Company (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-478, 7 NRC 772, 773 (1978)
 necessity for filing exceptions; ALAB-694, 16 NRC 959 (1982)
- Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-597, 11 NRC 870 (1980)
 subject matter jurisdiction of Licensing Board; LBP-82-86, 16 NRC 1191 (1982)
- Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-597, 11 NRC 870, 874 n.8 (1980)
 time for filing objections to nonfinal decisions; LBP-82-72, 16 NRC 971 (1982)
- Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980)
 showing required of pro se intervenor for admission of late-filed contention; LBP-82-63, 16 NRC 578 (1982)
- Duke Power Company (Perkins Nuclear Station, Units 1, 2, and 3), LBP-78-25, 8 NRC 87, 100 (1978)
 Appeal Board concurrence with conclusion of; ALAB-650, 14 NRC 909 (1982)
- Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625 (1973)
 application of relevance and materiality standards; LBP-82-73, 16 NRC 978 (1982)
- Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453 (1982)
 scope of hydrogen control issue considered; LBP-82-76, 16 NRC 1065 (1982)
- Duke Power Company v. Carolina Environmental Study Group, 438 U.S. 59, 74 (1978)
 proximity to radioactive source as basis for standing to intervene; ALAB-682, 16 NRC 154 (1982)
- Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460 (1982)
 admissibility of contentions based on unavailable documents; LBP-82-75, 16 NRC 1008, 1009, 1017 (1982);
 LBP-82-76, 16 NRC 1044, 1055, 1068, 1075, 1079, 1080, 1094 (1982)
- Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460 (1982)
 denial of contentions addressing offsite emergency planning issues; LBP-82-76, 16 NRC 1030 (1982)
- Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 465 (1982)
 appeal board reluctance to certify questions involving scheduling; ALAB-688, 16 NRC 475 (1982)
- Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467 (1982)
 contravention of hearing rights; LBP-82-87, 16 NRC 1200 (1982)
- Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), LBP-82-16, 15 NRC 566, 571-72 and n.6
 (1982); LBP-82-50, 15 NRC 1746 (1982)
 circumstances inappropriate for applying five-factor test to late-filed contentions; LBP-82-63, 16 NRC 577 (1982)
- Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173-175 (1974)
 loss of right to hearing through lack of notice; ALAB-682, 16 NRC 158 (1982)
- Energy Reserves Group, Inc. v. Department of Energy, 89 F.2d 1082, 1096 (T.E.C.A. 1978)
 limits on agency prerogatives to interpret policy statements; LBP-82-69, 16 NRC 753 (1982)
- EPA v. Mink, 410 U.S. 73, 86-87 and n.34 (1973)
 application of Exemption 5 of Freedom of Information Act to intragovernmental communications; LBP-82-82, 16
 NRC 1163 (1982)
- Federal Open Market Committee of the Federal Reserve System v. Merrill, 443 U.S. 340, 360 (1979)
 length of time documents shielded by executive privilege remain privileged; LBP-82-82, 16 NRC 1164 (1982)
- Fisher v. United States, 425 U.S. 391, 403-05 (1976)
 purpose of attorney-client privilege; LBP-82-82, 16 NRC 1157 (1982)
- Florida Power & Light Company (Turkey Point, Units 3 and 4), 4 AEC 9, 12-13 (1967)
 standards for safeguarding special nuclear materials; CLI-82-19, 16 NRC 76 (1982)
- Florida Power and Light Company (Turkey Point, Units 3 and 4), 4 AEC 9, 11-12, affirmed sub nom. Siegel v.
 AEC, 400 F.2d 778, 781-84 (D.C. Cir. 1968)
 providing design features for particularized threats of sabotage; CLI-82-19, 16 NRC 73 (1982)

LEGAL CITATIONS INDEX

CASES

- Frito-Lay of Puerto Rico, Inc. v. Canas, 92 F.R.D. 384 (D.P.R. 1981)
 specificity required of motion for reconsideration; LBP-82-68, 16 NRC 749 (1982)
- FTC v. Texaco, 555 F.2d 867, 881 (D.C. Cir. 1977), cert. denied, 431 U.S. 974 (1977) rehearing denied, 434 U.S. 883 (1977) at 893-94
 application of res judicata when agency decision involves substantial policy issues; CLI-82-23, 16 NRC 420 (1982)
- Gage v. United States Atomic Energy Commission, 479 F.2d 1214, 1220 n.19 (D.C. Cir. 1972)
 need for hearing on construction activities initiated prior to construction permit issuance; CLI-82-23, 16 NRC 421 (1982)
- Gordon v. United States, 438 F.2d 858, 875 (5th Cir.), cert. denied 404 U.S. 828 (1971)
 scope of informer's privilege; LBP-82-87, 16 NRC 1198 (1982)
- Greene County Planning Board v. FPC, 455 F.2d 412, 419 (2nd Cir. 1972)
 Licensing Board responsibility to develop the record; LBP-82-87, 16 NRC 1199 (1982)
- Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 228 (1974)
 advantage of use of summary disposition rule; LBP-82-58, 16 NRC 519 (1982)
- Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-358, 4 NRC 558 (1976)
 effect of change in intervening organization's representation of membership; LBP-82-54, 16 NRC 215 (1982)
- Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977)
 Board responsibility to consider unresolved generic safety issues in spent fuel pool modification proceeding; LBP-82-65, 16 NRC 723 (1982)
- obligations of interested state admitted as full party; LBP-82-76, 16 NRC 1079 (1982)
 place for review of unresolved safety issues; LBP-82-76, 16 NRC 1043 (1982)
- Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 771-73 (1977)
 failure of station blackout contention to satisfy nexus requirement; LBP-82-63, 16 NRC 591 (1982)
- Harrison v. Northern Trust Company, 317 U.S. 476, 479 (1943)
 determining intent of regulations; CLI-82-19, 16 NRC 62 (1982)
- Health Research Group v. Kennedy, 82 F.R.D. 21 (D.D.C. 1979)
 intervention by a group having sponsors rather than members; CLI-82-15, 16 NRC 31, 32 (1982)
- Hickman v. Taylor, 329 U.S. 495 (1947)
 material encompassed by lawyer work product; ALAB-691, 16 NRC 917 (1982)
- Hickman v. Taylor, 329 U.S. 495, 508 (1947)
 adaptation of NRC discovery rules from Federal Rules; LBP-82-82, 16 NRC 1159 (1982)
- Holiday Queen Land Corp. v. Baker, 489 F.2d 1031, 1032 (5th Cir. 1974)
 basis for departing from rule of dismissal of applications without prejudice; LBP-82-81, 16 NRC 1135 (1982)
- Houston Lighting and Power Company (Allens Creek Nuclear Generating Station), ALAB-635, 13 NRC 309, 310 (1981)
 standards for granting discretionary interlocutory review; LBP-82-62, 16 NRC 568 (1982)
- Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 (1979)
 failure of organization to comply with requirements for standing; LBP-82-52, 16 NRC 185 (1982)
 representational requirement for organization seeking standing to intervene; LBP-82-54, 16 NRC 216 (1982)
- Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-547, 9 NRC 638 (1979)
 appeal board policy concerning enforcement time limits on appeals from Licensing Board proceedings; ALAB-684, 16 NRC 165 (1982)
- Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521 (1979)
 response by intervenor to applicants' arguments opposing motion to reopen record; LBP-82-54, 16 NRC 213 (1982)
 responses of intervenors to applicant, Staff, and Board questions; LBP-82-63, 16 NRC 576 (1982)
- Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546 (1980)
 consideration of totally deficient brief prepared by layman; ALAB-693, 16 NRC 957 (1982)
- Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546 (1980)
 showing required of pro se intervenor for admission of late-filed contention; LBP-82-63, 16 NRC 578 (1982)

LEGAL CITATIONS INDEX

CASES

- Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 547-49 (1980)
 resolution of factual questions in considering admissibility of contentions; LBP-82-63, 16 NRC 581, 583, 587, 588 (1982)
- Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550-51 (1980)
 encouragement of use of summary disposition procedures; LBP-82-58, 16 NRC 519 (1982)
- Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508 (1982)
 standards for evaluating new contentions; LBP-82-63, 16 NRC 576 (1982)
- Houston Lighting and Power Company (South Texas Project, Units 1 and 2), LBP-81-54, 14 NRC 918, 922-23 & n.4 (1981)
 circumstances allowing invocation of Appeal Board's sua sponte authority; ALAB-685, 16 NRC 452 (1982)
- Houston Lighting and Power Company, et al. (South Texas Project, Units 1 and 2), ALAB-608, 12 NRC 168, 170 (1980)
 standards for granting discretionary interlocutory review; LBP-82-62, 16 NRC 568 (1982)
- Houston Lighting and Power Company, et al. (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367, 370 (1981)
 standards for granting discretionary interlocutory review; LBP-82-62, 16 NRC 568 (1982)
- Houston Lighting and Power Company, et al. (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367, 370-71 (1981)
 appeal board reluctance to certify questions involving scheduling; ALAB-688, 16 NRC 475 (1982)
- Houston Lighting and Power Company, et al. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 471, 473-74, 475 n.20, 476, 477, 478 n.26 (1981)
 yielding of informer's privilege; LBP-82-59, 16 NRC 537-38 (1982)
- Houston Lighting and Power Company, et al. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 483 n.6 (1981)
 extent of informer's privilege; LBP-82-87, 16 NRC 1202 (1982)
- Houston Lighting and Power Company, et al. (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281 (1980)
 denial of operating license because of management incompetence; LBP-82-54, 16 NRC 221, 223 (1982)
- Houston Lighting and Power Company, et al. (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563 (1979), affirmed summarily, ALAB-575, 11 NRC 14 (1980)
 application of collateral estoppel to relitigation of tourism impact contention; LBP-82-76, 16 NRC 1081 (1982)
- Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977)
 ability of intervenor groups to represent their members adequately; CLI-82-15, 16 NRC 32 (1982)
- Illinois Power Company (Clinton Power Station, Units 1 and 2), ALAB-340, 4 NRC 27, 48 (1976)
 consideration of financial costs in NEPA cost-benefit balance; LBP-82-58, 16 NRC 526 (1982)
- Illinois Power Company, et al. (Clinton Power Station, Units 1 and 2), LBP-81-56, 14 NRC 1035 (1981)
 severance of consolidated proceedings; DPRM-82-2, 16 NRC 1215 (1982)
- In re Fischel, 557 F.2d 209 (9th Cir. 1977)
 burden of proof for claim of executive privilege; LBP-82-82, 16 NRC 1153 (1982)
- In re Fischel, 557 F.2d 209, 211, 212 (9th Cir. 1977)
 communications encompassed by attorney-client privilege; LBP-82-82, 16 NRC 1158 (1982)
- In re Grand Jury Subpoena Dated November 8, 1979, 622 F.2d 933, 934 n.1 (6th Cir. 1980)
 extent of attorney work product privilege; ALAB-650, 14 NRC 917 (1982)
- In re Murphy, 560 F.2d 326, 334, 336 n.20 (8th Cir. 1977)
 clarification of attorney work product doctrine; LBP-82-82, 16 NRC 1160, 1161 (1982)
- In re Sealed Case, 676 F.2d 793, at 806-807
 specificity required of claims of executive privilege; LBP-82-82, 16 NRC 1153 (1982)
- In re Walsh, 623 F.2d 489, 494 (7th Cir.), cert. denied sub nom. Walsh v. United States, 449 U.S. 994 (1980)
 communications encompassed by attorney-client privilege; LBP-82-82, 16 NRC 1159 (1982)

LEGAL CITATIONS INDEX

CASES

- Indiana and Michigan Electric Company (Donald C. Cook Nuclear Plant, Units 1 and 2), CLI-72-75, 5 AEC 13, 14 (1972)
 example of good cause for acceptance of late contention; LBP-82-63, 16 NRC 577 (1982)
 International Harvester Company v. Occupational Safety and Health Review Commission, 628 F.2d 982, 986 (7th Cir. 1980)
 application of res judicata by an administrative agency; CLI-82-23, 16 NRC 420 (1982)
 Iowa Electric Light & Power Company (Duane Arnold Energy Center), ALAB-108, 6 AEC 195 (1973)
 appeal board policy concerning enforcement time limits on appeals from Licensing Board proceedings; ALAB-684, 16 NRC 165 (1982)
 Jack Winter, Inc. v. Koratron Company, Inc., 54 F.R.D. 44, 46 (N.D. Cal. 1971)
 communications encompassed by attorney-client privilege; LBP-82-82, 16 NRC 1158 (1982)
 Jersey Central Power and Light Company (Oyster Creek Nuclear Generating Station), ALAB-612, 12 NRC 314 (1980)
 extent of Appeal Board sua sponte review authority; ALAB-689, 16 NRC 890 (1982)
 Jicarilla Apache Tribe of Indians v. Morton, 47 F.2d 1275, 1280 (9th Cir. 1973)
 scope of information concerning environmental impact of a project to be obtained before project initiation; LBP-82-62, 16 NRC 569 (1982)
 Jones v. SEC, 298 U.S. 1, 19 (1935)
 basis for departing from rule of dismissal of applications without prejudice; LBP-82-81, 16 NRC 1135 (1982)
 Jones v. State Board of Education, 397 U.S. 31 (1970)
 dismissal of grant of review when parties have already briefed the issues; CLI-82-26, 16 NRC 881 (1982)
 Joseph v. U.S. Civil Service Commission, 554 F.2d 1140, 1153 n.24 (D.C. Cir. 1977)
 limits on agency prerogatives to interpret policy statements; LBP-82-69, 16 NRC 753 (1982)
 Kansas Gas and Electric Company and Kansas City Power and Light Company (Wolf Creek Generating Station, Unit 1), ALAB-327, 3 NRC 408, 416-417 (1976)
 standards for showing good cause for a protective order; LBP-82-82, 16 NRC 1153 (1982)
 Kansas Gas and Electric Company and Kansas City Power and Light Company (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978)
 admissibility of contention; LBP-82-53, 16 NRC 199 (1982)
 burden of proponent of motion to reopen record; LBP-82-84, 16 NRC 1185 (1982)
 Kent Corp. v. NLRB, 530 F.2d 612 (5th Cir.), cert. denied, 429 U.S. 920 (1976)
 material encompassed by attorney work product doctrine; LBP-82-82, 16 NRC 1161, 1162 (1982)
 Kerr-McGee Corp. (West Chicago Rare Earth Facility), CLI-82-2, 15 NRC 232, 244-46 (1982), petition for review pending sub nom. City of West Chicago v. Nuclear Regulatory Commission, No. 82-1575 (7th Cir., filed April 8, 1982)
 requirements for giving notice of materials license actions; ALAB-682, 16 NRC 157 (1982)
 Kerr-McGee Corp. (West Chicago Rare Earth Facility), CLI-82-2, 15 NRC 232, 247-62 (1982), petition for review pending sub nom. City of West Chicago v. Nuclear Regulatory Commission, No. 82-1575 (7th Cir., filed April 8, 1982)
 type of hearing required for materials licensing action; ALAB-682, 16 NRC 155, 157-59 (1982)
 Kleppe v. Sierra Club, 427 U.S. 390 (1976)
 conditions allowing segmentation of major federal actions; CLI-82-23, 16 NRC 424 (1982)
 Kleppe v. Sierra Club, 427 U.S. 390, 403 et seq. (June 28, 1976)
 NEPA consideration of use of spent fuel for nuclear weapons; LBP-82-53, 16 NRC 199 (1982)
 Lacey v. Lumber Mutual Fire Insurance Company, 554 F.2d 1204 (1st Cir. 1977)
 specificity required of motion for reconsideration; LBP-82-68, 16 NRC 749 (1982)
 LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 603-05 (5th Cir. 1976)
 Licensing Board discretion to prescribe terms for withdrawal of construction permit application; LBP-82-81, 16 NRC 1134, 1139 (1982)
 Lewis v. United States, 445 U.S. 55, 60 (1980)
 interpretation of immediate effectiveness regulation; ALAB-686, 16 NRC 456 (1982)
 Long Island Lighting Company (Shoreham Nuclear Power Station), ALAB-39, 4 AEC 727 (1971)
 Board discretion to conduct hearings outside 10-mile EPZ; CLI-82-15, 16 NRC 37 (1982)
 Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481, 483 (1977)
 representation, by an organization, of individuals other than its own members; LBP-82-74, 16 NRC 984 (1982)

LEGAL CITATIONS INDEX

CASES

- Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NRC 601 (1982)
 lack of basis for litigation of system's interaction contention; LBP-82-76, 16 NRC 1034 (1982)
- Louisiana Power and Light Company (Waterford Steam Generating Station, Unit No. 3), ALAB-258, 1 NRC 45, 48 n.6 (1975)
 appellate review of Licensing Board rulings on economic issues, intervention requests, or procedural matters; ALAB-691, 16 NRC 908 (1982)
 extent of Appeal Board sua sponte review authority; ALAB-689, 16 NRC 890 (1982)
- Lunn v. United Aircraft Corp., 26 F.R.D. 12, 18 (D.C. Del. 1960)
 liability of plaintiff for defendant's attorney's fees; LBP-82-81, 16 NRC 1142 (1982)
- Maine Yankee Atomic Power Company (Maine Yankee Atomic Power Station, ALAB-161, 6 AEC 1003 (1973)
 lack of regulatory requirement for probabilistic risk assessment; LBP-82-76, 16 NRC 1033, 1050 (1982)
- Manhattan General Equipment Company v. Commissioner of Internal Revenue, 297 U.S. 129, 134-35 (1936)
 preclusion of hearing on germane issues through unlawful procedural requirements; ALAB-687, 16 NRC 469 (1982)
- Martin v. Easton Publishing Company, 85 F.R.D. 312, 315 (E.D. Pa. 1980)
 application of NEPA "rule of reason" to applicant's responses to interrogatories; LBP-82-67, 16 NRC 736 (1982)
- Maryland-National Capital Park and Planning Commission v. Postal Service, 487 F.2d 1029, 1036-37 (D.C. Cir. 1973)
 evaluation of environmental impact of site preparation activities in context of zoning; CLI-82-23, 16 NRC 427 (1982)
- Maxwell v. N.L.R.B., 414 F.2d 477, 479 (6th Cir. 1969)
 application of res judicata when agency decision involves substantial policy issues; CLI-82-23, 16 NRC 420 (1982)
- Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-80-16, 11 NRC 674 (1980)
 interpretation of policy statement regarding hydrogen issue in; LBP-82-76, 16 NRC 1064 (1982)
 need for credible hydrogen generation scenario for admission of contention; LBP-82-76, 16 NRC 1040, 1050, 1062 (1982)
- Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-80-16, 11 NRC 674, 675 (1980)
 proper response to generic challenges to regulations; CLI-82-19, 16 NRC 74 (1982)
- Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-82-12, 16 NRC 1 (1982)
 appellate consideration of uncontested safety issues in cases other than operating license applications; ALAB-685, 16 NRC 452 (1982)
- Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), LBP-81-59, 14 NRC 1211, 1419 (1981)
 delegation of Licensing Board authority to NRC Staff; LBP-82-68, 16 NRC 748 (1982)
- Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), LBP-81-59, 14 NRC 1211, 1465 (1981)
 practical effect of rebuttable presumption with regard to contested FEMA findings; LBP-82-68, 16 NRC 746 (1982)
- Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 2), ALAB-486, 8 NRC 9, 46 (1975)
 standard applied in deciding whether to allow plant operation during appellate review; ALAB-680, 16 NRC 130 (1982)
- Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 2), CLI-80-13, 11 NRC 519, 531-32 (1980)
 potential of excluded radiation dose contention as sua sponte issue; LBP-82-79, 16 NRC 1119 (1982)
- Michigan Consolidated Gas Company v. FPC, 283 F.2d 204, 226 (D.C. Cir. 1960)
 Licensing Board responsibility to develop the record; LBP-82-87, 16 NRC 1199 (1982)
- Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979)
 objection to rejection of waste confidence contention; LBP-82-51, 16 NRC 172 (1982)
- Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2) ALAB-130, 6 AEC 423, 426 (1973)
 rejection of transmission lines contention; LBP-82-76, 16 NRC 1085 (1982)
- Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424-25 (1973)
 encouragement of use of summary disposition procedures; LBP-82-58, 16 NRC 519 (1982)
- Moog Industries v. FTC, 355 U.S. 411 (1958)
 scope of proceedings on enforcement actions; CLI-82-16, 16 NRC 46 (1982)

LEGAL CITATIONS INDEX

CASES

- Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306, 314 (1950)
loss of right to hearing through lack of notice; ALAB-682, 16 NRC 158 (1982)
- Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972)
Commission review of Appeal Board decision on operating license amendment improvidently granted; CLI-82-26, 16 NRC 881 (1982)
- Natural Resources Defense Council v. Nuclear Regulatory Commission, 685 F.2d 459 (D.C. Cir. 1982)
admissibility of waste disposal contention; LBP-82-53, 16 NRC 205 (1982)
consideration of late-filed contention on environmental effects of nuclear fuel cycle
failure of intervenor's contention to present "novel question of policy or law"; LBP-82-62, 16 NRC 569 (1982)
- Natural Resources Defense Council v. Nuclear Regulatory Commission, 685 F.2d 459, 467 (D.C. Cir. 1982)
invalidation of Table S-3 Rule; LBP-82-76, 16 NRC 1076 (1982)
- Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission, 685 F.2d 459 (D.C. Cir. 1982)
use of decision as basis for late-filed radiation dose contention; LBP-82-79, 16 NRC 1117 (1982)
- New England Patriots Football Club, Inc. v. University of Colorado, 592 F.2d 1196 (1st Cir. 1979)
distinction between amicus curiae and traditional party; ALAB-679, 16 NRC 126 (1982)
- New England Power Company, et al. (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 279 (1978)
review and amendment of Staff EIS; LBP-82-78, 16 NRC 1111 (1982)
- New York State Energy Research and Development Agency v. Nuclear Fuel Services, Inc., CIV-81-18E
(W.D.N.Y. Oct. 16, 1981), rev'd, No. 81-7736 (2d Cir., Dec. 8, 1981)
responsibility for waste disposal facility; ALAB-679, 16 NRC 124 (1982)
- Niagara Mohawk Power Corporation (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 352-69 (1975)
rule applicable to cases involving changes in need for power forecasts; LBP-82-81, 16 NRC 1138 (1982)
- Niagara Mohawk Power Corporation (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 373 n.91 (1975)
extent of Appeal Board sua sponte review authority; ALAB-689, 16 NRC 890 (1982)
- NLRB v. Sears, 421 U.S. 132, 149, n.16 (1975)
equities to be considered in civil discovery cases which are not considered in FOIA cases; LBP-82-82, 16 NRC 1163 (1982)
- North Alabama Express, Inc. v. United States, 585 F.2d 783, 789 (5th Cir. 1978)
loss of right to hearing through lack of notice; ALAB-682, 16 NRC 158 (1982)
- Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 838 (1974)
code for judging lawyer conduct in NRC proceedings; ALAB-691, 16 NRC 916 (1982)
- Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), CLI-79-11, 10 NRC 733, 737 (1979), remanded on other grounds, State of Illinois v. NRC, 661 F.2d 253 (D.C. Cir. 1981)
amendment of construction permits; DD-82-1207
- Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, 4 AEC 390, 399 (1970)
referral to Appeal Board of ruling compelling disclosure of informants' identities; LBP-82-87, 16 NRC 1202 (1982)
- Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 304, 309 (1980)
Appeal Board authority to retain jurisdiction over radon issue; ALAB-691, 16 NRC 909 (1982)
- Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 304, 309-13 (1980)
extent of Appeal Board sua sponte review authority; ALAB-689, 16 NRC 890-91 (1982)
- Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188 (1973), affirmed CLI-73-12, 6 AEC 241 (1973), affirmed sub nom. BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974)
timing of discovery on contentions; ALAB-687, 16 NRC 467 (1982)
- Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 862 (1974)
consideration of financial costs in NEPA cost-benefit balance; LBP-82-58, 16 NRC 526 (1982)
- Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 864, reconsideration denied, ALAB-252, 8 AEC 1175 (1974), aff'd, CLI-75-1, 1 NRC 1 (1975)
consequences of intervenor's failure to file proposed findings of fact; ALAB-691, 16 NRC 906 (1982)

LEGAL CITATIONS INDEX

CASES

- Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-252, 8 AEC 1175, 1177, affirmed, CLI-75-1, 1 NRC 1 (1975)
 necessity for filing exceptions; ALAB-694, 16 NRC 960 (1982)
- Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-288, 2 NRC 390, 393 (1975)
 effect of change in intervenor's residence; LBP-82-54, 16 NRC 216 (1982)
- Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 44 (1978), remanded on other grounds sub nom. *Minnesota v. Nuclear Regulatory Commission*, 602 F.2d 412 (D.C. Cir. 1979)
 findings on NEPA compliance to be made by Director prior to issuance of operating license; ALAB-693, 16 NRC 956 (1982)
- Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 48 (1978)
 showing required to warrant consideration of alleged adverse environmental effects of plant operation; LBP-82-58, 16 NRC 526 (1982)
- Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-73-12, 6 AEC 241, 242 (1973), aff'd sub nom. *BPI v. AEC*, 502 F.2d 424 (D.C. Cir. 1974)
 encouragement of use of summary disposition procedures; LBP-82-58, 16 NRC 519 (1982)
- Northern States Power Company, et al. (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 374, n.4 (1978)
 Licensing Board jurisdiction to consider motion to reopen record received after Licensing Board's final decision; LBP-82-86, 16 NRC 1191 (1982)
- Nothdurft v. Ross*, 104 Misc.2d 898 (N.Y. Sup. Ct. 1980), aff'd 445 N.Y.S.2d 222 (N.Y. App. Div. 1981)
 lack of jurisdiction to address motives of legislator in enacting statute; LBP-82-72, 16 NRC 970 (1981)
- Nuclear Engineering Company, Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 159-60 (1980)
 acceptance of untimely appeals; ALAB-684, 16 NRC 165 (1982)
- Nuclear Engineering Company, Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 155, 160 (1980)
 test of "finality" for appeal purposes; ALAB-690, 16 NRC 894 (1972)
- Nuclear Fuel Services, Inc. and New York State Atomic and Space Development Authority (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975)
 factors evaluated in accepting untimely contentions; ALAB-687, 16 NRC 470 (1982)
- Nuclear Fuel Services, Inc. and New York State Atomic and Space Development Authority (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975)
 acceptance of late contention where "good cause" factor has not been demonstrated; LBP-82-63, 16 NRC 577 (1982)
- O'Brien v. Board of Education of City School District of City of New York*, 86 F.R.D. 548, 549 (S.D.N.Y. 1980)
 relevance of document's author to document's status as privileged; LBP-82-82, 16 NRC 1158 (1982)
- Offshore Power Systems (Floating Nuclear Power Plants), ALAB-517, 9 NRC 8, 1 (1979)
 standards for granting discretionary interlocutory review; LBP-82-62, 16 NRC 568 (1982)
- Offshore Power Systems (Manufacturing License for Floating Nuclear Plants), ALAB-689, 16 NRC 887, 890-91 (1982)
 finality of initial decision; ALAB-693, 16 NRC 954 (1982)
 sua sponte review of Licensing Board decisions; ALAB-694, 16 NRC 960 (1980)
- Ohio-Sealy Mattress Manufacturing Company v. Kaplan*, 90 F.R.D. 21, 28 (N.D. Ill. 1980)
 communications encompassed by attorney-client privilege; LBP-82-82, 16 NRC 1157, 1159 (1982)
- Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1401-02 (1977)
 test to be applied to request for release of protected information; LBP-82-80, 16 NRC 1124 (1982)
- Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1405 (1977)
 burden for demonstrating credentials of a witness; LBP-82-51, 16 NRC 176 (1982)
- Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410 (1978)
 circumstances in which directed certification is warranted; LBP-82-62, 16 NRC 567 (1982)

LEGAL CITATIONS INDEX

CASES

- Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-580, 11 NRC 227 (1980)
 assurance of proper implementation of emergency plan; LBP-82-66, 16 NRC 732 (1982)
- Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-592, 11 NRC 746 (1980)
 guidelines for release of security plans to intervenors; LBP-82-80, 16 NRC 1124 (1982)
 guidelines for release of security plans to intervenors; LBP-82-80, 16 NRC 1124 (1982)
- Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876 (1980)
 assumption of jurisdiction over seismic issues by Appeal Board; LBP-82-86, 16 NRC 1192 (1982)
- Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903 (1981)
 basis for determining horizontal ground acceleration at GE test reactor site; LBP-82-64, 16 NRC 680 (1982)
 propriety of calling independent experts as Board witnesses; LBP-82-55, 16 NRC 277 (1982)
- Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-1, 15 NRC 225 (1982)
 type of withheld information constituting material false statement; ALAB-691, 16 NRC 913 (1982)
- Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-19, 16 NRC 53 (1982)
 publication of restricted document; LBP-82-80, 16 NRC 1123 (1982)
- Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-27, 14 NRC 325, 331 (1981)
 lack of specificity of systems interaction contention; LBP-82-76, 16 NRC 1034 (1982)
- Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-563, 10 NRC 449, 450 n.1 (1979)
 standard for appellate briefs of pro se intervenors; ALAB-693, 16 NRC 956 (1982)
- Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-593, 11 NRC 761, 762 (1980)
 standards for granting discretionary interlocutory review; LBP-82-62, 16 NRC 568 (1982)
- Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 340 (1980)
 failure of contention's proponent to respond to summary disposition motion; LBP-82-58, 16 NRC 520 (1982)
- Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 551 (1981)
 standards for granting discretionary interlocutory review; LBP-82-62, 16 NRC 568 (1982)
- Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 297-98 (1979)
 standing of petitioners in license application proceeding to litigate issues related to distant uranium mines; LBP-82-52, 16 NRC 192 (1982)
- Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-81-8, 13 NRC 335, 337 (1981), directed certification denied, ALAB-641, 13 NRC 550 (1981)
 favorability in viewing summary disposition motion; LBP-82-58, 16 NRC 519 (1982)
- People Against Nuclear Energy v. Nuclear Regulatory Commission, 678 F.2d 222 (D.C. Cir. 1982)
 consideration of effects of psychological stress on emergency communications/notification personnel; LBP-82-75, 16 NRC 1013 (1982)
 interpretation of; LBP-82-69, 16 NRC 752 (1982)
 litigation of psychological stress contentions; LBP-82-53, 16 NRC 202 (1982)
 preparation of supplemental EIS on psychological health effects of operation of TMI; CLI-82-13, 16 NRC 21 (1982)
- People Against Nuclear Energy v. Nuclear Regulatory Commission, 678 F.2d 222, 233-34 (D.C. Cir. 1982)
 petition for cert. filed, 51 U.S.L.W. 3006 (U.S. July 1, 1982)
 submission of psychological stress contention based on; LBP-82-71, 16 NRC 966 (1982)

LEGAL CITATIONS INDEX

CASES

- Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 418 (1978)
applicant/licensee obligation to provide accurate and timely information in NRC proceeding; ALAB-691, 16 NRC 910 (1982)
- Petition for Emergency and Remedial Action, CLI-80-21, 11 NRC 707 (1980)
admission of contentions on equipment qualification testing; LBP-82-63, 16 NRC 585 (1982)
- Petition for Emergency and Remedial Action, CLI-80-21, 11 NRC 707 (1980)
lessons of TMI not incorporated; LBP-82-76, 16 NRC 1048 (1982)
- Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 973, 974-79 (1981)
guidelines for determining whether withdrawal of construction permit application should be with or without prejudice; LBP-82-81, 16 NRC 1131, 1134 (1982)
- Philadelphia Electric Company, et al. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13 (1974)
rejection of transmission lines contention; LBP-82-76, 16 NRC 1085 (1982)
- Philadelphia Electric Company, et al. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974)
rejection of contentions attacking statutory requirements; LBP-82-76, 16 NRC 1035 (1982)
- Philadelphia Electric Company, et al. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-640, 13 NRC 487 (1981)
appellate review of record in; ALAB-691, 16 NRC 909 (1982)
standing of petitioners in license application proceeding to litigate issues related to distant uranium mines; LBP-82-52, 16 NRC 192 (1982)
- Pickus v. United States Board of Parole, 507 F.2d 1107 (D.C. Cir. 1974)
limits on agency prerogatives to interpret policy statements; LBP-82-69, 16 NRC 753 (1982)
- Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962)
favorability in viewing summary disposition motion; LBP-82-58, 16 NRC 519 (1982)
- Portland General Electric Company, et al. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976)
discretionary intervention by petitioners without a valid contention; LBP-82-52, 16 NRC 194 (1982)
- Portland General Electric Company, et al. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976)
establishing interest under the Atomic Energy Act for standing to intervene; ALAB-682, 16 NRC 155 (1982)
intervention as a matter of right; LBP-82-74, 16 NRC 983 (1982)
- Portland General Electric Company, et al. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976)
right to discretionary hearing on enforcement action; CLI-82-16, 16 NRC 46 (1982)
- Portland General Electric Company, et al. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1976)
importance of intervenor's ability to contribute to record through late-filed contention; LBP-82-63, 16 NRC 577 (1982)
- Portland General Electric Company, et al. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 266 (1979)
interpretation of the term "available resources"; LBP-82-78, 16 NRC 1111-12 (1982)
- Potomac Electric Power Company (Douglas Point Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)
acceptance of contentions that are the subject of rulemaking; LBP-82-76, 16 NRC 1036 (1982)
- Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1191 (1977)
appeal board authority to decline Licensing Board referrals; ALAB-687, 16 NRC 464 (1982)
- Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977)
standards for granting discretionary interlocutory review; LBP-82-62, 16 NRC 568 (1982)
- Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 188 (1978)
appeal board reluctance to certify questions involving scheduling; ALAB-688, 16 NRC 475 (1982)

LEGAL CITATIONS INDEX

CASES

- Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 202 (1978)
necessity for filing exceptions; ALAB-694, 16 NRC 959 (1982)
- Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 318 (1978)
delegation of Licensing Board authority to NRC Staff; LBP-82-68, 16 NRC 748 (1982)
- Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980)
use of NRC resources for public hearings; LBP-82-54, 16 NRC 215 (1982)
- Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 439 (1980)
criteria for admission of interested state as full party; LBP-82-76, 16 NRC 1079 (1982)
- Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, at 441-42 (1980)
scope of proceedings on enforcement actions; CLI-82-16, 16 NRC 45 (1982)
- Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482 (1975)
relief for intervenors following denial of certification of contentions; LBP-82-51, 16 NRC 171 (1982)
- Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482-83 (1975)
petition for directed certification of unpublished order; ALAB-688, 16 NRC 473 (1982)
- Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-349, 4 NRC 235, 271 (1976)
construction halted because of invalidity of cost-benefit analysis; LBP-82-76, 16 NRC 1076 (1982)
- Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 41 (1977)
burden of explanation of Board rulings; LBP-82-60A, 16 NRC 557 (1982)
- Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-471, 7 NRC 477, 479 (1978)
consideration of local economic effects in cost-benefit analysis; LBP-82-53, 16 NRC 204 (1982)
- Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-667, 15 NRC 421 (1982)
propriety of calling independent experts as Board witnesses; LBP-82-55, 16 NRC 277 (1982)
- Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 462 (1976)
role of NRC Staff; LBP-82-87, 16 NRC 1200 (1982)
- Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-17 (1977)
Commission authority to provide guidance on admissibility of contentions before Licensing Boards; CLI-82-15, 16 NRC 34 (1982)
- Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 534 (1977)
consideration of "sunk costs" in operating license cost-benefit balance; LBP-82-63, 16 NRC 587 (1982)
- Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 18 (1978)
interpretation of the term "reasonable assurance"; LBP-82-66, 16 NRC 732 (1982)
- Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 24 (1978)
Licensing Board avoidance of pointless litigation; LBP-82-72, 16 NRC 970 (1982)
- Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877, 878-79 (1974)
use of Federal Rules in application of 10 CFR 2.1-9; LBP-82-58, 16 NRC 519 (1982)

LEGAL CITATIONS INDEX

CASES

- Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), LBP-76-26, 3 NRC 857, 881-82 (1976)
 application of collateral estoppel to relitigation of tourism impact contention; LBP-82-76, 16 NRC 1081 (1982)
- Public Service Company of Oklahoma, et al. (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 778 (1979)
 activities allowed under limited work authorization; ALAB-688, 16 NRC 473 (1982)
- Public Service Company of Oklahoma, et al. (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 787 (1979)
 disposition of unsupported briefs; ALAB-693, 16 NRC 956 (1982)
- Public Service Company of Oklahoma, et al. (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 789 (1979)
 grounds for defense of Licensing Board decision; ALAB-650, 14 NRC 908 (1982)
- Public Service Company of Oklahoma, et al. (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 804 (1979)
 admissibility of contention; LBP-82-53, 16 NRC 199 (1982)
- Public Service Company of Oklahoma, et al. (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC 264 (1980)
 estimation of risks from radiation resulting from normal nuclear power plant operation; LBP-82-57, 16 NRC 501 (1982)
- Public Service Company of Oklahoma, et al. (Black Fox Station, Units 1 and 2), LBP-78-26, 8 NRC 102 (1978)
 use of U.S. Army Corps of Engineers witnesses as Board-appointed experts; LBP-82-55, 16 NRC 277 (1982)
- Public Service Electric and Gas Company, et al. (Hope Creek Generating Station, Units 1 and 2), LBP-78-15, 7 NRC 642, 674 ff. (1978) aff'd, ALAB-518, 9 NRC 14 (1979)
 Commission guidance sought on Licensing Board treatment of testimony on risks; LBP-82-61, 16 NRC 563 (1982)
- Public Service Electric and Gas Company, et al. (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980)
 standard to be met by request for directed certification; ALAB-688, 16 NRC 474 (1982)
 standards for granting discretionary interlocutory review; LBP-82-62, 16 NRC 568 (1982)
- Public Service Electric and Gas Company, et al. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981)
 Board standard for considering issues raised for the first time on appeal; ALAB-680, 16 NRC 143 (1982)
- Public Service Electric and Gas Company, et al. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981)
 standard for considering issues raised for first time on appeal; ALAB-650, 14 NRC 907 (1981)
- Public Service Electric and Gas Company, et al. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 n.6 (1981)
 appeal board right to review any issues contested before a Licensing Board; ALAB-685, 16 NRC 552 (1982)
- Public Service Electric and Gas Company, et al. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49, 50 n.7 (1981)
 contents of briefs on appeal; ALAB-693, 16 NRC 956 (1982)
- Public Service Electric and Gas Company, et al. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 68-69 (1981)
 litigability of waste confidence contentions; LBP-82-51, 16 NRC 172 (1982)
- Public Service Electric and Gas Company, et al. (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973)
 consideration of totally deficient brief prepared by layman; ALAB-693, 16 NRC 957 (1982)
- Public Service Electric and Gas Company, et al. (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973)
 showing required of pro se intervenor for admission of late-filed contention; LBP-82-63, 16 NRC 578 (1982)
- Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1135 n.11, 1136-37 (1981)
 guidelines for determining whether withdrawal of construction permit application should be with or without prejudice; LBP-82-81, 16 NRC 1131, 1134, 1138 (1982)

LEGAL CITATIONS INDEX

CASES

- Puget Sound Power and Light Company, et al. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 NRC 693, 694 (1979)
- standards for granting discretionary interlocutory review; LBP-82-62, 16 NRC 568 (1982)
- Rivera v. Patino, 524 F.Supp. 136 (N. Dis. Calif., July 9, 1981)
- limits on agency prerogatives to interpret policy statements; LBP-82-69, 16 NRC 753 (1982)
- RKO General, Inc. v. Federal Communications Commission, 670 F.2d 215, 229 (D.C. Cir. 1981), cert. denied, 102 S.Ct. 1974, 2931 (1982)
- conduct expected of attorneys in NRC proceedings; ALBA-650, 14 NRC 919 (1982)
- Rochester Gas and Electric Corporation (Sterling Power Project, Nuclear Unit No. 1), ALAB-596, 11 NRC 867 (1980)
- vacation of unreviewed judgments because of mootness; CLI-82-18, 16 NRC 51 (1982)
- Rochester Gas and Electric Corporation, et al. (Sterling Power Project, Nuclear Unit No. 1), ALAB-596, 11 NRC 867 (1980)
- remanding of case based on record that no longer represents case's actual situation; CLI-82-26, 16 NRC 881 (1982)
- Roviaro v. United States, 353 U.S. 53, 60-61 (1957)
- yielding of informer's privilege; LBP-82-59, 16 NRC 538 (1982)
- Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981)
- scope of sua sponte review of final disposition of Licensing Board decision; ALAB-691, 16 NRC 908 (1982)
- Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981)
- sua sponte review of unopposed decision to authorize manufacturing license for nuclear power reactors; ALAB-686, 16 NRC 455 (1982)
- Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803-04, 817 (1981)
- nature of cases subject to sua sponte review by Appeal Board; ALAB-689, 16 NRC 890-91 (1982)
- Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 816 (1981)
- acceptance of contentions that are the subject of rulemaking; LBP-82-76, 16 NRC 1036 (1982)
- Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965)
- Licensing Board responsibility to develop the record; LBP-82-87, 16 NRC 1199 (1982)
- SCM Corp. v. Xerox Corp., 70 F.R.D. 508 (D. Conn.), interlocutory appeal dismissed, 534 F.2d 1031 (2d Cir. 1976)
- communications encompassed by attorney-client privilege; LBP-82-82, 16 NRC 1158 (1982)
- Sedco International v. Cory, Nos. 81-2007, 81-2056 (8th Cir. August 2, 1982)
- purpose of attorney-client privilege; LBP-82-82, 16 NRC 1159 (1982)
- Sholly v. Nuclear Regulatory Commission, 651 F.2d 780 (D.C. Cir.), cert. granted, 451 U.S. 1016 (1981)
- preclusion of procedural modifications that would foreclose a party's contentions; CLI-82-23, 16 NRC 422 (1982)
- Sholly v. Nuclear Regulatory Commission, 651 F.2d 780, 787 n.20 (D.C. Cir. 1980), rehearing en banc denied, 651 F.2d 792, cert. granted, 101 S.Ct. 3004 (1981)
- loss of right to hearing through lack of notice; ALAB-682, 16 NRC 158 (1982)
- Siegel v. Atomic Energy Commission, 400 F.2d 778, 784 (D.C. Cir. 1968)
- examples of common defense and security standards; CLI-82-19, 16 NRC 76 (1982)
- Sierra Club v. Froehle, 534 F.2d 1289 (8th Cir. 1976)
- conditions allowing segmentation of major federal actions; CLI-82-23, 16 NRC 424 (1982)
- Sierra Club v. Morton, 405 U.S. 727 (1972)
- standing of petitioner in decontamination proceeding to litigate related waste disposal issues; LBP-82-52, 16 NRC 191 (1982)
- Sierra Club v. Morton, 405 U.S. 727, 939, 940 (1972)
- satisfaction of interest test for standing; LBP-82-74, 16 NRC 983 (1982)
- Smith v. FTC, 403 F.Supp. 1000, 1015, n.45 (D. Del. 1975)
- guidelines for resolving claims of executive privilege in NRC proceedings related to discovery; LBP-82-82, 16 NRC 1164 (1982)

LEGAL CITATIONS INDEX

CASES

- South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895-96 (1981), affirmed sub nom. *Fairfield United Action v. Nuclear Regulatory Commission*, No. 81-2042 (D.C. Cir., April 28, 1982)
responsibility of NRC Staff on uncontested safety issues; ALAB-680, 16 NRC 143 (1982)
- South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1156 n.31 (1981)
responsibility of NRC Staff on uncontested safety issues; ALAB-680, 16 NRC 143 (1982)
- South Carolina Electric and Gas Company, et al. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 884, 887 (1981)
standards for admitting late-filed TMI contentions; LBP-82-63, 16 NRC 578 (1982)
- South Carolina Electric and Gas Company, et al. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 887-91, 895 (1981)
weight given to factors applied to admission of late-filed contentions
- Southern California Edison Company, et al. (San Onofre Nuclear Generating Station Units 2 and 3), ALAB-680, 16 NRC 127, 135-39 (1982)
viability of medical services contention in light of decision in; LBP-82-75, 16 NRC 997-99 (1982)
- Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3) LBP-82-39, 15 NRC 1212, n.33 (1982)
entitlement of interim FEMA finding to rebuttable presumption; LBP-82-68, 16 NRC 746 (1982)
- Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-268, 1 NRC 383, 399 (1975)
Staff interference with Licensing Board's performance of its duties; LBP-82-87, 16 NRC 1200 (1982)
- Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 698
showing required for stay of Licensing Board decision pending appeal; ALAB-680, 16 NRC 130 (1982)
- Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-81-36, 14 NRC 691, 699 (1981)
requirement for reasonable assurance determination; LBP-82-66, 16 NRC 732 (1982)
- Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-3, 15 NRC 61 (1982)
propriety of calling independent experts as Board witnesses; LBP-82-55, 16 NRC 277 (1982)
- Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-39, 15 NRC 1203 (1982)
significance of pre-emergency public information program; LBP-82-66, 16 NRC 732 (1982)
- State of Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir.), vacated, in part, sub nom. *Western Oil and Gas Association v. Alaska*, 439 U.S. 922 (1978)
scope of information concerning environmental impact of a project to be obtained before project initiation; LBP-82-62, 16 NRC 569 (1982)
- Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456 (1981)
basis for timely rulings on psychological stress contentions; LBP-82-53, 16 NRC 203 (1982)
- Licensing Board jurisdiction for referral of ruling conditionally admitting nonspecific contentions; ALAB-687, 16 NRC 465 (1982)
- Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456-57 (1981)
certification of question to Commission to avoid licensing delays; ALAB-681, 16 NRC 149 (1982)
- Stewart v. Smith*, 673 F.2d 485 (D.C. Cir., October 1, 1981)
limits on agency prerogatives to interpret policy statements; LBP-82-69, 16 NRC 753 (1982)
- Taggart v. Weinacker's Inc.*, 397 U.S. 223 (1970)
Commission review of Appeal Board decision on operating license amendment inappropriately granted; CLI-82-26, 16 NRC 881 (1982)
- Ten Applications for Low-Enriched Uranium Exports to EURATOM Member Nations, CLI-77-24, 6 NRC 525, 531 (1977)
standing to intervene as member of general public subject to harm from accident at nuclear facility; LBP-82-76, 16 NRC 1032 (1982)

LEGAL CITATIONS INDEX

CASES

- Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 209 at 216 (1976)
use of references in support of contentions; LBP-82-52, 16 NRC 189 (1982)
- Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387 (1982)
applicant/licensee obligation to provide accurate and timely information in NRC proceeding; ALAB-691, 16 NRC 910 (1982)
- Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387 (1982)
application of relevance and materiality standards; LBP-82-73, 16 NRC 978 (1982)
- Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-367, 5 NRC 92, 102-03 (1977)
consideration of financial costs in NEPA cost-benefit balance; LBP-82-58, 16 NRC 526 (1982)
- Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-367, 5 NRC 92, 102-05 (1977)
inadequacy of discussion of alternatives in operating license FES; LBP-82-58, 16 NRC 526 (1982)
- Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-463, 7 NRC 341, 348 (1978)
standard for consideration of issues raised for first time on appeal; ALAB-691, 16 NRC 907 (1982); ALAB-693, 16 NRC 956 (1982)
- Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-463, 7 NRC 341, 355-56 (1978)
circumstances favoring disclosure of confidential information; LBP-82-59, 16 NRC 538 (1982)
- Tennessee Valley Authority v. Hill, 437 U.S. 153, 184-185 (1978)
applicability of appeal board immediate effectiveness review in manufacturing license cases; ALAB-686, 16 NRC 457 (1982)
- Texas Utilities Generating Company, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-260, 1 NRC 51, 55 (1975)
Staff responsibility regarding preparation of EIS; LBP-82-78, 16 NRC 1110 (1982)
- Texas Utilities Generating Company, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-599, 12 NRC 1, 2 (1980)
circumstances appropriate for interlocutory appeals; ALAB-683, 16 NRC 161 (1982)
- Toledo Edison Company (Davis-Besse Nuclear Power Station), ALAB-157, 6 AEC 858, 859 (1973)
necessity for filing exceptions; ALAB-694, 16 NRC 960 (1982)
- Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621, 629 (1977)
appellate standard in reviewing Licensing Board decision in context of stay pending appeal; ALAB-680, 16 NRC 133 (1982)
- Toledo Edison Company and Cleveland Electric Illuminating Company (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98, 99-100 (1976)
appeal board reluctance to certify questions involving scheduling; ALAB-688, 16 NRC 475 (1982)
- Toledo Edison Company and the Cleveland Electric Illuminating Company (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC at 99 (1976)
circumstances in which directed certification is warranted; LBP-82-62, 16 NRC 567 (1982)
- Toledo Edison Company, et al. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975)
test of "finality" for appeal purposes; ALAB-690, 16 NRC 894 (1972)
- Toledo Edison Company, et al. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 760 (1975)
application of Federal Rules of Civil Procedure to NRC proceedings; LBP-82-82, 16 NRC 1157 (1982)
- use of Federal Rules in interpreting MRC discovery rules; LBP-82-82, 16 NRC 1163 (1982)
- Trustees of Columbia University in the City of New York, ALAB-50, 4 AEC 849 (1972)
potential of excluded radiation dose contention as sua sponte issue; LBP-82-79, 16 NRC 1119 (1982)
- Turner v. FCC, 514 F.2d 1354 (D.C. Cir. 1975)
basis for award of intervenors' attorney's fees; LBP-82-81, 16 NRC 1139 (1982)
- Union Electric Company (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 128-39 (1979)
circumstances allowing Licensing Board to override informer's privilege; LBP-82-87, 16 NRC 1200 (1982)
- Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1090 (D.C. Cir. 1974)
amount of hydrogen generation to be taken in account into containment design; LBP-82-76, 16 NRC 1064 (1982)
- United Mine Workers of America, Dist. 22 v. Roncco, 314 F.2d 186, 188 (10th Cir. 1963)
favorability in viewing summary disposition motion; LBP-82-58, 16 NRC 519 (1982)

LEGAL CITATIONS INDEX

CASES

- United Mine Workers v. Kleppe, 561 F.2d 1258, 1263 (7th Cir. 1977)
preclusion of hearing on germane issues through unlawful procedural requirements: ALAB-687, 16 NRC 469 (1982)
- United States Energy Research and Development Administration (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 75-76 (1976)
Commission authority to provide guidance on admissibility of contentions before Licensing Boards, CLI-82-15, 16 NRC 34 (1982)
- United States Energy Research and Development Administration, et al. (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976)
history of 10 CFR 50.12; CLI-82-23, 16 NRC 437 (1982)
- United States Steel Corp. v. Train, [556 F.2d 822, 837 (1977)]
disposition of unsupported briefs, ALAB-693, 16 NRC 956 (1982)
- United States Sugar Corp. v. Atlantic Coast Line R.R., 196 F.2d 1015, 1016 (5th Cir. 1952)
situations giving rise to appealable order, ALAB-690, 16 NRC 895 (1982)
- United States v. American Trucking Ass'n., 310 U.S. 534, 544 (1940)
determining intent of regulations, CLI-82-19, 16 NRC 62 (1982)
- United States v. Barnett, 376 U.S. 681, 737-739 (1964) (Goldberg, J., dissenting)
distinction between amicus curiae and traditional party, ALAB-679, 16 NRC 126 (1982)
- United States v. Berrigan, 482 F.2d 171, 181 (3rd Cir. 1973)
purpose behind executive privilege, LBP-82-82, 16 NRC 1164 (1982)
- United States v. Bollin, Joseph & Company, 144 U.S. 1, 4 (1892)
authenticity of recorded notes, LBP-82-72, 16 NRC 970 (1981)
- United States v. Brown, 478 F.2d 1038, 1041 (7th Cir. 1973)
discovery of attorney's opinion work product, LBP-82-82, 16 NRC 1160 (1982)
- United States v. Culbert, 435 U.S. 371 (1978)
determining intent of regulations, CLI-82-19, 16 NRC 62 (1982)
- United States v. Davis, 636 F.2d 1028, 1044 n.20 (5th Cir. 1981)
specificity required of claims of executive privilege, LBP-82-82, 16 NRC 1153, 1154 (1982)
- United States v. El Paso Company, No. 81-2484 (5th Cir. August 13, 1982)
extent of protection of attorney-client privilege, LBP-82-82, 16 NRC 1158 (1982)
- United States v. Gates, 35 F.R.D. 524 (D. Colo. 1964)
specificity required of claims of executive privilege, LBP-82-82, 16 NRC 1153, 1158, 1161 (1982)
- United States v. Gates, 35 F.R.D. 524 (D. Colo. 1964)
material encompassed by attorney work product doctrine, LBP-82-82, 16 NRC 1161 (1982)
- United States v. Leggett & Platt, Inc., 542 F.2d 655, 658-659 (6th Cir. 1976) cert. denied, 430 U.S. 945 (1977)
disclosure of documents protected by executive privilege, LBP-82-82, 16 NRC 1164 (1982)
- United States v. Munsingwear, Inc., 340 U.S. 36 (1950)
remanding of case based on record that no longer represents case's actual situation, CLI-82-26, 16 NRC 881 (1982)
- United States v. Nixon, 418 U.S. 683, 705-711 (1974)
vacation of unreviewed judgments because of mootness, CLI-82-18, 16 NRC 51 (1982)
- United States v. Nixon, 418 U.S. 683, 705-711 (1974)
intragovernmental documents encompassed by executive privilege, LBP-82-82, 16 NRC 1164 (1982)
- United States v. Oliver, 570 F.2d 397, 401 (1st Cir. 1978)
scope of informer's privilege, LBP-82-87, 16 NRC 1198 (1982)
- United States v. Pierce Auto Freight Lines, 327 U.S. 515, 527-530 (1945)
criteria for official notice of information in separate proceedings, ALAB-682, 16 NRC 154 (1982)
- United States v. Ramirez, 608 F.2d 1261, 1268 n.12 (9th Cir. 1979)
communications encompassed by attorney-client privilege, LBP-82-82, 16 NRC 1158 (1982)
- United States v. United Mine Workers, 330 U.S. 258, 291-94 (1947)
NRC Staff duty to obey Licensing Board orders, LBP-82-87, 16 NRC 1203 (1982)
- United States v. United Shoe Machinery Corporation, 89 F.Supp. 357, 358-359 (D. Mass. 1950)
essential elements of attorney-client privilege, LBP-82-82, 16 NRC 1157-58 (1982)
- United States v. Weathers, 618 F.2d 663 (10th Cir. 1980)
approval of court for appointing its own expert witness, LBP-82-55, 16 NRC 277 (1982)
- Upjohn Company v. United States, 449 U.S. 383, 389 (1981)
purpose of attorney-client privilege, LBP-82-82, 16 NRC 1157-59 (1982)
- Upjohn Company v. United States, 449 U.S. 383, 397-398 (1981)
attorney's mental impressions and opinions at attorney work product doctrine, LBP-82-82, 16 NRC 1160 (1982)

LEGAL CITATIONS INDEX

CASES

- Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973)
 showing necessary in moving papers to reopen the record; LBP-82-84, 16 NRC 1185 (1982)
 showing necessary in moving papers to reopen the record; LBP-82-84, 16 NRC 1185 (1982)
- Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-141, 6 AEC 576, 583-585 (1973)
 difference between concepts of effectiveness and finality; ALAB-689, 16 NRC 891 (1982)
- Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 539 (1978)
 content of environmental impact statement for major federal actions; LBP-82-76, 16 NRC 1076 (1982)
- Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978)
 issues explored in considering conduct of licensee; ALAB-691, 16 NRC 904 (1982)
- Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978)
 obligations of intervenors in NRC proceedings; ALAB-693, 16 NRC 957 (1982)
- Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 557-58 (1978)
 responsibility for judgment to use nuclear energy as a source of power; LBP-82-87, 16 NRC 1200 (1982)
- Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-324, 3 NRC 347, 358-63 (1976)
 omissions as material false statements; ALAB-650, 14 NRC 911, 914 (1982)
- Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245, 247 (1978)
 appeal board disagreement with Licensing Board interpretation of an issue; ALAB-680, 16 NRC 135 (1982)
 appeal board right to review any issues contested before a Licensing Board; ALAB-685, 16 NRC 452 (1982)
- Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245, 249-50 (1978)
 extent of Appeal Board sua sponte review authority; ALAB-689, 16 NRC 890-91 (1982)
- Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56, 57 n.5 (1979)
 establishment of causality for standing to intervene in materials license renewal proceeding; ALAB-682, 16 NRC 153-55 (1982)
- Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-529, 9 NRC 153 (1979)
 Appeal Board practice when sua sponte review uncovers problems in Licensing Board decision; ALAB-689, 16 NRC 891 (1982)
- Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 458 (1980)
 interpretation of the term "available resources"; LBP-82-78, 16 NRC 1112 (1982)
- Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), CLI-74-17, 7 AEC 313 (1974)
 disclosure of material protected by executive privilege; LBP-82-82, 16 NRC 1163 (1982)
- Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), CLI-74-18, 7 AEC 313 (1974)
 application of Exemption 5 of Freedom of Information Act to intragovernmental Communications; LBP-82-82, 16 NRC 1163 (1982)
- Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 486 (1976), aff'd sub nom. Virginia Electric and Power Company v. Nuclear Regulatory Commission, 571 F.2d 1289 (4th Cir. 1978)
 liability of applicant/licensee for material false statement; ALAB-691, 16 NRC 910 (1982)
- Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 487-88, 491 (1976), aff'd sub nom. Virginia Electric and Power Company v. Nuclear Regulatory Commission, 571 F.2d 1289 (4th Cir. 1978)
 test for materiality of a statement; ALAB-650, 14 NRC 910, 912, 914, 915 (1981)
- Virginia Electric and Power Company (North Anna Station, Units 1 and 2), CLI-74-16, 7 AEC 313, 314 (1974)
 Commission policy regarding withholding of information; LBP-82-59, 16 NRC 538 (1982)
- Virginia Petroleum Jobbers Assoc. v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958)
 factors to be considered by Licensing Board in ruling on a motion for stay; LBP-82-84, 16 NRC 1184 (1982)

LEGAL CITATIONS INDEX

CASES

- Walker v. Hutchinson, 352 U.S. 112, 115 (1956)
loss of right to hearing through lack of notice; ALAB-682, 16 NRC 158 (1982)
- Warth v. Selden, 422 U.S. 490 (1975)
satisfaction of interest test for standing; LBP-82-74, 16 NRC 983 (1982)
- Washington Public Power Supply System (Hanford No. 2 Nuclear Power Plant), ALAB-113, 6 AEC 251 (1973)
extent of Appeal Board sua sponte review authority; ALAB-689, 16 NRC 890 (1982)
- Washington Public Power Supply System (Nuclear Projects No. 1 and No. 4), ALAB-265, 1 NRC 374, 375 n.1 (1975)
appellate review of Licensing Board rulings on economic issues, intervention requests, or procedural matters; ALAB-650, 14 NRC 908 (1982)
- Washington Public Power Supply System (WPPSS Nuclear Power Project Nos. 3 and 5), CLI-77-11, 5 NRC 719 (1977)
Commission practice for grant of exemption from 50.10; CLI-82-23, 16 NRC 426 (1982)
- Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-571, 10 NRC 687, 692 (1979)
scope of sua sponte review of final disposition of Licensing Board decision; ALAB-689, 16 NRC 890 (1982); ALAB-691, 16 NRC 908 (1982)
- Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 149-50 (1980)
situations giving rise to appealable order; ALAB-690, 16 NRC 895 (1982)
- Wisconsin Electric Power Company (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928 (1974)
use of draft EIS as basis for late-filed contention; LBP-82-79, 16 NRC 1118 (1982)
- Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 2), ALAB-31, 4 AEC 689, 690-91 (1971)
timing of discovery on contentions; ALAB-687, 16 NRC 467 (1982)
- Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 2), ALAB-85, 5 AEC 375 (1972)
difference between concepts of effectiveness and finality; ALAB-689, 16 NRC 891 (1982)
- Wright v. Hartford Accident & Indemnity Company, 580 F.2d 809, 810 (5th Cir. 1978)
failure of party to submit requested proposed findings of fact; ALAB-691, 16 NRC 907 (1982)
- Yoffe v. Keller Indus., Inc., 580 F.2d 126, 129-30, 131 n.13 (5th Cir. 1978); petition for rehearing denied, 582 F.2d 982, 983 (1978)
standards for dismissal of applications without prejudice; LBP-82-81, 16 NRC 1134 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

- 10 CFR 1
consolidation of proceedings; DPRM-82-2, 16 NRC 1214 (1982)
- 10 CFR 2
denial of petition for amendment of, to require operating license hearings for each reactor; DPRM-82-2, 16 NRC 1214 (1982)
- 10 CFR 2, Subpart B
Board recommendation for proceeding to modify or suspend reactor operators' licenses; LBP-82-56, 16 NRC 309, 383 (1982)
- 10 CFR 2.104(a) and 2.105(a)(6)
standard for discretionary hearing on materials license amendment; CLI-82-21, 16 NRC 402 (1982)
- 10 CFR 2.107(a)
terms for withdrawal of construction permit application after issuance of Notice of Hearing; LBP-82-81, 16 NRC 1131, 1134 (1982)
- 10 CFR 2.109
continuation of licensee operation during processing of license renewal requests; ALAB-682, 16 NRC 159 (1982)
- 10 CFR 2.202
suspension of low-power license; ALAB-681, 16 NRC 147 (1982); LBP-82-70, 16 NRC 762 (1982)
- 10 CFR 2.206
assistance for intervenor who cannot present his own case; LBP-82-84, 16 NRC 1186 (1982)
challenges to emergency planning; CLI-82-15, 16 NRC 37 (1982)
denial of petition requesting amendment of operating license application concerning management restructuring; DD-82-10, 16 NRC 1205 (1982)
denial of petition requesting initiation of show-cause proceeding on basis of licensee's financial qualifications; DD-82-8, 16 NRC 394 (1982)
denial of petition to decommission Humboldt Bay Power Plant; DD-82-7, 16 NRC 387 (1982)
forum for seeking more stringent enforcement actions; CLI-82-16, 16 NRC 46-47 (1982)
partial denial of petition regarding construction deficiencies at LaSalle; DD-82-9, 16 NRC 396 (1982)
- 10 CFR 2.4(n)
example of contested proceeding within the meaning of; LBP-82-55, 16 NRC 228 (1982); LBP-82-57, 16 NRC 480 (1982)
- 10 CFR 2.500
applicability of immediate effectiveness review to manufacturing licenses; ALAB-686, 16 NRC 456 (1982)
- 10 CFR 2.503
distinction between construction permits and manufacturing licenses; ALAB-686, 16 NRC 456 (1982)
- 10 CFR 2.504
applicability of immediate effectiveness review to manufacturing licenses; ALAB-686, 16 NRC 456 (1982)
- 10 CFR 2.700
conduct of special proceedings; ALAB-685, 16 NRC 451 (1982)
- 10 CFR 2.707
Board authority to impose sanctions for noncompliance with its orders; LBP-82-75, 16 NRC 990 (1982)
- 10 CFR 2.712(a)
use of informal oral notification to trigger time for seeking appeal; ALAB-690, 16 NRC 895 (1982)
- 10 CFR 2.712(d)(3)
Licensing Board jurisdiction to consider motion to reopen record mailed before Licensing Board final decision; LBP-82-86, 16 NRC 1191 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

- 10 CFR 2.713(a)
conduct of parties to NRC proceedings; ALAB-691, 16 NRC 916 (1982)
- 10 CFR 2.713(c)
Licensing Board authority to censure parties to a proceeding; LBP-82-87, 16 NRC 1201 (1982)
- 10 CFR 2.714
admission of contention subject to further specificity; LBP-82-75, 16 NRC 1004 (1982)
admission of QA contention citing deficiencies in FSA as basis; LBP-82-76, 16 NRC 1073 (1982)
amendment of; ALAB-687, 16 NRC 466 (1982)
application of additional requirements for admission of contentions; CLI-82-15, 16 NRC 34, 41 (1982)
demonstration of good cause for late filing; LBP-82-53, 15 NRC 201 (1982)
denial of intervention for lack of standing; ALAB-682, 16 NRC 153 (1982)
exclusion of groups as intervenors because of their opinions on nuclear power; CLI-82-15, 16 NRC 31 (1982)
failure of contentions addressing decontamination problems to meet specificity requirements; LBP-82-52, 16 NRC 188 (1982)
failure of emergency planning contention to meet specificity requirement; LBP-82-75, 16 NRC 993 (1982)
intervention on enforcement actions; CLI-82-16, 16 NRC 45 (1982)
lack of basis of transmission lines contention; LBP-82-76, 16 NRC 1085 (1982)
quality assurance contention seen as expedition seeking information; LBP-82-76, 16 NRC 1042 (1982)
reason for specificity requirement; LBP-82-52, 16 NRC 193 (1982)
restrictions on Board authority; LBP-82-69, 16 NRC 752 (1982)
specificity required of contention concerning qualification of safety-related equipment; LBP-82-76, 16 NRC 1038 (1982)
timing of discovery on contentions; ALAB-687, 16 NRC 468 (1982)
weak showing for acceptance of tardy contentions; LBP-82-54, 16 NRC 213 (1982)
- 10 CFR 2.714(a)
admission of quality assurance contention favored by five-factor test; LBP-82-63, 16 NRC 584 (1982)
applicability to late-filed contentions based on previously unavailable documents; ALAB-687, 16 NRC 463, 469 (1982)
balancing of five factors favors limited admission of risk assessment contention; LBP-82-63, 16 NRC 592 (1982)
clarification of requirements for late-filing, amending, expanding, and deleting contentions; ALAB-687, 16 NRC 467, 470 (1982)
dismissal of intervenor for failure to cure deficiencies in standing; LBP-82-76, 16 NRC 1032 (1982)
five-factor test for intervention; LBP-82-54, 16 NRC 213 (1982)
interests encompassed by; LBP-82-52, 16 NRC 185 (1982)
satisfaction of residency requirements for standing to intervene; LBP-82-52, 16 NRC 186 (1982)
standards for admitting late intervenor; LBP-82-63, 16 NRC 586 (1982)
time for filing supplements to contentions; ALAB-687, 16 NRC 469 (1982)
- 10 CFR 2.714(a)(1)
admission requirements to be met by refiled contention; LBP-82-76, 16 NRC 1038 (1982)
amendment of petition to intervene; ALAB-690, 16 NRC 895 (1982)
balancing of five factors for intervention; LBP-82-74, 16 NRC 984 (1982)
balancing of five-factor test favors admission of cost-benefit contentions; LBP-82-63, 16 NRC 588, 589 (1982)
good cause not shown for late filing of radiation dose contention; LBP-82-79, 16 NRC 1119 (1982)
Licensing Board interpretation of; LBP-82-63, 16 NRC 577 (1982)
participation by a State; ALAB-690, 16 NRC 894 (1982)
standards for admitting late intervenor; LBP-82-63, 16 NRC 586 (1982)
standards for evaluating new contentions; LBP-82-63, 16 NRC 576 (1982)
- 10 CFR 2.714(a)(3)
admission of late-filed, clarified contention; LBP-82-51, 16 NRC 175 (1982)
authorization for submission of second amended petition to intervene; LBP-82-52, 16 NRC 184 (1982)
standards for admitting late intervenor; LBP-82-63, 16 NRC 586 (1982)
- 10 CFR 2.714(b)
admission of late-filed contentions based on previously unavailable documents; ALAB-687, 16 NRC 467 (1982)
conditional admission of nonspecific contentions; ALAB-687, 16 NRC 463, 465-66 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

- contention requirement for intervention; ALAB-687, 16 NRC 464 (1982); LBP-82-74, 16 NRC 985 (1982)
exclusion of contentions for lack of basis; LBP-82-53, 16 NRC 198 (1982)
inconsistency between Statement of Consideration and; ALAB-687, 16 NRC 464 (1982)
licensing board instructed to allow intervention petitioner to supplement its petition; ALAB-682, 16 NRC 156 (1982)
Licensing Board interpretation of; LBP-82-63, 16 NRC 577 (1982)
specificity required of radioactive releases contention; LBP-82-51, 16 NRC 175 (1982)
standards for evaluating new contentions; LBP-82-63, 16 NRC 576 (1982)
- 10 CFR 2.714(c)
justification for untimely response to contentions; LBP-82-63, 16 NRC 575 (1982)
- 10 CFR 2.714(d)
weight given to five-factor test for intervention when interest is strong; LBP-82-74, 16 NRC 984 (1982)
- 10 CFR 2.714(f)
standing of petitioner in decontamination proceeding to litigate related waste disposal issues; LBP-82-52, 16 NRC 191 (1982)
- 10 CFR 2.714a
appeal of rulings admitting intervenors; CLI-82-15, 16 NRC 30 (1982)
application of finality rule; ALAB-690, 16 NRC 895 (1982)
circumstances appropriate for interlocutory appeals; ALAB-683, 16 NRC 163 (1982)
rejection of argument for dismissal of appeal; ALAB-690, 16 NRC 895 (1982)
use of informal oral notification to trigger time for seeking appeal; ALAB-690, 16 NRC 895 (1982)
- 10 CFR 2.714a(c)
standard for permitting appeals of orders granting intervention; ALAB-687, 16 NRC 464 (1982)
admission of local government entity as full party; LBP-82-76, 16 NRC 1092 (1982)
participation by a State; ALAB-690, 16 NRC 894 (1982)
participation by Commonwealth of Massachusetts as full party; LBP-82-76, 16 NRC 1079 (1982)
participation by South Carolina as interested state; LBP-82-55, 16 NRC 229 (1982)
- 10 CFR 2.715(d)
definition of amicus curiae; ALAB-679, 16 NRC 125 (1982)
- 10 CFR 2.715a
requirement of consolidated parties; CLI-82-25, 16 NRC 868 (1982)
- 10 CFR 2.716
Commission authority to consolidate two or more proceedings; DPRM-82-2, 16 NRC 1215 (1982)
criteria for consolidating materials license renewal and operating license proceedings; ALAB-682, 16 NRC 155 (1982)
- 10 CFR 2.717(a)
termination of jurisdiction of presiding officer; LBP-82-86, 16 NRC 1191, 1193 (1982)
- 10 CFR 2.717(b)
licensing board jurisdiction to consider hearing request on operating license amendment that it is not authorized to review; ALAB-679, 16 NRC 125 (1982)
- 10 CFR 2.718
alteration of Board authority of conduct hearings; LBP-82-69, 16 NRC 753 (1982)
- 10 CFR 2.718
Board responsibility for fairness; LBP-82-73, 16 NRC 979 (1982)
- 10 CFR 2.718(e)
Board discretion to conduct hearings outside 10-mile EPZ; CLI-82-15, 16 NRC 37 (1982)
- 10 CFR 2.718(i)
denial of petition for directed certification of two evidentiary rulings made during operating license proceedings; LBP-82-62, 16 NRC 566 (1982)
Licensing Board authority to certify questions to the Commission; LBP-82-62, 16 NRC 567 (1982)
petition for directed certification of unpublished order; ALAB-688, 16 NRC 473 (1982)
request for Commission review of licensing board order denying motion for stay or dismissal of evidentiary proceeding; CLI-82-15, 16 NRC 33 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

- 10 CFR 2.718(j)
authority of licensing board to reopen the record; CLJ-82-20, 16 NRC 114 (1982)
Board authority to reopen the record; LBP-82-54, 16 NRC 214 (1982)
termination of jurisdiction of presiding officer; LBP-82-86, 16 NRC 1191, 1193 (1982)
- 10 CFR 2.720(f)
Licensing Board authority to condition its rulings; LBP-82-81, 16 NRC 1140 (1982)
- 10 CFR 2.721(b)
reconstitution of Licensing Board; CLJ-82-24, 16 NRC 866 (1982)
- 10 CFR 2.722(a)(2)
appointment of Special Master; LBP-82-56, 16 NRC 288 (1982)
- 10 CFR 2.722(a)(3)
weight given to report of Special Master; LBP-82-56, 16 NRC 288 (1982)
- 10 CFR 2.730
right of movant to reply to answers in NRC proceedings; LBP-82-72, 16 NRC 971 (1981)
- 10 CFR 2.730(c)
justification for untimely response to contentions; LBP-82-63, 16 NRC 575 (1982)
- 10 CFR 2.730(e)
notification of absent parties of oral rulings; ALAB-690, 16 NRC 895 (1982)
- 10 CFR 2.730(f)
appellate standard for acceptance of licensing board referrals; ALAB-687, 16 NRC 464 (1982)
referral of rulings conditionally admitting nonspecific contentions; ALAB-687, 16 NRC 463 (1982)
- 10 CFR 2.732
burden of proof for assurance of adequacy of emergency plans; LBP-82-77, 16 NRC 1099 (1982)
burden of proof in show cause order; LBP-82-64, 16 NRC 655 (1982)
- 10 CFR 2.740
timing of discovery on contentions; ALAB-687, 16 NRC 467 (1982)
- 10 CFR 2.740(b)(1)
exclusion of financial qualifications issues from operating license proceedings; LBP-82-67, 16 NRC 738 (1982)
matters on which discovery may be obtained; LBP-82-82, 16 NRC 1156 (1982)
- 10 CFR 2.740(b)(2)
materials encompassed by work product doctrine; LBP-82-82, 16 NRC 1159, 1162 (1982)
matters which are privileged from discovery; LBP-82-82, 16 NRC 1157 (1982)
- 10 CFR 2.740(c)
claims of privilege improperly raised; LBP-82-82, 16 NRC 1152 (1982)
- 10 CFR 2.740(c)(6)
standards for showing good cause for a protective order; LBP-82-82, 16 NRC 1153 (1982)
- 10 CFR 2.740(f)
motion for order compelling government intervenor to produce emergency planning documents; LBP-82-82, 16 NRC 1149 (1982)
need for intervenor to seek protective order when responding negatively to discovery request; LBP-82-82, 16 NRC 1151, 1152 (1982)
- 10 CFR 2.740(f)(1)
timeliness of motion to compel; LBP-82-82, 16 NRC 1151 (1982)
- 10 CFR 2.741(d)
responses to motions to compel; LBP-82-82, 16 NRC 1151, 1152 (1982)
- 10 CFR 2.743(g)
admission of Staff EIA as evidence; LBP-82-78, 16 NRC 1110 (1982)
- 10 CFR 2.743(i)
criteria for official notice of information in separate proceedings; ALAB-682, 16 NRC 154 (1982)
- 10 CFR 2.744
executive privilege for intragovernmental communications; LBP-82-82, 16 NRC 1162 (1982)
- 10 CFR 2.744(e)
criteria for release of security plans to intervenors; LBP-82-80, 16 NRC 1125 (1982)
restrictions on disclosure of safeguards information; LBP-82-51, 16 NRC 177 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

- 10 CFR 2.749
burdens met in Staff's and applicants' statements of material facts regarding ATWS contention; LBP-82-57, 16 NRC 482, 483 (1982)
conformance of intervenor's response with; LBP-82-57, 16 NRC 481 (1982)
requirements met by applicants' motion for summary disposition; LBP-82-57, 16 NRC 484 (1982)
Staff satisfaction of the requirements of; LBP-82-57, 16 NRC 483 (1982)
summary disposition of unconditionally admitted contentions; ALAB-687, 16 NRC 464 (1982)
- 10 CFR 2.749(a)
submission of statement of material facts with summary disposition motion; LBP-82-58, 16 NRC 520 (1982)
- 10 CFR 2.749(d)
standards for summary disposition; LBP-82-58, 16 NRC 519 (1982)
- 10 CFR 2.751a
failure of intervenor to meet filing time for objections; LBP-82-72, 16 NRC 971 (1981)
lack of specificity of contention not grounds for rejection; LBP-82-51, 16 NRC 169 (1982)
- 10 CFR 2.751a(d)
denial of certification of emergency planning contentions; LBP-82-51, 16 NRC 174 (1982)
- 10 CFR 2.754
Board authority to vary scheduling procedures; LBP-82-51A, 16 NRC 181 (1982)
- 10 CFR 2.754(a)
alteration of regulatory schedule for filing findings of fact; LBP-82-51A, 16 NRC 181 (1982)
- 10 CFR 2.758
admission of contentions challenging Commission regulations; CLI-82-15, 16 NRC 35 (1982)
Commission authority to determine applicability of; CLI-82-15, 16 NRC 34 (1982)
example of special circumstances necessary for considering need-for-power issues in operating license proceedings; LBP-82-58, 16 NRC 528 (1982)
interpretation of "special circumstances"; LBP-82-58, 16 NRC 532 (1982)
petition to exception to numerical limitation on size of design basis threat; CLI-82-19, 16 NRC 71 (1982)
- 10 CFR 2.758(a)
challenges to regulations; CLI-82-19, 16 NRC 71 (1982)
claim of greater-than-zero radioactive releases as excessive; LBP-82-58, 16 NRC 522, 523 (1982)
- 10 CFR 2.758(b)
exceptions to regulations; CLI-82-19, 16 NRC 71 (1982)
lack of showing for certification of emergency planning contentions; LBP-82-51, 16 NRC 174 (1982)
unsupported petitions for exceptions to regulation; CLI-82-19, 16 NRC 72 (1982)
- 10 CFR 2.758(c)
challenges to regulations; CLI-82-19, 16 NRC 71 (1982)
- 10 CFR 2.758(d)
denial of certification of emergency planning contentions; LBP-82-51, 16 NRC 174 (1982)
treatment of exceptions to regulations where grounds are shown; CLI-82-19, 16 NRC 71 (1982)
- 10 CFR 2.760(a)
application to manufacturing license proceedings; ALAB-689, 16 NRC 889 (1982)
certification of record of special proceeding to the Commission; ALAB-685, 16 NRC 451 (1982)
discretion of Board to take up important safety issues; LBP-82-60, 16 NRC 547 (1982)
- 10 CFR 2.760(a)
nature of cases subject to sua sponte review by Appeal Board; ALAB-689, 16 NRC 890-91 (1982)
- 10 CFR 2.760a
authority of licensing board to reopen the record; CLI-82-20, 16 NRC 114 (1982)
Board authority to reopen the record; LBP-82-54, 16 NRC 214 (1982)
Commission review of licensing board decisions to exercise sua sponte authority; CLI-82-20, 16 NRC 115 (1982)
limitation on matters to be resolved in operating license proceedings; LBP-82-76, 16 NRC 1086 (1982)
responsibilities of presiding officers in initial decision in contested proceeding; DPRM-82-2, 16 NRC 1216 (1982)
sua sponte adoption by licensing board of contentions advanced by intervenor; CLI-82-20, 16 NRC 115 (1982)
sua sponte adoption of late-filed, excluded contention; LBP-82-79, 16 NRC 1119 (1982)
sua sponte adoption of quality assurance and management competence contentions; CLI-82-20, 16 NRC 109 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

- 10 CFR 2.761a
preclusion of evidentiary hearings on limited work authorization request; ALAB-688, 16 NRC 473, 474 (1982)
- 10 CFR 2.762
application of finality rule; ALAB-690, 16 NRC 895 (1982)
- 10 CFR 2.762
requirements for filing appellate briefs; LBP-82-78, 16 NRC 1115 (1982)
- 10 CFR 2.762(a)
appeal of rejection of contention; ALAB-683, 16 NRC 161 (1982)
contents of briefs on appeal; ALAB-693, 16 NRC 956 (1982)
rejection of argument for dismissal of appeal; ALAB-690, 16 NRC 895 (1982)
use of informal oral notification to trigger time for seeking appeal; ALAB-690, 16 NRC 895 (1982)
- 10 CFR 2.762(a), (c), and (d)
failure of appeal to conform to the requirements of; ALAB-684, 16 NRC 166 (1982)
- 10 CFR 2.762(f)
failure of appeal to conform to the requirements of; ALAB-684, 16 NRC 166 (1982)
- 10 CFR 2.764
amendment of; ALAB-686, 16 NRC 457, 458 (1982)
Appeal Board obligation to conduct immediate effectiveness review in manufacturing license proceedings; ALAB-689, 16 NRC 889, 891 (1982)
- 10 CFR 2.764 (1982)
applicability of immediate effectiveness review to manufacturing license case; ALAB-686, 16 NRC 456, 457 (1982)
- 10 CFR 2.764(e)(1)(ii), (3)(iii) (1982)
amendment of; ALAB-686, 16 NRC 457, 458 (1982)
- 10 CFR 2.764(e)(2)
immediate effectiveness reviews by appeal board; ALAB-686, 16 NRC 456 (1982)
- 10 CFR 2.764(f)
applicability of, to order converting provisional operating license to full term; LBP-82-58, 16 NRC 532 (1982)
deficiencies in emergency offsite medical arrangements for public not a deterrent to full-power operation of San Onofre; CLI-82-14, 16 NRC 25 (1982)
effectiveness of full-power licenses for San Onofre; CLI-82-27, 16 NRC 884 (1982)
effectiveness of license amendment pending Commission review; LBP-82-60A, 16 NRC 556 (1982)
- 10 CFR 2.764(f) (1982)
results of Commission immediate effectiveness review; ALAB-693, 16 NRC 954 (1982)
- 10 CFR 2.764(f)(2)
Commission and Staff responsibilities before full-power license issues; ALAB-680, 16 NRC 144 (1982)
- 10 CFR 2.770(a)
appeal board authority to review entire record sua sponte; ALAB-685, 16 NRC 451 (1982)
- 10 CFR 2.771
specificity required of motion for reconsideration; LBP-82-68, 16 NRC 749 (1982)
time for filing objections to nonfinal decisions; LBP-82-72, 16 NRC 971 (1981)
- 10 CFR 2.780
conversations among parties in a licensing proceeding; ALAB-680, 16 NRC 144 (1982)
- 10 CFR 2.785(a)
appeal board authority to review entire record sua sponte; ALAB-685, 16 NRC 451 (1982)
nature of cases subject to sua sponte review by Appeal Board; ALAB-689, 16 NRC 890-91 (1982)
- 10 CFR 2.785(b)(1)
petition for directed certification of unpublished order; ALAB-688, 16 NRC 473 (1982)
- 10 CFR 2.785(b)(2)
authority for appeal board to hear safety issues it has raised sua sponte; CLI-82-12, 16 NRC 3 (1982)
distinction between appellate review of record and sua sponte authority; ALAB-685, 16 NRC 452 (1982)
- 10 CFR 2.785(d)
certification of questions to Commission concerning adjudicatory board's jurisdiction to consider quality assurance issues; ALAB-681, 16 NRC 148 (1982)
certification of questions to Commission regarding reopening record on QA/QC issues; LBP-82-70, 16 NRC 763 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

- 10 CFR 2.786(b)
 - reasons for Commission review of appeal board decision; CLI-82-12A, 16 NRC 18 (1982)
- 10 CFR 2.786(b)(5)
 - delegation of review by Commission
- 10 CFR 2.787(b)
 - authority of Appeal Panel Chairman; ALAB-683, 16 NRC 161 (1982)
- 10 CFR 2.788(e)
 - factors determining stay of effectiveness of a permit; ALAB-686, 16 NRC 456 (1982)
 - factors to be considered by Licensing Board in ruling on a motion for stay; LBP-82-84, 16 NRC 1184 (1982)
- 10 CFR 2.788(e)(2)
 - application of "irreparable injury" criterion to manufacturing license case; ALAB-686, 16 NRC 458 (1982)
 - satisfaction of criterion, in manufacturing license case; ALAB-689, 16 NRC 891 (1982)
- 10 CFR 2.790
 - classification of security plans as commercial or financial information; LBP-82-80, 16 NRC 1124 (1982)
 - executive privilege for intragovernmental communications; LBP-82-82, 16 NRC 1162 (1982)
- 10 CFR 2.790(d)
 - release of sensitive information to intervenors in NRC proceedings; LBP-82-80, 16 NRC 1124, 1125 (1982)
- 10 CFR 2.800-2.809
 - publication of petition for rulemaking for comment; DPRM-82-2, 16 NRC 1215 (1982)
- 10 CFR 2.802
 - eligibility to petition for rulemaking; CLI-82-19, 16 NRC 74 (1982)
 - raising general health and safety concerns; LBP-82-52, 16 NRC 185 (1982)
- 10 CFR 2, App. A, V(f)(4)
 - standards for determining whether directed certification is appropriate; LBP-82-62, 16 NRC 566-67 (1982)
- 10 CFR 2, App. A, VIII(b)(3)
 - health effects of transmission lines; LBP-82-76, 16 NRC 1085 (1982)
- 10 CFR 2, App. A, IX(d)(3)
 - acceptance of untimely appeals; ALAB-684, 16 NRC 165 (1982)
- 10 CFR 2, App. C
 - definition of material false statement; ALAB-691, 16 NRC 911, 915 (1982)
- 10 CFR 9
 - basis for Staff claim of privilege; LBP-82-87, 16 NRC 1202 (1982)
- 10 CFR 9.103
 - request for Commission review of Board order ruling on contentions to be litigated; CLI-82-15, 16 NRC 33 (1982)
 - source of guidance on Commission's intent; CLI-82-25, 16 NRC 877 (1982)
- 10 CFR 19
 - retaliation against QA/QC personnel in violation of; LBP-82-54, 16 NRC 220 (1982)
- 10 CFR 20
 - Staff position on risks to individuals from radiation doses; LBP-82-57, 16 NRC 501 (1982)
 - summary disposition of contention alleging off-gas emissions fail to comply with radiation protection standards of; LBP-82-58, 16 NRC 522-24 (1982)
- 10 CFR 20.1
 - rejection of contention asserting equipment repairs will cause failure to meet exposure requirements of; LBP-82-51, 16 NRC 173 (1982)
- 10 CFR 20.1(c)
 - detection of loose parts; LBP-82-76, 16 NRC 1066 (1982)
 - showing necessary to establish conformance with as-low-as-reasonably achievable requirement for radioactive; LBP-82-58, 16 NRC 522 (1982)
- 10 CFR 21.2
 - basis for Staff claim of privilege; LBP-82-87, 16 NRC 1202 (1982)
- 10 CFR 30
 - consolidation of materials license and operating license proceedings; ALAB-682, 16 NRC 151-52 (1982)
- 10 CFR 40
 - license amendment sought for water collection and retention system at inactive thorium ore mill; CLI-82-21, 16 NRC 402 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

10 CFR 50

amendment of, to impose additional licensing requirements; ALAB-686, 16 NRC 457 (1982)
consolidation of materials license and operating license proceedings; ALAB-682, 16 NRC 152 (1982)
detection of loose parts, LBP-82-76, 16 NRC 1066 (1982)
interaction between safety and non-safety systems at Seabrook; LBP-82-76, 16 NRC 1082 (1982)
performance of pre-construction permit, safety-related activities; CLI-82-23, 16 NRC 417 (1982)
TMI compliance with reactor operator requalification program; LBP-82-56, 16 NRC 349 (1982)

10 CFR 50.10

exemption from, granted in part for experimental reactor; CLI-82-23, 16 NRC 415 (1982)
grant of partial exemption from, for breeder reactor project; ALAB-688, 16 NRC 473 (1982)
public interest considerations in granting exemption from; CLI-82-23, 16 NRC 422, 425 (1982)

10 CFR 50.10(b)(2)

distinction between construction permits and manufacturing licenses; ALAB-686, 16 NRC 456 (1982)

10 CFR 50.10(c)

limitations of, construction activities prior to issuance of LWA or construction permit; CLI-82-23, 16 NRC 416, 418 (1982)

10 CFR 50.10(e)(1)

activities allowed under limited work authorization; ALAB-688, 16 NRC 473 (1982)

10 CFR 50.10(e)(2)

requirements for grant of limited work authorization; ALAB-688, 16 NRC 473 (1982)

10 CFR 50.10(e)(3)(i)-(ii)

foreclosure of consideration of site suitability issues through grant of exemption to 50.10; CLI-82-23, 16 NRC 423 (1982)

10 CFR 50.11(b)

application of licensing provisions of Atomic Energy Act to Department of Energy; ALAB-679, 16 NRC 125 (1982)

10 CFR 50.12

application of, to first-of-a-kind project; CLI-82-23, 16 NRC 419 (1982)
history of; CLI-82-23, 16 NRC 446 (1982)
public interest factors favoring grant of exemption under; CLI-82-23, 16 NRC 439 (1982)

10 CFR 50.12(a)

discussion of criteria for granting exemption from 50.10; CLI-82-23, 16 NRC 418, 419, 422 (1982)

10 CFR 50.12(b)

Commission interpretation of; CLI-82-23, 16 NRC 423 (1982)
discussion of criteria to be met for granting of exemption from 50.10(c); CLI-82-23, 16 NRC 416, 418-19, 422, 423, 426 (1982)

10 CFR 50.12(b)(1)

environmental impacts considered in allowing pre-construction permit site preparation activities; CLI-82-23, 16 NRC 426, 437 (1982)

10 CFR 50.12(b)(2)

redressability of pre-construction permit site activities; CLI-82-23, 16 NRC 427 (1982)

10 CFR 50.12(b)(3)

foreclosure of consideration of alternatives through initiation of site preparation activities; CLI-82-23, 16 NRC 428 (1982)

10 CFR 50.12(b)(4)

effects of delay in initiating breeder reactor project; CLI-82-23, 16 NRC 429, 438 (1982)

10 CFR 50.13

providing design features for particularized threats of sabotage; CLI-82-19, 16 NRC 73 (1982)
rejection of electromagnetic pulse contention as challenge to; LBP-82-51, 16 NRC 174 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

- 10 CFR 50.31
consolidation of proceedings; DPRM-82-2, 16 NRC 1214 (1982)
- 10 CFR 50.33(f)
contention alleges inadequacy of sum allotted for decommissioning; LBP-82-57, 16 NRC 481 (1982)
preclusion of financial qualifications considerations in operating license proceedings; LBP-82-76, 16 NRC 1045, 1081 (1982)
- 10 CFR 50.33(g)
compliance of Diablo Canyon onsite State and local emergency response plans and preparedness; LBP-82-70, 16 NRC 763 (1982)
compliance of Diablo Canyon's emergency plans with; LBP-82-70, 16 NRC 760, 798 799, 855 (1982)
deficiencies in boundaries for EPZs at Seabrook; LBP-82-76, 16 NRC 1077 (1982)
failure of applicant to submit emergency response plans of State and local governments; LBP-82-76, 16 NRC 1077 (1982)
responsibility for preparation of radiological response plan; LBP-82-82, 16 NRC 1162 (1982)
- 10 CFR 50.34(a)(3)(i)
inapplicability to test reactors; LBP-82-64, 16 NRC 698 (1982)
- 10 CFR 50.34(a)(7)
amendment of construction permits; DD-82-1207
- 10 CFR 50.34(b)(6)(i) and (ii)
information to be submitted in FSAR on management structure and organization; DD-82-1207
- 10 CFR 50.34(b)(6)(ii)
deficiencies in FSAR, on quality assurance for operations; LBP-82-76, 16 NRC 1073 (1982)
- 10 CFR 50.34(b)(6)(v)
failure of Seabrook emergency plan to address requirements of; LBP-82-76, 16 NRC 1074 (1982)
- 10 CFR 50.34(c)
criteria for protection of nuclear reactors; CLI-82-19, 16 NRC 62 (1982)
- 10 CFR 50.34a
showing necessary to establish conformance with as-low-as-reasonably achievable requirement for radioactive releases; LBP-82-58, 16 NRC 522 (1982)
- 10 CFR 50.36
detection of loose parts; LBP-82-76, 16 NRC 1066 (1982)
- 10 CFR 50.36a
showing necessary to establish conformance with as-low-as-reasonably achievable requirement for radioactive; LBP-82-58, 16 NRC 522 (1982)
- 10 CFR 50.40
consideration of liquid pathway accident impacts; LBP-82-76, 16 NRC 1037 (1982)
- 10 CFR 50.40(b)(1982)
elimination of financial qualifications issues from operating license proceedings; LBP-82-76, 16 NRC 1081 (1982)
- 10 CFR 50.40(d)
findings on NEPA compliance, to be made by Director prior to issuance of operating license; ALAB-693, 16 NRC 956 (1982)
- 10 CFR 50.44
adequacy of Seabrook design to withstand excessive hydrogen generation; LBP-82-76, 16 NRC 1039
amount of hydrogen generation to be taken in account in containment design; LBP-82-76, 16 NRC 1064 (1982)
differences between hydrogen control requirements and hydrogen release assumptions for purpose of environmental qualification; LBP-82-76, 16 NRC 1049 (1982)
hydrogen production at TMI; LBP-82-76, 16 NRC 1063 (1982)
- 10 CFR 50.46
necessity for risk assessment; LBP-82-76, 16 NRC 1033 (1982)
- 10 CFR 50.47
assurance of adequacy of protective measures to be taken in radiological emergency; LBP-82-70, 16 NRC 761 (1982)
conformance of Summer facility's emergency information brochure with; LBP-82-57, 16 NRC 490 (1982)
division of responsibility for emergency planning; LBP-82-77, 16 NRC 1099 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

- emergency planning standards for evacuation of persons without vehicles; LBP-82-77, 16 NRC 1100 (1982)
emergency response plans for radiation-injured in the general public; ALAB-680, 16 NRC 135 (1982)
enforcement of requirements of; LBP-82-70, 16 NRC 802 (1982)
failure of Seabrook emergency plan to address requirements of; LBP-82-76, 16 NRC 1074 (1982)
location of emergency public alerting system
necessity for FEMA findings on State emergency plan; LBP-82-85, 16 NRC 1188 (1982)
operating license conditioned on resolution of emergency preparedness matters under; CLI-82-14, 16 NRC 25 (1982)
responsibility for onsite radiation monitoring during radiological emergency; LBP-82-70, 16 NRC 827 (1982)
responsibility for preparation of radiological response plan; LBP-82-82, 16 NRC 1162 (1982)
standard of Board review of emergency planning; LBP-82-70, 16 NRC 802 (1982)
- 10 CFR 50.47(a)
FEMA review of emergency planning pamphlet in license amendment proceeding; LBP-82-60, 16 NRC 547 (1982)
requirement for Staff issuance of supplement to Safety Evaluation Report; LBP-82-68, 16 NRC 749 (1982)
- 10 CFR 50.47(a) and (b)
protective action contention limited to onsite measures; LBP-82-76, 16 NRC 1046 (1982)
- 10 CFR 50.47(a)(1)
emergency planning findings required prior to issuance of full-power license; LBP-82-68, 16 NRC 745 (1982)
NRC emergency preparedness findings required for issuance of operating license; LBP-82-57, 16 NRC 484 (1982)
- 10 CFR 50.47(a)(1), (a)(2) and (b)
failure of emergency plan to take local conditions into account; LBP-82-75, 16 NRC 991 (1982)
- 10 CFR 50.47(a)(2)
basis of Commission findings that emergency plans are adequate; LBP-82-68, 16 NRC 745-46 (1982)
basis of NRC findings on adequacy of offsite emergency plans; LBP-82-57, 16 NRC 485 (1982)
- 10 CFR 50.47(b)
adequacy of Summer facility's emergency response planning; LBP-82-57, 16 NRC 495 (1982)
admission of contention contesting compliance of iodine monitors with; LBP-82-75, 16 NRC 1010 (1982)
failure of applicant to meet standards of; LBP-82-57, 16 NRC 509 (1982)
FEMA review of emergency planning pamphlet in license amendment proceeding; LBP-82-60, 16 NRC 547 (1982)
requirement for specific identification of radiation monitors; LBP-82-75, 16 NRC 1010 (1982)
satisfaction of requirements for radiological emergency response training; LBP-82-57, 16 NRC 495 (1982)
- 10 CFR 50.47(b)(1)
assurance that Diablo Canyon meets planning standard of; LBP-82-70, 16 NRC 763, 768, 799 (1982)
inadequacy of plan for assigning emergency communications and notification responsibility; LBP-82-75, 16 NRC 1027 (1982)
inadequate delineation of responsibilities of onsite emergency personnel; LBP-82-75, 16 NRC 1024 (1982)
lack of assurance of assistance from offsite agencies during radiological emergency; LBP-82-75, 16 NRC 1023 (1982)
- 10 CFR 50.47(b)(1), (2) and (3)
lack of incorporation of federal response capabilities in Shoreham's emergency plans; LBP-82-75, 16 NRC 1022 (1982)
- 10 CFR 50.47(b)(2)
adequacy and continuity of staffing at Seabrook; LBP-82-76, 16 NRC 1046 (1982)
inadequacy of Shoreham's accident assessment and monitoring abilities; LBP-82-75, 16 NRC 1025 (1982)
inadequate delineation of responsibilities of onsite emergency personnel; LBP-82-75, 16 NRC 1024 (1982)
lack of assurance of assistance from offsite agencies during radiological emergency; LBP-82-75, 16 NRC 1023 (1982)
lack of incorporation of federal response capabilities in Shoreham's emergency plans; LBP-82-75, 16 NRC 1022 (1982)
requirement for specific identification of radiation monitors; LBP-82-75, 16 NRC 1010 (1982)
- 10 CFR 50.47(b)(3)
adequacy of Diablo Canyon's emergency response support and resources; LBP-82-70, 16 NRC 771, 808, 810 (1982)
inadequate delineation of responsibilities of onsite emergency personnel; LBP-82-75, 16 NRC 1024 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

- lack of assurance of assistance from offsite agencies during radiological emergency; LBP-82-75, 16 NRC 1023 (1982)
- lack of incorporation of federal response capabilities in Shoreham's emergency plans; LBP-82-75, 16 NRC 1022 (1982)
- 10 CFR 50.47(b)(4)
- adequacy of Diablo Canyon's emergency classification system; LBP-82-70, 16 NRC 772, 810-811 (1982)
- inadequacies cited in emergency classification and action scheme at Seabrook; LBP-82-76, 16 NRC 1045 (1982)
- inadequacy of Shoreham interim safety parameter display system; LBP-82-75, 16 NRC 1028 (1982)
- inadequacy of Shoreham's accident assessment and monitoring abilities; LBP-82-75, 16 NRC 1025 (1982)
- requirement for specific identification of radiation monitors; LBP-82-75, 16 NRC 1010 (1982)
- 10 CFR 50.47(b)(5)
- adequacy of Diablo Canyon's emergency public alerting system; LBP-82-70, 16 NRC 775, 811, 816 (1982)
- adequacy of San Onofre emergency public notification system; CLI-82-14, 16 NRC 25 (1982)
- burden of demonstrating existence of satisfactory prompt notification system for plume exposure pathway EPZ populace; LBP-82-60, 16 NRC 550 (1982)
- relevancy of applicant's public information emergency planning pamphlet; LBP-82-60, 16 NRC 542 (1982)
- scope of regulations for altering plume exposure pathway EPZ populace of radiological emergency; LBP-82-57, 16 NRC 495 (1982)
- size and configuration of plume exposure emergency planning zone; ALAB-680, 16 NRC 132 (1982)
- 10 CFR 50.47(b)(5) and (6)
- adequacy of Shoreham prompt notification system; LBP-82-75, 16 NRC 1021 (1982)
- 10 CFR 50.47(b)(6)
- adequacy of offsite communications system at Diablo Canyon to cope with radiological emergency; LBP-82-70, 16 NRC 776, 816, 820 (1982)
- adequacy of Shoreham prompt notification system; LBP-82-75, 16 NRC 1021 (1982)
- 10 CFR 50.47(b)(7)
- adequacy of Diablo Canyon public notification program; LBP-82-70, 16 NRC 780, 820 (1982)
- inadequacy of plan for assigning emergency communications and notification responsibility; LBP-82-75, 16 NRC 1027 (1982)
- lack of dissemination of emergency planning information to public; LBP-82-76, 16 NRC 1046 (1982)
- satisfaction of requirement for notification and education of public on what action they should take in radiological emergency; LBP-82-57, 16 NRC 495 (1982)
- 10 CFR 50.47(b)(8)
- adequacy of Diablo Canyon equipment for implementing emergency plans; LBP-82-70, 16 NRC 782, 825, 828 (1982)
- admission of contention contesting compliance of iodine monitors with; LBP-82-75, 16 NRC 1010 (1982)
- inadequacy of Shoreham interim safety parameter display system; LBP-82-75, 16 NRC 1028 (1982)
- inadequacy of Shoreham's accident assessment and monitoring abilities; LBP-82-75, 16 NRC 1025 (1982)
- inadequate delineation of responsibilities of onsite emergency personnel; LBP-82-75, 16 NRC 1024 (1982)
- lack of assurance of assistance from offsite agencies during radiological emergency; LBP-82-75, 16 NRC 1023 (1982)
- nonconformance of Shoreham plan and procedures for operation of Emergency Operations Facility; LBP-82-75, 16 NRC 1025 (1982)
- requirement for specific identification of radiation monitors; LBP-82-75, 16 NRC 1010 (1982)
- 10 CFR 50.47(b)(9)
- capability for assessing and monitoring radioactive releases at Diablo Canyon; LBP-82-70, 16 NRC 785, 828, 833 (1982)
- inadequacy of accident and dose assessment models; LBP-82-75, 16 NRC 1028 (1982)
- inadequacy of Shoreham interim safety parameter display system; LBP-82-75, 16 NRC 1028 (1982)
- inadequacy of Shoreham's accident assessment and monitoring abilities; LBP-82-75, 16 NRC 1025 (1982)
- requirement for specific identification of radiation monitors; LBP-82-75, 16 NRC 1010 (1982)
- types of radiological hazards; ALAB-680, 16 NRC 139 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

- 10 CFR 50.47(b)(10)
adequacy of Shoreham plans for implementation of protective actions during radiological emergency; LBP-82-75, 16 NRC 1023 (1982)
reliability of evacuation time estimates at Diablo Canyon; LBP-82-70, 16 NRC 786, 833, 836 (1982)
- 10 CFR 50.47(b)(11)
adequacy of means for controlling radiological exposures of emergency workers at Diablo Canyon; LBP-82-70, 16 NRC 786, 836 (1982)
failure of applicant to meet training requirements for emergency response personnel; LBP-82-75, 16 NRC 1024 (1982)
lack of means to control radiological exposures to emergency workers; LBP-82-75, 16 NRC 1025 (1982)
- 10 CFR 50.47(b)(12)
adequacy of medical and public health support during radiological emergency at Diablo Canyon; LBP-82-70, 16 NRC 787, 837 (1982)
Appeal Board and Licensing Board differences in interpretation; CLI-82-27, 16 NRC 884 (1982)
inadequacies in Shoreham's emergency plans for medical and public health support; LBP-82-75, 16 NRC 1022 (1982)
interpretation of "contaminated injured individuals"; ALAB-680, 16 NRC 135, 136 (1982)
interpretation of "contaminated injured individuals"; LBP-82-75, 16 NRC 997 (1982)
lack of assurance of assistance from offsite agencies during radiological emergency; LBP-82-75, 16 NRC 1023 (1982)
obligation of licensee to make emergency medical services arrangements; LBP-82-60A, 16 NRC 556 (1982)
- 10 CFR 50.47(b)(13)
adequacy of plans for recovery and reentry operation at Diablo Canyon; LBP-82-70, 16 NRC 788, 839 (1982)
failure of intervenor to revise recovery and reentry contention; LBP-82-75, 16 NRC 1016 (1982)
- 10 CFR 50.47(b)(14)
adequacy of Diablo Canyon's plans for emergency exercises and drills; LBP-82-70, 16 NRC 790, 841 (1982)
- 10 CFR 50.47(b)(15)
adequacy of radiological emergency response training at Diablo Canyon; LBP-82-70, 16 NRC 792, 845 (1982)
education of public officials on problems of radiation exposure; LBP-82-77, 16 NRC 1098 (1982)
failure of applicant to meet training requirements of emergency response personnel; LBP-82-75, 16 NRC 1024 (1982)
lack of assurance of assistance from offsite agencies during radiological emergency; LBP-82-75, 16 NRC 1023 (1982)
lack of means to control radiological exposures to emergency workers; LBP-82-75, 16 NRC 1025 (1982)
- 10 CFR 50.47(b)(16)
adequacy of planning for review and distribution of emergency plans at Diablo Canyon; LBP-82-70, 16 NRC 792, 847, 849 (1982)
- 10 CFR 50.47(c)(1)
alternative means of notifying public of an emergency; ALAB-680, 16 NRC 132 (1982)
compensations for emergency planning deficiencies; ALAB-680, 16 NRC 142 (1982)
criteria for determining merits of emergency planning issue; ALAB-680, 16 NRC 131 (1982)
distribution of emergency planning pamphlet to transients; LBP-82-60, 16 NRC 552 (1982)
factors to be considered by licensing boards in allowing full-power operation prior to resolution of emergency planning issues; ALAB-680, 16 NRC 136, 138 (1982)
immediate effectiveness review of decision to issue conditioned full-power operating license; CLI-82-14, 16 NRC 25 (1982)
intervenors challenge licensing board's conclusions concerning radiation assessment capabilities of local jurisdictions; ALAB-680, 16 NRC 140 (1982)
significance of deficiencies in emergency plan; LBP-82-57, 16 NRC 485-87 (1982)
significance of deficiencies in Summer facility emergency plans; LBP-82-57, 16 NRC 509 (1982)
- 10 CFR 50.47(c)(2)
adjustment of emergency planning zone to correct deficiency; LBP-82-57, 16 NRC 486-87 (1982)
challenges to; CLI-82-36, 16 NRC 36 (1982)
deficiencies in boundaries for emergency planning zones at Seabrook; LBP-82-76, 16 NRC 1077 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

- difference between California EPZs and federally defined EPZs; LBP-82-70, 16 NRC 764-66, 801, 802 (1982)
- extent of testimony to be allowed on emergency planning beyond 10-mile plume exposure EPZ; CLI-82-25, 16 NRC 872 (1982)
- significance of deficiencies in emergency plan; LBP-82-57, 16 NRC 486-87 (1982)
- size and configuration of plume exposure emergency planning zone; ALAB-680, 16 NRC 132 (1982)
- 10 CFR 50.54(a)(1), (2)
- failure of Seabrook emergency plan to address requirements of; LBP-82-76, 16 NRC 1074 (1982)
- 10 CFR 50.54(p)
- licensee's responsibilities prior to implementing safeguards contingency plan; CLI-82-19, 16 NRC 79, 80 (1982)
- 10 CFR 50.54(q)
- relevancy of applicant's public information emergency planning pamphlet; LBP-82-60, 16 NRC 542 (1982)
- 10 CFR 50.54(s)(2)(ii)
- deadline for correction of emergency planning deficiencies at Indian Point; CLI-82-25, 16 NRC 869 (1982)
- distribution of emergency planning pamphlet to transients; LBP-82-60, 16 NRC 552 (1982)
- division of responsibility for emergency planning; LBP-82-77, 16 NRC 1099 (1982)
- period for correction of emergency planning deficiencies in operating nuclear power plants; ALAB-680, 16 NRC 131 (1982)
- relevancy of applicant's public information emergency planning pamphlet; LBP-82-60, 16 NRC 542 (1982)
- time limit on correction of emergency planning deficiencies; LBP-82-61, 16 NRC 563 (1982)
- 10 CFR 50.55a
- compliance of Seabrook safety-related equipment; LBP-82-76, 16 NRC 1037 (1982)
- reliability of Seabrook safety-related equipment in accident environment; LBP-82-76, 16 NRC 1082 (1982)
- 10 CFR 50.57
- findings, on NEPA compliance, to be made by Director prior to issuance of operating license; ALAB-693, 16 NRC 956 (1982)
- 10 CFR 50.57(a)(3)(i)
- need for administrative controls to prevent cask drop; LBP-82-77, 16 NRC 1104 (1982)
- 10 CFR 50.57(c)
- means of raising question of low-power operation; LBP-82-68, 16 NRC 741 (1982)
- 10 CFR 50.58(a)
- referral of applications for construction permit and operating license amendments to ACRS for review; LBP-82-64, 16 NRC 602 (1982)
- 10 CFR 50.109
- backfitting of facilities; LBP-82-64, 16 NRC 698 (1982)
- 10 CFR 50, App. A
- admission of contention on protection of Seabrook safety systems from turbine missiles; LBP-82-76, 16 NRC 1067 (1982)
- application to test reactor; LBP-82-64, 16 NRC 653, 697-99 (1982)
- compliance of Seabrook safety-related equipment; LBP-82-76, 16 NRC 1037 (1982)
- deficiencies in FSAR, on quality assurance for operations; LBP-82-76, 16 NRC 1073 (1982)
- inadequacy of interim safety parameter display system; LBP-82-75, 16 NRC 1028 (1982)
- necessity of analysis of systems interaction to assess ability of system's design; LBP-82-76, 16 NRC 1034 (1982)
- reliability of Seabrook safety-related equipment in accident environment; LBP-82-76, 16 NRC 1082 (1982)
- satisfaction of single failure criterion by emergency feedwater system; LBP-82-76, 16 NRC 1059 (1982)
- 10 CFR 50, App. A, Criterion 2
- applicability to test reactor; LBP-82-64, 16 NRC 646 (1982)
- consideration of design basis event in connection with seismic event for test reactor; LBP-82-64, 16 NRC 697 (1982)
- 10 CFR 50, App. A, GDC 4
- environmental qualifications contention seen as challenge to regulations; LBP-82-76, 16 NRC 1048 (1982)
- 10 CFR 50, App. A, GDC 13
- compliance of Seabrook instrumentation
- 10 CFR 50, App. A, GDC 14, 15, 31, 32
- compliance of in-service inspection of steam generator tubes; LBP-82-76, 16 NRC 1067 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

- 10 CFR 50, App. A, GDC 19-22
adequacy of Seabrook design to minimize operator error at Seabrook; LBP-82-76, 16 NRC 1040 (1982)
- 10 CFR 50, App. A, GDC 63, 64
adequacy of monitoring of routine releases of radioactivity from Seabrook; LBP-82-76, 16 NRC 1040 (1982)
- 10 CFR 50, App. A, IV.E.5-7
inadequacies in Shoreham's emergency plans for medical and public health support; LBP-82-75, 16 NRC 1022 (1982)
- 10 CFR 50, App. B
extent of quality assurance programs required by; LBP-82-56, 16 NRC 380 (1982)
compliance of Seabrook's method for seismic qualification of electrical equipment; LBP-82-76, 16 NRC 1068 (1982)
deficiencies in regulations on which Seabrook QA program is based; LBP-82-76, 16 NRC 1069 (1982)
quality control of licensed operator training; LBP-82-56, 16 NRC 300 (1982)
sufficiency of quality assurance controls at Zimmer facility challenged; LBP-82-54, 16 NRC 217 (1982)
violation of requirement for nonconformance report; LBP-82-54, 16 NRC 220 (1982)
- 10 CFR 50, App. B, Criterion VII
contention challenges quality assurance for vendor purchases; LBP-82-54, 16 NRC 218 (1982)
- 10 CFR 50, App. B, Criterion VIII
contention cites failure of applicant to maintain material traceability as required by; LBP-82-54, 16 NRC 218 (1982)
- 10 CFR 50, App. B, Criterion XVI
failure of applicant to identify and correct construction deficiencies; LBP-82-54, 16 NRC 219 (1982)
- 10 CFR 50, App. B, III and XI
compliance of Seabrook safety-related equipment; LBP-82-76, 16 NRC 1037 (1982)
- 10 CFR 50, App. D
special circumstances necessary for consideration of class 9 accidents in environmental review; LBP-82-58, 16 NRC 529 (1982)
- 10 CFR 50, App. E
adequacy of Summer facility onsite emergency plan; LBP-82-57, 16 NRC 485 (1982)
assurance of adequacy of protective measures to be taken in radiological emergency; LBP-82-70, 16 NRC 761
compliance of Diablo Canyon's emergency plans with; LBP-82-70, 16 NRC 760, 798 799, 855 (1982)
failure of Seabrook emergency plan to address requirements of; LBP-82-76, 16 NRC 1074 (1982)
inadequacy of Shoreham's accident assessment and monitoring abilities; LBP-82-75, 16 NRC 1025 (1982)
lack of means to control radiological exposures to emergency workers; LBP-82-75, 16 NRC 1025 (1982)
protective action contention limited to onsite measures; LBP-82-76, 16 NRC 1046 (1982)
relevancy of applicant's public information emergency planning pamphlet; LBP-82-60, 16 NRC 542 (1982)
standard of Board review of emergency planning; LBP-82-70, 16 NRC 802 (1982)
- 10 CFR 50, App. E, D.2
adequacy of Shoreham prompt notification system; LBP-82-75, 16 NRC 1021 (1982)
- 10 CFR 50, App. E, F.1
public participation in emergency planning exercises; LBP-82-70, 16 NRC 843 (1982)
- 10 CFR 50, App. E, Item A
lack of assurance of assistance from offsite agencies during radiological emergency; LBP-82-75, 16 NRC 1023 (1982)
- 10 CFR 50, App. E, Item B
adequacy of Shoreham plans for implementation of protective actions during radiological emergency; LBP-82-75, 16 NRC 1023 (1982)
- 10 CFR 50, App. E, Item F
failure of applicant to meet training requirements for emergency response personnel; LBP-82-75, 16 NRC 1024 (1982)
- 10 CFR 50, App. E, Item IV.A.7
lack of incorporation of federal response capabilities in Shoreham's emergency plans; LBP-82-75, 16 NRC 1022 (1982)
- 10 CFR 50, App. E, Item IV.B.8
nonconformance of Shoreham plan and procedures for operation of Emergency Operations Facility; LBP-82-75, 16 NRC 1025 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

- 10 CFR 50, App. E, Items A and C
inadequate delineation of responsibilities of onsite emergency personnel; LBP-82-75, 16 NRC 1024 (1982)
- 10 CFR 50, App. E, Items IV.E.2 and 8
inadequacy of interim safety parameter display system; LBP-82-75, 16 NRC 1028 (1982)
- 10 CFR 50, App. E, IV.A
adequacy of Diablo Canyon's emergency classification system; LBP-82-70, 16 NRC 772, 810-811 (1982)
- 10 CFR 50, App. E, IV.D.3
adequacy of San Onofre emergency public notification system; CLI-82-14, 16 NRC 25 (1982)
objective of areawide alert signal for notifying public during radiological emergency; ALAB-680, 16 NRC 134 (1982)
size and configuration of plume exposure emergency planning zone; ALAB-680, 16 NRC 132 (1982)
time limit on correction of deficiencies in requirements of; LBP-82-61, 16 NRC 563 (1982)
- 10 CFR 50, App. E, IV.E
adequacy of means for controlling radiological exposures of emergency workers at Diablo Canyon; LBP-82-70, 16 NRC 836 (1982)
- 10 CFR 50, App. E, IV.F
education of public officials on problems of radiation exposure; LBP-82-77, 16 NRC 1099 (1982)
- 10 CFR 50, App. E, note 2
effect of population density on size and configuration of plume exposure pathway EPZ; CLI-82-15, 16 NRC 36 (1982)
- 10 CFR 50, App. G
compliance of Seabrook safety-related equipment; LBP-82-76, 16 NRC 1037 (1982)
- 10 CFR 50, App. G and H
compliance of end-of-life value for weldment; LBP-82-63, 16 NRC 588 (1982)
- 10 CFR 50, App. I
conformance of La Crosse Plant off-gas emissions with; LBP-82-58, 16 NRC 521-22 (1982)
- 10 CFR 50, App. K
compliance of Seabrook safety-related equipment; LBP-82-76, 16 NRC 1037 (1982)
- 10 CFR 50, App. M
Commission authority to license offsite manufacture of nuclear power reactors; ALAB-686, 16 NRC 455 (1982)
distinction between construction permits and manufacturing licenses; ALAB-686, 16 NRC 456 (1982)
- 10 CFR 51
amendment of; DPRM-82-2, 16 NRC 1216 (1982); LBP-82-58, 16 NRC 527 (1982)
necessity for environmental impact statement for spent fuel pool modification; LBP-82-65, 16 NRC 727 (1982)
- 10 CFR 51.20(a), (d)
failure of applicant to assess risk of class 9 accidents at Seabrook; LBP-82-76, 16 NRC 1035 (1982)
- 10 CFR 51.20(g)(1)
application of Table S-4 to transportation of spent fuel to and storage at Catawba facility; LBP-82-51, 16 NRC 171 (1982)
- 10 CFR 51.21
consideration of liquid pathway accident impacts; LBP-82-76, 16 NRC 1037 (1982)
- 10 CFR 51.21(g)(2)(v)
application of Table S-4 to transportation of spent fuel to and storage at Catawba facility; LBP-82-51, 16 NRC 171 (1982)
- 10 CFR 51.52(a)
evidentiary hearings on issues prior to issuance of final environmental impact statements; ALAB-688, 16 NRC 474 (1982)
- 10 CFR 51.52(b)(1)
introduction of Staff EIA into evidence; LBP-82-78, 16 NRC 1111 (1982)
- 10 CFR 51.52(b)(3)
modification of operating license FES, regarding energy alternative, ordered; LBP-82-58, 16 NRC 531 (1982)
- 10 CFR 51.53
litigation of need-for-power issues; LBP-82-63, 16 NRC 589 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

- 10 CFR 51.53(c)
 - consideration, in operating license proceeding, of alternative energy sources; LBP-82-58, 16 NRC 527 (1982)
 - dismissal of need-for-power contention on basis of; LBP-82-58, 16 NRC 528 (1982)
- 10 CFR 55
 - admission of contention challenging operator qualifications; LBP-82-51, 16 NRC 170 (1982)
 - Staff's implementation of; LBP-82-56, 16 NRC 369 (1982)
 - TMI compliance with reactor operator requalification program; LBP-82-56, 16 NRC 349 (1982)
- 10 CFR 55.10
 - TMI licensee's program for certification of competency of operator candidates; LBP-82-56, 16 NRC 365 (1982)
- 10 CFR 55.10(a)(6)
 - reasons for certification of reactor operators; LBP-82-56, 16 NRC 353 (1982)
 - redundancy required in training and testing reactor operators; LBP-82-56, 16 NRC 364 (1982)
- 10 CFR 55.20
 - licensing board jurisdiction over scope of reactor operator exams; LBP-82-56, 16 NRC 372 (1982)
 - NRC Staff role in auditing operator training and testing; LBP-82-56, 16 NRC 364 (1982)
- 10 CFR 55.20-55.23
 - grading of site-specific reactor operator exams; LBP-82-56, 16 NRC 372 (1982)
- 10 CFR 55.33
 - material false statement in connection with recertification of reactor operator; LBP-82-56, 16 NRC 348 (1982)
 - TMI licensee's program for certification of competency of operator candidates; LBP-82-56, 16 NRC 365 (1982)
- 10 CFR 55.33(4)
 - redundancy required in training and testing reactor operators; LBP-82-56, 16 NRC 364 (1982)
 - Board recommendation for proceeding to modify or suspend reactor operators' licenses; LBP-82-56, 16 NRC 309 (1982)
 - licensing board jurisdiction over revocation of reactor operator's license; LBP-82-56, 16 NRC 309 (1982)
 - licensing board recommendation for proceeding to consider penalties against reactor operators; LBP-82-56, 16 NRC 383 (1982)
- 10 CFR 55, App. A
 - material false statement in connection with recertification of reactor operator; LBP-82-56, 16 NRC 348 (1982)
 - redundancy required in training and testing reactor operators; LBP-82-56, 16 NRC 364 (1982)
- 10 CFR 55, App. A(5)
 - NRC Staff role in auditing operator training and testing; LBP-82-56, 16 NRC 364 (1982)
- 10 CFR 71 and 73
 - exclusion of portion of contention concerning transportation of irradiated fuel assemblies; LBP-82-51, 16 NRC 172 (1982)
- 10 CFR 73
 - purpose of; CLI-82-19, 16 NRC 72 (1982)
- 10 CFR 73.1(a)(1)
 - adequacy of power reactor security force training based on Regulatory Guides; CLI-82-19, 16 NRC 86 (1982)
 - adequacy of training of Diablo Canyon security force; CLI-82-19, 16 NRC 106 (1982)
 - definition of design basis threat of radiological sabotage; CLI-82-19, 16 NRC 59 (1982)
 - description of design basis insider threat; CLI-82-19, 16 NRC 102 (1982)
 - efficacy of provisions for training security forces at nuclear power plants; CLI-82-19, 16 NRC 84 (1982)
 - interpretation of numerical size of external assault force characterized in design basis threat as "several"; CLI-82-19, 16 NRC 54 (1982)
 - limitations on design basis threat; CLI-82-19, 16 NRC 74 (1982)
 - proper response to generic challenges to; CLI-82-19, 16 NRC 74 (1982)
 - threat to nuclear reactors from terrorist groups; CLI-82-19, 16 NRC 73 (1982)
- 10 CFR 73.1(a)(1) and (2)
 - comparison of external attack components applicable to commercial power reactors and fuel cycle facilities; CLI-82-19, 16 NRC 62 (1982)
- 10 CFR 73.2(h) and (i)
 - definition of vital area and equipment; CLI-82-19, 16 NRC 96 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

- 10 CFR 73.2(k)
 - security measures for building intrusion into isolation zone; CLI-82-19, 16 NRC 97 (1982)
- 10 CFR 73.2(p)
 - definition of radiological sabotage; CLI-82-19, 16 NRC 58 (1982)
- 10 CFR 73.2(y)
 - definition of power reactor fuel as special nuclear material; CLI-82-19, 16 NRC 59 (1982)
- 10 CFR 73.20
 - characterization of size of attack force; CLI-82-19, 16 NRC 68 (1982)
- 10 CFR 73.21
 - deletion of safeguards information; CLI-82-19, 16 NRC 61 (1982)
- 10 CFR 73.21(c)(vi)
 - access to restricted documents; CLI-82-17, 16 NRC 49 (1982)
 - criteria for granting access to security plan; LBP-82-80, 16 NRC 1123, 1125 (1982)
- 10 CFR 73.40 (1974)
 - criteria for protection of nuclear reactors; CLI-82-19, 16 NRC 62 (1982)
- 10 CFR 73.40(c)
 - licensee's responsibilities prior to implementing safeguards contingency plan; CLI-82-19, 16 NRC 79, 80 (1982)
- 10 CFR 73.40(d)
 - licensee's responsibilities after preparing safeguards contingency plan; CLI-82-19, 16 NRC 79 (1982)
- 10 CFR 73.46(h)(2)
 - liaison between security forces of fuel reprocessing facilities and local law enforcement authorities; CLI-82-19, 16 NRC 91 (1982)
- 10 CFR 73.50(g)(2)
 - difference in levels of coordination with local law enforcement agencies between fuel storage facilities and power reactors; CLI-82-19, 16 NRC 91 (1982)
- 10 CFR 73.55
 - implementation of applicant's safeguards contingency plan; CLI-82-19, 16 NRC 79 (1982)
 - size of adversary force against which safeguards performance is evaluated; CLI-82-19, 16 NRC 68 (1982)
- 10 CFR 73.55(a)
 - meeting high-assurance objective of; CLI-82-19, 16 NRC 86 (1982)
 - objectives of reactor security system; CLI-82-19, 16 NRC 59 (1982)
 - protection of vital equipment; CLI-82-19, 16 NRC 96 (1982)
 - satisfaction of general performance objectives of; CLI-82-19, 16 NRC 101 (1982)
 - standards for safeguarding special nuclear materials; CLI-82-19, 16 NRC 76 (1982)
 - substitution of security measures in lieu of regulatory requirements; CLI-82-19, 16 NRC 97 (1982)
 - sufficiency of Diablo Canyon's safeguards system; CLI-82-19, 16 NRC 98 (1982)
 - use of security measures other than those required by Commission regulations; CLI-82-19, 16 NRC 60 (1982)
- 10 CFR 73.55(b)(1)
 - employment of contract guard force in physical security organization; CLI-82-19, 16 NRC 82 (1982)
 - licensee's responsibility to establish a physical security organization; CLI-82-19, 16 NRC 81 (1982)
- 10 CFR 73.55(b)(2) and (3)
 - management criteria for licensee's physical security organization; CLI-82-19, 16 NRC 81, 83 (1982)
- 10 CFR 73.55(b)(4)
 - implementation of guard training at Diablo Canyon; CLI-82-19, 16 NRC 86 (1982)
 - implementation of security force training; CLI-82-19, 16 NRC 87 (1982)
 - training requirements for members of licensee's physical security organization; CLI-82-19, 16 NRC 81, 83 (1982)
- 10 CFR 73.55(b)-(h)
 - number of armed responders required to counter design basis threat of radiological sabotage; CLI-82-19, 16 NRC 104 (1982)
 - security measures beyond requirements of; CLI-82-19, 16 NRC 59 (1982)
- 10 CFR 73.55(c)(1) and (2)
 - protection of vital equipment; CLI-82-19, 16 NRC 96 (1982)
- 10 CFR 73.55(c)(3)
 - security measures for building intrusion into isolation zone; CLI-82-19, 16 NRC 97 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

- 10 CFR 73.55(c)(4)
 - inspection of protected areas; CLI-82-19, 16 NRC 94 (1982)
- 10 CFR 73.55(c)(5)
 - illumination of protected areas; CLI-82-19, 16 NRC 94 (1982)
- 10 CFR 73.55(d)
 - detection function of access requirements of; CLI-82-19, 16 NRC 94 (1982)
- 10 CFR 73.55(d)(1)-(4)
 - control of access into protected areas; CLI-82-19, 16 NRC 94 (1982)
- 10 CFR 73.55(d)(1)-(6)
 - exceptions to controlled access to protected areas; CLI-82-19, 16 NRC 98 (1982)
- 10 CFR 73.55(d)(2)-(f)
 - function of badging and escort requirements of; CLI-82-19, 16 NRC 94 (1982)
- 10 CFR 73.55(d)(7)
 - control of access into vital areas; CLI-82-19, 16 NRC 94 (1982)
- 10 CFR 73.55(d)(8)
 - access to security containment; CLI-82-19, 16 NRC 94 (1982)
- 10 CFR 73.55(e)(1)-(3)
 - description of detection aids in reactor security systems; CLI-82-19, 16 NRC 93 (1982)
- 10 CFR 73.55(f)
 - maintenance of communications between security forces and alarm stations; CLI-82-19, 16 NRC 88 (1982)
- 10 CFR 73.55(f)(1)-(4)
 - testing and maintenance of security communications system; CLI-82-19, 16 NRC 88 (1982)
- 10 CFR 73.55(g)(3)
 - testing and maintenance of security communications system; CLI-82-19, 16 NRC 88 (1982)
- 10 CFR 73.55(h)
 - goals of safeguards contingency plan; CLI-82-19, 16 NRC 78 (1982)
 - size of force responding to external assault on nuclear power plant; CLI-82-19, 16 NRC 67 (1982)
- 10 CFR 73.55(h)(1)
 - criteria for safeguards contingency plan; CLI-82-19, 16 NRC 64 (1982)
- 10 CFR 73.55(h)(2) and (4)
 - safeguards contingency plans for liaison between licensee's security force and local law enforcement authorities; CLI-82-19, 16 NRC 89 (1982)
- 10 CFR 73.55(h)(3)
 - authority to determine number of armed responders to design basis threat to power reactor; CLI-82-19, 16 NRC 105 (1982)
 - factors determining size of security force at nuclear power plants; CLI-82-19, 16 NRC 103 (1982)
- 10 CFR 73.55(h)(6)
 - purpose of observation of isolation zones and protected areas; CLI-82-19, 16 NRC 94 (1982)
- 10 CFR 73, App. B
 - training requirements for members of licensee's physical security organization; CLI-82-19, 16 NRC 81, 83 (1982)
- 10 CFR 73, App. B, II.D
 - training requirements for security forces for power reactors not covered by Regulatory Guides; CLI-82-19, 16 NRC 85 (1982)
- 10 CFR 73, App. B, V
 - equipment to be used by Diablo Canyon security force; CLI-82-19, 16 NRC 86 (1982)
- 10 CFR 73, App. C
 - criteria for safeguards contingency plans; CLI-82-19, 16 NRC 64 (1982)
 - Diablo Canyon's compliance with security communications requirements of; CLI-82-19, 16 NRC 89 (1982)
 - goals of safeguards contingency plan; CLI-82-19, 16 NRC 78 (1982)
- 10 CFR 73, App. C, 1-5
 - contents of safeguards contingency plan; CLI-82-19, 16 NRC 79 (1982)
- 10 CFR 73, App. C, 3^b
 - safeguards contingency plans for liaison between licensee's security force and local law enforcement authorities; CLI-82-19, 16 NRC 89 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

- 10 CFR 73, App. C, Section 1.a
 - criteria for safeguards contingency plans; CLI-82-19, 16 NRC 64 (1982)
- 10 CFR 95, App. A, sub-topic 112
 - denial of petition for rulemaking to amend Classification Guide for Safeguards Information
- 10 CFR 100
 - adequacy of investigations regarding landslides near GE test reactor site; LBP-82-64, 16 NRC 631 (1982)
 - adequacy of Seabrook design to withstand excessive hydrogen generation; LBP-82-76, 16 NRC 1039
 - amount of hydrogen generation to be taken into account in containment design; LBP-82-76, 16 NRC 1064 (1982)
 - capability of Verona Fault; LBP-82-64, 16 NRC 600 (1982)
 - components required to be safety grade; LBP-82-70, 16 NRC 794, 850 (1982)
 - litigation of hydrogen control issues under; LBP-82-76, 16 NRC 1065 (1982)
 - radiological consequences of postulated design basis events at GE test reactor; LBP-82-64, 16 NRC 646 (1982)
 - showing required for hydrogen generation contention; LBP-82-76, 16 NRC 1064 (1982)
- 10 CFR 100, App. A
 - adoption of; LBP-82-64, 16 NRC 698 (1982)
 - application to test reactors; LBP-82-64, 16 NRC 653 (1982)
- 10 CFR 100, App. A
 - determination of safe shutdown earthquake at Diablo Canyon facility; CLI-82-12A, 16 NRC 10 (1982)
- 10 CFR 100, App. A, III(c)
 - need to qualify pressurizer heaters as safety grade; LBP-82-70, 16 NRC 793-95, 850 (1982)
 - qualification of relief and block valves as safety grade; LBP-82-70, 16 NRC 797, 853 (1982)
- 10 CFR 100, App. A, III(a)
 - qualification of pressurizer heaters and block and power-operated relief valves as safety-grade; LBP-82-70, 16 NRC 761 (1982)
- 10 CFR 100, App. A, V(a)
 - failure of station blackout contention to satisfy nexus requirement; LBP-82-63, 16 NRC 591 (1982)
- 10 CFR 100, App. A, V(a)(1)(iii)
 - localization of 1886 Charleston earthquake relative to Summer facility; LBP-82-55, 16 NRC 231 (1982)
- 10 CFR 100, App. A, VI(b)(3)
 - reason for not requiring test facility structure to withstand full postulated design basis; LBP-82-64, 16 NRC 684 (1982)
- 10 CFR 100, App. B
 - deficiencies in FSAR, on quality assurance for operations; LBP-82-76, 16 NRC 1073 (1982)
- 10 CFR 100.10(c)(1)
 - inapplicability to test reactors; LBP-82-64, 16 NRC 698 (1982)
- 10 CFR 100.11
 - amount of hydrogen generation to be taken in account in containment design; LBP-82-76, 16 NRC 1064 (1982)
 - criteria for determining vital areas; CLI-82-19, 16 NRC 97 (1982)
 - purpose of offsite radiological doses set forth in; CLI-82-19, 16 NRC 58 (1982)
 - standards for radioactive releases from acts of sabotage; CLI-82-19, 16 NRC 76 (1982)
- 10 CFR 110.70(a), (c)
 - means for providing notice of export license applications; ALAB-682, 16 NRC 158 (1982)
- 10 CFR 110.70(b)
 - means for providing notice of export license applications; ALAB-682, 16 NRC 158 (1982)
- 10 CFR 110.82
 - means for providing notice of export license applications; ALAB-682, 16 NRC 158 (1982)
- 10 CFR 170
 - basis for award of intervenors' attorney's fees; LBP-82-81, 16 NRC 1139 (1982)
- 10 CFR 305.76-5
 - limits on agency prerogatives to interpret policy statements; LBP-82-69, 16 NRC 753 (1982)

LEGAL CITATIONS INDEX

REGULATIONS

10 CFR 50 App. E, IV. A

adequacy of Diablo Canyon's emergency response support and resources; LBP-82-70, 16 NRC 771, 808, 810 (1982)

40 CFR 81.350

consideration of radiation emissions from nuclear power plant in developing air quality standard for coal-fired power plant; LBP-82-58, 16 NRC 526 (1982)

40 CFR 1502.6, 1507.2 (1981)

consideration of psychological stress issues under NEPA; LBP-82-53, 16 NRC 203 (1982)

44 CFR 20-1.5410 and 20-1.5404-1(f)

conflict of interest consideration in NRC's review of its contracts; LBP-82-73, 16 NRC 977 (1982)

LEGAL CITATIONS INDEX

STATUTES

- Administration Procedure Act, 5 U.S.C. 553 (b)(A)
binding nature of policy statements LBP-82-69, 16 NRC 753 (1982)
- Administrative Procedure Act, 5 U.S.C. 553(e) and 555(e)
publication of petition for rulemaking for comment, DPRM-82-2, 16 NRC 1216 (1982)
- Administrative Procedure Act, 5 U.S.C. 556 and 557
right of intervenors to reopen record on quality assurance issues; ALAB-681, 16 NRC 148 (1982)
- Administrative Procedure Act, 556(d), 5 U.S.C. 556(d)
burden of proof in show cause order; LBP-82-64, 16 NRC 655 (1982)
- Administrative Procedure Act, 9(b), 5 U.S.C. 558
continuation of licensee operation during processing of license renewal requests; ALAB-682, 16 NRC 159 (1982)
- Atomic Energy Act, 103, 42 U.S.C. 2133
Commission authority to license offsite manufacture of nuclear power reactors; ALAB-686, 16 NRC 455 (1982)
- Atomic Energy Act, 103b, 42 U.S.C. 2133b
cause for consideration of applicant's/licensee's character; ALAB-650, 14 NRC 915 (1982)
- Atomic Energy Act, 104c
reason for defining GE reactor as testing reactor; LBP-82-64, 16 NRC 698 (1982)
- Atomic Energy Act, 147
interpretation of "several" as used in design basis threat; CLI-82-19, 16 NRC 54 (1982)
- Atomic Energy Act, 161
consolidation of proceedings for power reactor units; DPRM-82-2, 16 NRC 1215 (1982)
- Atomic Energy Act, 170A, 42 U.S.C. §2210a(b)
on-the-record disclosure of potential conflicts of interest; LBP-82-73, 16 NRC 978 (1982)
- Atomic Energy Act, 181, 42 U.S.C. 2231
burden of proof in show cause order; LBP-82-64, 16 NRC 655 (1982)
- circumstances favoring disclosure of confidential information; LBP-82-59, 16 NRC 538 (1982)
- delegation of authority to rule on requests for hearing on seismic design issues; LBP-82-64, 16 NRC 601 (1982)
- Atomic Energy Act, 186a, 42 U.S.C. 2236a
applicant/licensee obligation to provide accurate and timely information in NRC proceeding; ALAB-650, 14 NRC 910 (1982)
- cause for consideration of applicant's/licensee's character; ALAB-650, 14 NRC 915 (1982)
- Atomic Energy Act, 182(b), 42 U.S.C. 2232(b)
ACRS review of restart of GE training reactor; LBP-82-64, 16 NRC 602 (1982)
- Atomic Energy Act, 189, 42 U.S.C. 2239
hearing requirement for contested issues in operating license proceeding; LBP-82-68, 16 NRC 748 (1982)
- persons who may request hearings; LBP-82-87, 16 NRC 1201 (1982)
- right of intervenors to reopen record on quality assurance issues; ALAB-681, 16 NRC 148 (1982)
- Atomic Energy Act, 189a, 42 U.S.C. 2239(a)
conditions to the right to a hearing; ALAB-687, 16 NRC 469 (1982)
- contravention of hearing rights; ALAB-687, 16 NRC 467 (1982); LBP-82-87, 16 NRC 1200 (1982)
- need for hearing on request for exemption from regulations; CLI-82-23, 16 NRC 421, 422, 435, 445 (1982)
- need for hearing on safety-related activities; CLI-82-23, 16 NRC 429, 430 (1982)
- nondiscretionary right to hearing on enforcement action; CLI-82-16, 16 NRC 45 (1982)
- point of intervention process; LBP-82-81, 16 NRC 1137 (1982)
- timing of discovery on contentions; ALAB-687, 16 NRC 468 (1982)
- type of hearing required for materials licensing action; ALAB-682, 16 NRC 155, 157-59 (1982)

LEGAL CITATIONS INDEX

STATUTES

Atomic Energy Act, 191a
jurisdiction of Licensing Boards; LBP-82-69, 16 NRC 752 (1982)

Atomic Energy Act, 191, 42 U.S.C. §2241
purpose and composition of Licensing Boards; LBP-82-87, 16 NRC 1201 (1982)

Clayton Act, 4, 15 U.S.C. 15
basis for award of intervenors' attorney's fee; LBP-82-81, 16 NRC 1139 (1982)

Delaware River Basin Compact, 15.1(s)(1), Pub. L. No. 87-328, 75 Stat 688 (1961)
preclusion of Licensing Board jurisdiction over impacts of water allocation; LBP-82-72, 16 NRC 969 (1982)

Energy Reorganization Act of 1974, 210
identification of unresolved safety issues to be addressed in spent fuel pool modification proceeding; LBP-82-65, 16 NRC 717 (1982)

N.Y. Executive Law §§20, et seq. (McKinney)
responsibility for preparation of radiological response plan; LBP-82-82, 16 NRC 1162 (1982)

National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321, et seq.
limitations on matters to be resolved in operating license proceedings; LBP-82-76, 16 NRC 1087 (1982)
necessity for environmental impact statement for spent fuel pool modification; LBP-82-65, 16 NRC 727 (1982)
preparation of EIA on plan for solidification of high-level radioactive wastes; ALAB-679, 16 NRC 123 (1982)
timing for litigation of contentions involving; ALAB-688, 16 NRC 473 (1982)

National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332
NEPA consideration of use of spent fuel for nuclear weapons; LBP-82-53, 16 NRC 199 (1982)

National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(C)
content of environmental impact statement for major federal actions; LBP-82-76, 16 NRC 1076 (1982)

National Environmental Policy Act of 1969 (NEPA), 102(2)(E), 42 U.S.C. §4332(2)(E)
compliance of EIA for Big Rock Point spent fuel pool expansion; LBP-82-78, 16 NRC 1108, 1112-13 (1982)

Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35
national policy favoring expeditious completion of breeder reactor; CLI-82-23, 16 NRC 429, 430 (1982)

West Valley Demonstration Project Act, Pub. L. No. 96-368, 94 Stat. 1347 (1980)
purpose of; ALAB-679, 16 NRC 123 (1982)

West Valley Demonstration Project Act, 2(c)
review of plan for solidification of high-level radioactive wastes; ALAB-679, 16 NRC 123 (1982)

LEGAL CITATIONS INDEX

OTHERS

- Asimow, "Public Participation in the Adoption of Interpretive Rules and Policy Statements," 75 Mich. L. Rev. 521 (1976)
- limits on agency prerogatives to interpret policy statements LBP-82-69, 16 NRC 753 (1982)
 - 3 K. Davis, *Administrative Law Treatise* 17:13 at 319-20 (2d Ed. 1980)
 - alteration of Board authority to conduct hearings; LBP-82-69, 16 NRC 753 (1982)
 - M. Frankel, *The Search for Truth: An Umpireal View*, 123 U. Pa. L. Rev. 1031, 1037 (1975)
 - value of formal legal procedures in reviewing technical issues; CL1-82-20, 16 NRC 115 (1982)
 - 4 J. Moore's Federal Practice §26.68 (2d ed. 1982)
 - good cause for issuance of protective orders; LBP-82-82, 16 NRC 1153 (1982)
 - 4A Moore's Federal Practice §33.25(1) at 33-129-130 (2d ed. 1981)
 - application of NEPA "rule of reason" to applicant's responses to interrogatories; LBP-82-67, 16 NRC 736 (1982)
 - 5 Moore's Federal Practice §41.05[1] at 41-58
 - Licensing Board discretion to prescribe terms for withdrawal of construction permit application; LBP-82-81, 16 NRC 1134 (1982)
 - 5 Moore's Federal Practice §41.05[1] at 41-72 to 41-73 (2d ed. 1981)
 - basis for departing from rule of dismissal of applications without prejudice; LBP-82-81, 16 NRC 1135 (1982)
 - 5 Moore's Federal Practice, §41.05[2], at 71-75 (2d ed. 1981)
 - denial of motions for withdrawal without prejudice; LBP-82-81, 16 NRC 1135 (1982)
 - 5 Moore's Federal Practice §41.06, at 41-83, 41-86 1081-1083 (2d ed. 1975)
 - conditions that require payment of costs or attorney's fees; LBP-82-81, 16 NRC 1139-40 (1982)
 - Federal Rules of Civil Procedure, Rule 26(b)
 - application to NRC proceedings; LBP-82-82, 16 NRC 1157 (1982)
 - Federal Rules of Civil Procedure, Rule 26(b)(3)
 - adaptation of NRC discovery rules from; LBP-82-82, 16 NRC 1159 (1982)
 - clarification of qualified work product doctrine
 - Federal Rules of Civil Procedure, Rule 41(a)(1), (2)
 - circumstances favoring dismissal of applications without prejudice; LBP-82-81, 16 NRC 1134 (1982)
 - Federal Rules of Civil Procedure, Rule 56
 - analogy between summary disposition procedures and; LBP-82-58, 16 NRC 519 (1982)
 - Federal Rules of Evidence, Rule 706
 - compliance of licensing board with, in appointing its own expert witness; LBP-82-55, 16 NRC 277 (1982)
 - Shapiro, "The Choice of Rulemaking or Adjudication in the Development of Administrative Policy," 78 Harv. L. Rev. 921, 947-950 (1965)
 - limits on agency prerogatives to interpret policy statements LBP-82-69, 16 NRC 753 (1982)
 - 8 J. Wigmore, *Evidence* §2290 (McNaughten rev. 1961)
 - purpose of attorney-client privilege; LBP-82-82, 16 NRC 1157 (1982)
 - 8 J. Wigmore, *Evidence* §2992, at 554 (McNaughten rev. 1961)
 - essential elements of attorney-client privilege; LBP-82-82, 16 NRC 1157 (1982)
 - Wright and Miller, *Federal Practice and Procedure: Civil* §2024, at 198 (1970)
 - documents prepared in contemplation of litigation as attorney work product; LBP-82-82, 16 NRC 1161 (1982)
 - 9 Wright and Miller, *Federal Practice and Procedure: Civil* §2364 (1971)
 - denial of motions for withdrawal without prejudice; LBP-82-81, 16 NRC 1135, 1142 (1982)

SUBJECT INDEX

ACCIDENT(S)

assessment and monitoring at Diablo Canyon, capabilities for; LBP-82-70, 16 NRC 756 (1982)
class 9, assessment of risk of, at Seabrook; LBP-82-76, 16 NRC 1029 (1982)
class 9, showing required for consideration of, in operating license proceedings; LBP-82-58, 16 NRC 512 (1982)
consequences and probabilities, scope of testimony on; CLI-82-25, 16 NRC 867 (1982)
core-disruptive, Staff position on classification of; CLI-82-22, 16 NRC 405 (1982)
greater-than-design-basis, adequacy of Summer facility emergency plans to cope with; LBP-82-57, 16 NRC 477 (1982)

ADJUDICATORY BOARDS

jurisdiction of, to reopen record on quality assurance issues; ALAB-681, 16 NRC 146 (1982)

AIRCRAFT CRASH

probability of, at Three Mile Island; ALAB-692, 16 NRC 921 (1982)

ALERTING

of public during radiological emergency, through siren system; LBP-82-57, 16 NRC 477 (1982)
of public near Diablo Canyon of radiological emergency, methods and procedures for; LBP-82-70, 16 NRC 756 (1982)
the public of radiological emergency, rejection of contentions alleging inadequacies in tone system for; LBP-82-75, 16 NRC 986 (1982)

ALTERNATIVE ENERGY SOURCES

consideration of, in operating license proceedings; LBP-82-58, 16 NRC 512 (1982)

ALTERNATIVES

to reracking in spent fuel pool, technical discussion of; LBP-82-65, 16 NRC 714 (1982)
to spent fuel pool expansion, need for discussion of, in EIA; LBP-82-79, 16 NRC 1116 (1982)

AMENDMENT

of Rules of Practice to require operating license hearings for each nuclear power reactor, denial of petition for; DPRM-82-2, 16 NRC 1209 (1982)
to materials license, authorizing work at inactive thorium ore mill; CLI-82-21, 16 NRC 401 (1982)

AMICUS CURIAE

participation in appellate hearings; ALAB-679, 16 NRC 121 (1982)

ANTICIPATED TRANSIENTS WITHOUT SCRAM

at Seabrook, reduction of risk of, through interim measures; LBP-82-76, 16 NRC 1029 (1982)
scope of interrogatories on; LBP-82-67, 16 NRC 734 (1982)
summary disposition of contention asserting inadequate assurance of small probability of occurrence of; LBP-82-57, 16 NRC 477 (1982)

APPEAL BOARD

authority to decline Licensing Board referrals; ALAB-687, 16 NRC 460 (1982)
decision, Commission dismissal of grant of review of; CLI-82-26, 16 NRC 880 (1982)
directed to certify questions on interpretation of 10 CFR 50.47(b)(12) to the Commission; CLI-82-27, 16 NRC 883 (1982)
disagreement with Licensing Board interpretation of emergency planning issue; ALAB-680, 16 NRC 127 (1982)
obligation to conduct immediate effectiveness review in manufacturing license proceeding; ALAB-686, 16 NRC 454 (1982)
policy concerning enforcement of time limits for filing exceptions; ALAB-684, 16 NRC 162 (1982)
portions of the record addressed in sua sponte review by; ALAB-691, 16 NRC 897 (1982)
request for authority to hear sua sponte safety issues, denial of; CLI-82-12, 16 NRC 1 (1982)

SUBJECT INDEX

- review of Licensing Board decision concerned with integrity of hearing process; ALAB-691, 16 NRC 897 (1982)
- review of Licensing Board rulings on economic issues, intervention requests, or procedural matters, scope of; ALAB-691, 16 NRC 897 (1982)
- standard in reviewing Licensing Board decision in context of motion for stay pending appeal; ALAB-680, 16 NRC 127 (1982)
- sua sponte review authority, nature of, and relationship to effectiveness of Licensing Board decisions; ALAB-689, 16 NRC 887 (1982)
- See also Certification
- APPEAL PANEL CHAIRMAN
 - authority of, to summarily dismiss interlocutory appeal; ALAB-683, 16 NRC 160 (1982)
- APPEAL(S)
 - by licensees of order admitting intervenors to discretionary hearing on possible suspension of Units 2 and 3 denied; CLI-82-15, 16 NRC 27 (1982)
 - construed as complaint against Staff compliance with and implementation of Board order; ALAB-684, 16 NRC 162 (1982)
 - interlocutory, circumstances appropriate for; ALAB-683, 16 NRC 160 (1982)
 - interlocutory, exception to Commission's rule against; LBP-82-62, 16 NRC 565 (1982)
 - interlocutory, involving the scheduling of hearings or timing of admission of evidence; ALAB-688, 16 NRC 471 (1982)
 - standard for considering contention raised for first time on; ALAB-680, 16 NRC 127 (1982)
 - treatment of issues raised for first time on; ALAB-691, 16 NRC 897 (1982)
 - See also Briefs, Finality
- APPLICANT
 - consideration of character of; ALAB-691, 16 NRC 897 (1982)
 - liability of, for material false statement; ALAB-691, 16 NRC 897 (1982)
 - obligation of, in NRC proceeding, to provide timely and accurate information; ALAB-691, 16 NRC 897 (1982)
- ATOMIC SAFETY AND LICENSING BOARD
 - reconstitution of; CLI-82-24, 16 NRC 865 (1982)
 - sua sponte authority of; CLI-82-20, 16 NRC 109 (1982)
 - See also Licensing Board(s)
- ATTORNEY'S FEES
 - intervenors' payment of, as condition of withdrawal of construction permit application; LBP-82-81, 16 NRC 1128 (1982)
- AUXILIARY FEEDWATER SYSTEMS
 - at TMI-1, sua sponte issues raised on reliability of spargers in; CLI-82-12, 16 NRC 1 (1982)
- BAYESIAN THEORY
 - use of, for calculation of aircraft crash probability at Three Mile Island; ALAB-692, 16 NRC 921 (1982)
- BRIEFS
 - for appeals, contents of; ALAB-693, 16 NRC 952 (1982)
- BURDEN OF PROOF
 - for demonstrating compliance of offsite emergency plans; LBP-82-77, 16 NRC 1096 (1982)
 - for summary disposition motions; LBP-82-58, 16 NRC 512 (1982)
- BYPRODUCT MATERIALS LICENSE
 - renewal proceeding, standing to intervene in; ALAB-682, 16 NRC 150 (1982)
 - See also Materials License
- CALIFORNIA
 - comparison of slip rates of faults in; LBP-82-64, 16 NRC 596 (1982)
- CANCER
 - resulting from radiation from normal nuclear power plant operation, risk of; LBP-82-57, 16 NRC 477 (1982)
- CAVEAT
 - decision on full-power operating license issued with; LBP-82-70, 16 NRC 756 (1982)
- CERTIFICATION
 - of Appeal Board questions concerning jurisdiction of adjudicatory boards to reopen record on quality assurance issues; ALAB-681, 16 NRC 146 (1982)
 - of contentions to Commission or Appeal Board, burden not met for; LBP-82-51, 16 NRC 167 (1982)

SUBJECT INDEX

- of questions asking clarification of scope of testimony on emergency planning issues; CLI-82-25, 16 NRC 867 (1982)
standard for obtaining; LBP-82-69, 16 NRC 751 (1982)
See also Directed Certification
- CHLORINE
use of, to clean condenser cooling system at Seabrook; LBP-82-76, 16 NRC 1029 (1982)
- CLAMS, ASIATIC
burden of clarification and specificity of contention on; LBP-82-51, 16 NRC 167 (1982)
- CLARIFICATION
by Licensing Board of FEMA findings on, and standard operating procedures of, emergency plans; LBP-82-85, 16 NRC 1187 (1982)
- COLLATERAL ESTOPPEL
application of, to NRC proceedings; CLI-82-23, 16 NRC 412 (1982)
application of, to relitigation of environmental issues; LBP-82-76, 16 NRC 1029 (1982)
- COMMUNICATIONS
emergency, at Diablo Canyon, adequacy of; LBP-82-70, 16 NRC 756 (1982)
with outside agencies during radiological emergency, applicant required to respond to interrogatories on; LBP-82-67, 16 NRC 734 (1982)
- CONFLICT OF INTEREST
potential, responsibility of parties to disclose; LBP-82-73, 16 NRC 974 (1982)
- CONSOLIDATION
of hearings on power reactor units; DPRM-82-2, 16 NRC 1209 (1982)
of materials license renewal and operating license proceedings; ALAB-682, 16 NRC 150 (1982)
- CONSTRUCTION
activities prior to issuance of construction permit or LWA, limitations on; CLI-82-23, 16 NRC 412 (1982)
at La Salle Plant, partial denial of 2.206 petition regarding deficiencies in; DD-82-9, 16 NRC 396 (1982)
- CONSTRUCTION PERMIT
application, withdrawal without prejudice; LBP-82-81, 16 NRC 1128 (1982)
- CONTAINMENT
GE test reactor, integrity of; LBP-82-64, 16 NRC 596 (1982)
integrity, rejection of contention alleging compromise of; LBP-82-63, 16 NRC 571 (1982)
- CONTAMINATION
of liquid pathway during nuclear accident, rejection of contention alleging inadequate analysis of; LBP-82-76, 16 NRC 1029 (1982)
- CONTENTION(S)
admission of, pending effectiveness of Commission rule; LBP-82-53, 16 NRC 196 (1982)
good cause for acceptance of late-filed; LBP-82-63, 16 NRC 571 (1982)
intervenor excused for lateness in filing of; LBP-82-53, 16 NRC 196 (1982)
late-filed, acceptance of, where factor (i) has not been satisfied; LBP-82-63, 16 NRC 571 (1982)
late-filed, on quality assurance and management competence, adopted sua sponte by Licensing Board; LBP-82-54, 16 NRC 210 (1982)
new, on quality assurance and management competence, insufficient justification to reopen record to hear; CLI-82-20, 16 NRC 109 (1982)
nonspecific, admissibility of; ALAB-687, 16 NRC 460 (1982)
nontimely, arising from TMI-2 accident, standards for admission of; LBP-82-63, 16 NRC 571 (1982)
raised for first time on appeal, standard for considering; ALAB-680, 16 NRC 127 (1982)
reasons for requiring specificity of; LBP-82-52, 16 NRC 183 (1982)
resolution of factual questions in considering admissibility of; LBP-82-63, 16 NRC 571 (1982)
threshold showing of basis and specificity for admission of; LBP-82-75, 16 NRC 986 (1982)
untimely, standard for admission of; ALAB-687, 16 NRC 460 (1982)
See also Certification
- CONTROL ROOM
design, adequacy of, to minimize operator error at Seabrook; LBP-82-76, 16 NRC 1029 (1982)
- CONTROL SYSTEMS
automatic standby liquid, scope of interrogatories on; LBP-82-67, 16 NRC 734 (1982)
See also Chlorine, Emergency Core Cooling System

SUBJECT INDEX

COOLING POND

performance and fogging and icing, admission of contention questioning basis for data on; LBP-82-63, 16 NRC 571 (1982)

CORROSION

of steam generator tubes at TMI-1; CLI-82-12, 16 NRC 1 (1982)

COST-BENEFIT BALANCE

contention, denial of, because of continued validity of Table S-3; LBP-82-76, 16 NRC 1029 (1982)
contentions, burden not met for certification of; LBP-82-51, 16 NRC 167 (1982)
under NEPA, relevance of financial costs to; LBP-82-58, 16 NRC 512 (1982)

COUNSEL

conduct of, before a Licensing Board; LBP-82-87, 16 NRC 1195 (1982)

CRIMINAL PROSECUTION

of NRC examination cheaters; LBP-82-56, 16 NRC 281 (1982)

DECAY HEAT

adequacy of Seabrook's capacity for removal of; LBP-82-76, 16 NRC 1029 (1982)

DECISION

concerning holding of hearing on order restricting licensed operator overtime, vacation of; CLI-82-18, 16 NRC 50 (1982)

Licensing Board, grounds for defense of; ALAB-691, 16 NRC 897 (1982)

DECOMMISSIONING

of Humboldt Bay Plant, denial of 2,206 petition requesting; DD-82-7, 16 NRC 387 (1982)
of Seabrook Plant, negative impacts of; LBP-82-76, 16 NRC 1029 (1982)

DECONTAMINATION

consideration of impacts of, under NEPA; LBP-82-52, 16 NRC 183 (1982)
in event of radiological emergency at Summer facility, availability of facilities for; LBP-82-57, 16 NRC 477 (1982)

DEPARTMENT OF ENERGY

NRC authority to review demonstration waste solidification plan of; ALAB-679, 16 NRC 121 (1982)

DESIGN

adequacy and construction quality, admission of contention seeking independent assessment of; LBP-82-63, 16 NRC 571 (1982)
objectives of 10 CFR Part 50, Appendix I, compliance with; LBP-82-58, 16 NRC 512 (1982)
See also Control Room, Seismic Design

DESIGN BASIS

seismic and geologic, of GE test reactor, technical discussion of; LBP-82-64, 16 NRC 596 (1982)

DESIGN BASIS EVENT

at GE test reactor, postulated accident following; LBP-82-64, 16 NRC 596 (1982)

DESIGN BASIS THREAT

at Diablo Canyon, release of restricted documents dealing with definition of; CLI-82-17, 16 NRC 48 (1982)
of radiological sabotage at Diablo Canyon, physical security plan for countering; CLI-82-19, 16 NRC 53 (1982)

DETECTION SYSTEMS

loose parts, requirement for; LBP-82-76, 16 NRC 1029 (1982)
leakage, admission of contention alleging inadequate testing of; LBP-82-76, 16 NRC 1029 (1982)

DIESEL GENERATORS

reliability of, at Seabrook; LBP-82-76, 16 NRC 1029 (1982)

DIRECTED CERTIFICATION

of licensee's request for stay or dismissal of evidentiary proceeding on possible suspension of Units 2 and 3 denied; CLI-82-15, 16 NRC 27 (1982)
of question involving scheduling of hearings or timing of admission of evidence, denial of request for; ALAB-688, 16 NRC 471 (1982)
of questions addressing Licensing Board's refusal to admit evidence on effluent contract lawsuit, denial of; LBP-82-62, 16 NRC 565 (1982)
See also Certification

DISCOVERY

mandatory, suspension of; LBP-82-51, 16 NRC 167 (1982)
obligations of parties objecting to; LBP-82-82, 16 NRC 1144 (1982)

SUBJECT INDEX

on nuclear power plant security plans; LBP-82-80, 16 NRC 1121 (1982)

See also Privilege

DOCUMENTATION

of Seabrook deviations from current regulatory practice, requirement for; LBP-82-76, 16 NRC 1029 (1982)

DOCUMENTS

applicant- and Staff-generated, denial of intervenor's request for copies of; LBP-82-51, 16 NRC 167 (1982)

intragovernmental, privilege against discovery of; LBP-82-82, 16 NRC 1144 (1982)

responses to requests for production of; LBP-82-82, 16 NRC 1144 (1982)

DUE PROCESS

administrative, for licensed operators caught cheating on exams; LBP-82-56, 16 NRC 281 (1982)

NRC methods for ensuring; LBP-82-87, 16 NRC 1195 (1982)

See also Restricted Documents, Service of Documents

EARTHQUAKE(S)

Charleston, localization of, relative to Summer facility; LBP-82-55, 16 NRC 225 (1982)

design basis for GE test reactor, determination of; LBP-82-64, 16 NRC 596 (1982)

maximum magnitude, danger to nuclear plant structures at Summer site from; LBP-82-55, 16 NRC 225 (1982)

shallow and near-source, potential for, at Summer site; LBP-82-55, 16 NRC 225 (1982)

use of Brune Model to calculate maximum magnitude and peak acceleration of; LBP-82-55, 16 NRC 225 (1982)

See also Fault(s)

ECONOMICS

of decommissioning Humboldt Bay facility; DD-82-7, 16 NRC 387 (1982)

EFFECTIVENESS

of full-power operating license not stayed pending resolution of offsite medical arrangements issue; CLI-82-14, 16 NRC 24 (1982)

See also Regulations, Review

EFFLUENT

contract lawsuit, denial of directed certification of Licensing Board's ruling on inadmissibility of evidence on; LBP-82-62, 16 NRC 565 (1982)

ELECTRICAL WIRING

environmental qualification of; LBP-82-53, 16 NRC 196 (1982)

ELECTROMAGNETIC PULSE

contention considered challenge to regulations; LBP-82-51, 16 NRC 167 (1982)

EMBRITTLEMENT

admission of previously rejected contention on; LBP-82-51, 16 NRC 167 (1982)

of electrical insulation; LBP-82-53, 16 NRC 196 (1982)

EMERGENCY CLASSIFICATION SYSTEM

at Diablo Canyon, adequacy of; LBP-82-70, 16 NRC 756 (1982)

litigation of contentions on, prior to fuel loading; LBP-82-75, 16 NRC 986 (1982)

EMERGENCY CORE COOLING SYSTEM

at Catawba, reaffirmation of rejection of contention concerning postulated malfunctioning of; LBP-82-51, 16 NRC 167 (1982)

See also Cooling Systems

EMERGENCY EXERCISES

and drills, adequacy of Diablo Canyon's plans for; LBP-82-70, 16 NRC 756 (1982)

EMERGENCY FEEDWATER SYSTEM

satisfaction of single-failure criterion by; LBP-82-76, 16 NRC 1029 (1982)

EMERGENCY OPERATIONS FACILITY

scope of applicant's response to interrogatories on; LBP-82-67, 16 NRC 734 (1982)

EMERGENCY PLANNING

brochures, form and content of; LBP-82-66, 16 NRC 730 (1982)

by San Onofre to provide medical assistance for radiation-injured in the general public; ALAB-680, 16 NRC 127 (1982)

certification of Board questions asking clarification of scope of testimony on; CLI-82-25, 16 NRC 867 (1982)

circumstances appropriate for reopening the record on; LBP-82-68, 16 NRC 741 (1982)

contentions, denial of, as premature; LBP-82-76, 16 NRC 1029 (1982)

denial of certification of rejected contentions on; LBP-82-51, 16 NRC 167 (1982)

SUBJECT INDEX

findings necessary for issuance of low-power license: LBP-82-68, 16 NRC 741 (1982)
for medical services for contaminated injured individuals: LBP-82-75, 16 NRC 986 (1982)
for protective actions to be taken in Shoreham Plant vicinity, admission of contention questioning adequacy of:
LBP-82-75, 16 NRC 986 (1982)

offsite, requirement for FEMA findings on adequacy of: LBP-82-70, 16 NRC 756 (1982)
pamphlet for Big Rock Point Plant, attributes, content, purposes, and adequacy of; order for changes in and
distribution of: LBP-82-60, 16 NRC 540 (1982)

See also Evacuation

EMERGENCY PLANNING ZONE(S)

around nuclear power plants, responsibility for setting: LBP-82-70, 16 NRC 756 (1982)
at Summer facility, shape of: LBP-82-57, 16 NRC 477 (1982)

EMERGENCY PLANS

admission of contention relating to federal assistance for implementation of: LBP-82-75, 16 NRC 986 (1982)
at Diablo Canyon, assignment of responsibilities for; onsite emergency organization for implementing: LBP-82-70,
16 NRC 756 (1982)

Board clarification of FEMA findings on, and standard operating procedures under: LBP-82-85, 16 NRC 1187
(1982)

estimating training needs for purpose of: LBP-82-77, 16 NRC 1096 (1982)

for notifying transients of steps to take during radiological emergency: LBP-82-60, 16 NRC 540 (1982)

for offsite medical arrangements for public, license conditioned on resolution of: CLI-82-14, 16 NRC 24 (1982)

issuance of operating license prior to resolution of deficiencies in: ALAB-680, 16 NRC 127 (1982)

offsite, burden of proof for demonstrating compliance of: LBP-82-77, 16 NRC 1096 (1982)

procedures for correcting deficiencies in: LBP-82-77, 16 NRC 1096 (1982)

purpose of public information program under: LBP-82-66, 16 NRC 730 (1982)

rebuttable presumption on question of adequacy of: LBP-82-68, 16 NRC 741 (1982)

review and distribution of, at Diablo Canyon, assignment of responsibility for: LBP-82-70, 16 NRC 756 (1982)

to cope with greater-than-design-basis accident at Summer facility, adequacy of: LBP-82-57, 16 NRC 477 (1982)

See also Clarification

EMERGENCY PREPAREDNESS

basis of Licensing Board's findings on: LBP-82-68, 16 NRC 741 (1982)

EMERGENCY RESPONSE PLANS

at Diablo Canyon, adequacy of equipment and facilities for implementing; support and resources for: LBP-82-70,
16 NRC 756 (1982)

ENFORCEMENT ACTIONS

scope of proceedings on, CLI-82-16, 16 NRC 44 (1982)

ENVIRONMENTAL EFFECTS

of plant operation, showing required for consideration of, at evidentiary hearing: LBP-82-58, 16 NRC 512 (1982)

ENVIRONMENTAL IMPACT APPRAISAL

adequacy of, with respect to spent fuel pool expansion at Big Rock Point Plant: LBP-82-79, 16 NRC 1116 (1982)

ENVIRONMENTAL IMPACT STATEMENT

draft, as basis for late-filed radiation dose contention: LBP-82-79, 16 NRC 1116 (1982)

preparation of, for pre-construction permit activities, CLI-82-23, 16 NRC 412 (1982)

supplemental, on psychological health effects of operation of TMI, denial of licensee's motion asking about
preparation of: CLI-82-13, 16 NRC 21 (1982)

ENVIRONMENTAL ISSUES

application of collateral estoppel to relitigation of: LBP-82-76, 16 NRC 1029 (1982)

ENVIRONMENTAL QUALIFICATION

of emergency feedwater pumphouse HVAC, admission of contention asserting need for: LBP-82-76, 16 NRC 1029
(1982)

of safety-related equipment, lack of specificity of contention on: LBP-82-76, 16 NRC 1029 (1982)

suspension of licensee's obligation to answer Board question on: ALAB-685, 16 NRC 449 (1982)

EVACUATION

during radiological emergency at Summer facility, defects in transportation planning for: LBP-82-57, 16 NRC 477
(1982)

SUBJECT INDEX

of persons without vehicles, invalids, and schoolchildren during radiological emergency at Big Rock Point Plant, adequacy of plans for; LBP-82-77, 16 NRC 1096 (1982)

time estimates at Diablo Canyon, reliability of; LBP-82-70, 16 NRC 756 (1982)

EVIDENCE

drawing unfavorable inferences from; LBP-82-56, 16 NRC 281 (1982)

hearsay, in TMI cheating proceeding, Licensing Board treatment of; LBP-82-56, 16 NRC 281 (1982)

on accident risk, Licensing Board request for Commission guidance on treatment of; LBP-82-61, 16 NRC 560 (1982)

on effluent contract lawsuit, denial of directed certification of Licensing Board's ruling on inadmissibility of; LBP-82-62, 16 NRC 565 (1982)

See also Appeals

EXAMINATIONS

NRC reactor operator licensing, site-specific validation of, and proctoring and grading of; LBP-82-56, 16 NRC 281 (1982)

EXCEPTIONS

Appeal Board policy concerning enforcement of time limits for filing; ALAB-684, 16 NRC 162 (1982)

necessity of filing; ALAB-694, 16 NRC 958 (1982)

EXEMPTIONS

from 10 CFR 50.10(c) for first-of-a-kind project; CLI-82-23, 16 NRC 412 (1982)

See also Hearing(s)

FAULT(S)

Calaveras, characteristics of, relative to GE test reactor; LBP-82-64, 16 NRC 596 (1982)

deflection, technical discussions of; LBP-82-64, 16 NRC 596 (1982)

Hosgri, changes in seismic design bases of Diablo Canyon due to proximity of; LBP-82-12A, 16 NRC 7 (1982)

in California, characteristics of relative to GE test reactor; LBP-82-64, 16 NRC 596 (1982)

in vicinity of GE test reactor, activity of; LBP-82-64, 16 NRC 596 (1982)

San Fernando, seismicity of, relative to GE test reactor; LBP-82-64, 16 NRC 596 (1982)

Verona, characteristics of, relative to GE test reactor; LBP-82-64, 16 NRC 596 (1982)

Wateree Creek, near Summer facility, seismicity of; LBP-82-55, 16 NRC 225 (1982)

See also Ground Faulting

FEDERAL RULES OF CIVIL PROCEDURE

application of, to NRC proceedings; LBP-82-82, 16 NRC 1144 (1982)

FINALITY

test of, for appeal purposes; ALAB-690, 16 NRC 893 (1982)

FINANCIAL QUALIFICATIONS

amendment of regulations to preclude consideration of; LBP-82-76, 16 NRC 1029 (1982)

denial of 2206 petition requesting initiation of show-cause proceeding on basis of licensee's lack of; DD-82-8, 16 NRC 394 (1982)

issues, elimination of, from NRC proceedings; DPRM-82-2, 16 NRC 1209 (1982)

litigability of, in operating license proceedings; LBP-82-63, 16 NRC 571 (1982)

of applicant for fulfilling emergency planning responsibilities, consideration of; LBP-82-67, 16 NRC 734 (1982)

of applicants, elimination of consideration of; LBP-82-57, 16 NRC 477 (1982)

of small utility owners, dismissal of contentions on; LBP-82-51, 16 NRC 167 (1982)

FINDINGS OF FACT

proposed, consequences of failure to file; ALAB-691, 16 NRC 897 (1982)

proposed, significance of requirement to file; ALAB-691, 16 NRC 897 (1982)

simultaneous, denial of Staff motion to reconsider scheduling for; LBP-82-51A, 16 NRC 180 (1982)

FIRE PROTECTION SYSTEM

admission of contention listing inadequacies in, at Seabrook; LBP-82-76, 16 NRC 1029 (1982)

FISH

minimum standard for NEPA consideration of impingement and entrainment of; LBP-82-53, 16 NRC 196 (1982)

GROUND FAULTING

technical discussions of evidence, probability and estimates of offsets, and deflection relevant to; LBP-82-64, 16 NRC 596 (1982)

GROUND MOTION

at Summer facility, calculation of; LBP-82-55, 16 NRC 225 (1982)

SUBJECT INDEX

combined with surface offset, technical discussion; LBP-82-64, 16 NRC 596 (1982)
technical discussions of peak and vertical acceleration; LBP-82-64, 16 NRC 596 (1982)

HEALTH

effects of combined effluents from coal and nuclear power plants; LBP-82-58, 16 NRC 512 (1982)
effects of radiation releases, uranium fuel cycle, denial of summary disposition of contention alleging underestimation of; LBP-82-57, 16 NRC 477 (1982)
psychological, of residents of TMI area, preparation of supplemental EIS on; CLI-82-13, 16 NRC 21 (1982)

HEARING(S)

amicus participation in; ALAB-679, 16 NRC 121 (1982)
on grant of exemption, right to, under Atomic Energy Act; CLI-82-23, 16 NRC 412 (1982)
on issues related to enforcement action; CLI-82-16, 16 NRC 44 (1982)
on power reactor units, consolidation of; DPRM-82-2, 16 NRC 1209 (1982)
on site preparation activities, requirement for, under Atomic Energy Act; CLI-82-23, 16 NRC 412 (1982)
persons who may request; LBP-82-87, 16 NRC 1195 (1982)
right to, under Atomic Energy Act; ALAB-687, 16 NRC 460 (1982)
type required for materials license amendment; CLI-82-21, 16 NRC 401 (1982)
See also Appeal Board, Appeal(s), Consolidation

HUMAN ENGINEERING

location of multi-point recorder as flaw in; LBP-82-76, 16 NRC 1029 (1982)

HYDROGEN CONTROL SYSTEMS

at Seabrook, rejection of contention questioning adequacy of; LBP-82-76, 16 NRC 1029 (1982)

INFORMANTS

NRC Staff refusal to name; LBP-82-59, 16 NRC 533 (1982)

INFORMATION

materiality of; ALAB-691, 16 NRC 897 (1982)

INFORMER'S PRIVILEGE

application of and yielding of, in NRC practice; LBP-82-59, 16 NRC 533 (1982)
application of, in NRC proceedings; LBP-82-87, 16 NRC 1195 (1982)

INSTRUMENTATION

at Seabrook, regulatory compliance of; LBP-82-76, 16 NRC 1029 (1982)

INTERESTED STATE

obligations of, as a full party to a proceeding; LBP-82-76, 16 NRC 1029 (1982)

INTERROGATORIES

scope of applicant's response to; LBP-82-67, 16 NRC 734 (1982)

INTERSTATE COMPACT

preclusion of Licensing Board jurisdiction by; LBP-82-72, 16 NRC 968 (1982)

INTERVENORS

in NRC proceedings, structure of participation of; ALAB-693, 16 NRC 952 (1982)
pro se, showing required of, for admission of late-filed contentions; LBP-82-63, 16 NRC 571 (1982)
pro se, standard for briefs of; ALAB-663, 16 NRC 952 (1982)
unreasonable expectations of; LBP-82-63, 16 NRC 571 (1982)
views, purposes, and conduct of, outside of NRC proceedings; CLI-82-15, 16 NRC 27 (1982)
who cannot present their own cases, assistance for; LBP-82-84, 16 NRC 1183 (1982)

INTERVENTION

by an organization, requirements for; LBP-82-74, 16 NRC 981 (1982)
by groups opposing nuclear power; CLI-82-15, 16 NRC 27 (1982)
by interested state, criteria for; LBP-82-76, 16 NRC 1029 (1982)
contention requirement for; ALAB-687, 16 NRC 460 (1982); LBP-82-74, 16 NRC 981 (1982)
discretionary, by petitioners without a valid contention; LBP-82-52, 16 NRC 183 (1982)
in materials license proceedings, establishing interest for; ALAB-682, 16 NRC 150 (1982)
nontimely, justification for; LBP-82-74, 16 NRC 981 (1982)
standards for evaluating admissibility of untimely petition for; LBP-82-63, 16 NRC 571 (1982)

INVESTIGATION

of concealment of safety information, denial of intervenors' petition for; CLI-82-22, 16 NRC 405 (1982)

SUBJECT INDEX

IODINE

monitors, in-plant, admission of contention alleging insufficiency of; LBP-82-75, 16 NRC 986 (1982)

JURISDICTION

delegated to Special Master; LBP-82-56, 16 NRC 281 (1982)

of adjudicatory boards to reopen record on quality assurance issues at Diablo Canyon; ALAB-681, 16 NRC 146 (1982)

of Licensing Board over psychological stress contentions, following issuance of policy statement; LBP-82-69, 16 NRC 751 (1982)

of Licensing Board to hear evidence on Commission-posed emergency planning questions; LBP-82-61, 16 NRC 560 (1982)

of Licensing Board to impose monetary penalty; LBP-82-56, 16 NRC 281 (1982)

of Licensing Board to order NRC Staff to investigate alleged false material statement; LBP-82-56, 16 NRC 281 (1982)

of Licensing Board to reassess impacts of water allocations from Delaware River for cooling a nuclear plant; LBP-82-72, 16 NRC 968 (1982)

of Licensing Board to rule on motion to reopen the record; LBP-82-86, 16 NRC 1190 (1982)

over issues relating to compliance with and implementation of Board orders; ALAB-684, 16 NRC 162 (1982)

over TMI cheating decision retained by Licensing Board; LBP-82-56, 16 NRC 281 (1982)

LIABILITY

of applicant or licensee for material false statement; ALAB-691, 16 NRC 897 (1982)

LICENSE

amended to permit reracking in spent fuel pool; LBP-82-65, 16 NRC 714 (1982)

See also Byproduct Materials License, Manufacturing License, Materials License

LICENSEE

consideration of character of; ALAB-691, 16 NRC 897 (1982)

liability of, for material false statement; ALAB-691, 16 NRC 897 (1982)

obligation of, in NRC proceeding, to provide timely and accurate information; ALAB-691, 16 NRC 897 (1982)

LICENSING BOARD(S)

appointment of Special Master by; LBP-82-56, 16 NRC 281 (1982)

authority regarding withdrawal of construction permit application; LBP-82-81, 16 NRC 1128 (1982)

authority to impose sanctions on NRC Staff; LBP-82-87, 16 NRC 1195 (1982)

authority, delegation of, to NRC Staff; LBP-82-68, 16 NRC 741 (1982)

discretion in managing proceedings, imposition of sanctions; LBP-82-75, 16 NRC 986 (1982)

jurisdiction in admission of contentions; CLI-82-15, 16 NRC 27 (1982)

jurisdiction of, to order NRC Staff to investigate alleged false material statement; LBP-82-56, 16 NRC 281 (1982)

jurisdiction of, to refer NRC examination cheaters for criminal prosecution; LBP-82-56, 16 NRC 281 (1982)

jurisdiction over psychological stress contentions, following issuance of policy statement; LBP-82-69, 16 NRC 751 (1982)

jurisdiction to hear evidence on Commission-posed emergency planning questions; LBP-82-61, 16 NRC 560 (1982)

jurisdiction to impose monetary penalty; LBP-82-56, 16 NRC 281 (1982)

jurisdiction to reassess impacts of water allocation covered by interstate compact; LBP-82-72, 16 NRC 968 (1982)

jurisdiction to rule on motion to reopen the record; LBP-82-86, 16 NRC 1190 (1982)

limitations on providing assistance to intervenors; LBP-82-84, 16 NRC 1183 (1982)

responsibility to develop a full record; LBP-82-87, 16 NRC 1195 (1982)

See also Atomic Safety and Licensing Board, Decision

LIMITED WORK AUTHORIZATIONS

required determinations for granting of; ALAB-688, 16 NRC 471 (1982)

MAINTENANCE

performed during plant operation, limits on type of; LBP-82-63, 16 NRC 571 (1982)

MANAGEMENT CAPABILITY

at Zimmer, dismissal of sua sponte contentions on; CLI-82-20, 16 NRC 109 (1982)

MANAGEMENT COMPETENCE

to operate Zimmer facility, sua sponte adoption of untimely contentions challenging; LBP-82-54, 16 NRC 210 (1982)

MANUFACTURING LICENSE

proceeding, regulatory obligation to conduct immediate effectiveness review of; ALAB-686, 16 NRC 454 (1982)

SUBJECT INDEX

MATERIAL FALSE STATEMENT(S)

certification of licensed operator who has requalified through improper assistance as: LBP-82-56, 16 NRC 281 (1982)
liability of applicant or licensee for: ALAB-691, 16 NRC 897 (1982)
NRC staff investigation of: LBP-82-56, 16 NRC 281 (1982)
omissions as: ALAB-691, 16 NRC 897 (1982)
relevance of intent to deceive through: ALAB-691, 16 NRC 897 (1982)
test for: ALAB-691, 16 NRC 897 (1982)

MATERIALS LICENSE

amendment authorizing work at inactive thorium ore mill, authorization of hearing on: CLI-82-21, 16 NRC 401 (1982)

See also Byproduct Materials License, Notice

MEDICAL SERVICES

arrangements for contaminated injured individuals, emergency planning requirements for: LBP-82-75, 16 NRC 986 (1982)
for "contaminated injured individuals," interpretation of: CLI-82-27, 16 NRC 883 (1982)
for treating contaminated injured individuals during radiological emergency at Diablo Canyon, assurance of: LBP-82-70, 16 NRC 756 (1982)
in event of radiological emergency at Summer facility, availability of facilities for: LBP-82-57, 16 NRC 477 (1982)
need for further litigation on adequacy of offsite emergency plans for: LBP-82-60A, 16 NRC 555 (1982)

MISSILES

reactor coolant pump flywheel as potential source of: LBP-82-76, 16 NRC 1029 (1982)
See also Turbine Missiles

MONITORING

and assessing radiological emergencies, ability of offsite jurisdictions of San Onofre for: ALAB-680, 16 NRC 127 (1982)
meteorological, and dose projections, applicant required to respond to interrogatories on emergency planning for: LBP-82-67, 16 NRC 734 (1982)
of routine releases of radioactivity from Seabrook, adequacy of: LBP-82-76, 16 NRC 1029 (1982)
of site seismicity, license conditioned for continued: LBP-82-57, 16 NRC 477 (1982)
radiological environmental, at La Crosse facility, methodology and adequacy of: LBP-82-58, 16 NRC 512 (1982)
seismic, at Summer facility, as a license condition: LBP-82-55, 16 NRC 225 (1982)
See also Iodine

MONTICELLO RESERVOIR

seismic history of, following impoundment of: LBP-82-55, 16 NRC 225 (1982)

MOOTNESS

vacation of unreviewed judgments because of: CLI-82-18, 16 NRC 50 (1982)

NEED FOR POWER

considerations in operating license proceedings, justification for raising: LBP-82-58, 16 NRC 512 (1982)

NOTICE

of information in separate proceedings, criteria for providing: ALAB-682, 16 NRC 150 (1982)
of materials license actions, recommendation for rulemaking on: ALAB-682, 16 NRC 150 (1982)

NOTIFICATION

of public of radiological emergency at San Onofre: ALAB-680, 16 NRC 127 (1982)
of the public of a radiological emergency at Summer facility, sufficiency of plan for: LBP-82-57, 16 NRC 477 (1982)
program to inform public of steps to take during radiological emergency, status of, at Diablo Canyon: LBP-82-70, 16 NRC 756 (1982)

NOZZLE CRACKING

in high pressure injection system at TMI-1, sua sponte issue raised on: CLI-82-12, 16 NRC 1 (1982)

NRC STAFF

delegation of Licensing Board authority to: LBP-82-68, 16 NRC 741 (1982)
ordered to show cause why sanctions should not be imposed for its refusal to name informants: LBP-82-59, 16 NRC 533 (1982)
oversight of construction activities at Midland Plant: ALAB-684, 16 NRC 162 (1982)

SUBJECT INDEX

- responsibility concerning uncontested safety issues; ALAB-680, 16 NRC 127 (1982)
- responsibility of, regarding compliance with NEPA; ALAB-693, 16 NRC 952 (1982)
- responsibility to comply with Licensing Board orders; LBP-82-87, 16 NRC 1195 (1982)
- role in adjudicatory process; LBP-82-64, 16 NRC 506 (1982)
- NUCLEAR FUEL CYCLE**
 - contention considered impermissible challenge to Table S-3; LBP-82-63, 16 NRC 571 (1982)
 - See also Uranium Fuel Cycle
- NUCLEAR REGULATORY COMMISSION**
 - authority to provide guidance on admissibility of contentions before Licensing Boards; CLI-82-15, 16 NRC 27 (1982)
 - authority to require threshold showing of basis and specificity for admission of contention; LBP-82-75, 16 NRC 986 (1982)
 - authority to review DOE's demonstration waste solidification plan; ALAB-679, 16 NRC 121 (1982)
 - dismissal of grant of review of Appeal Board decision; CLI-82-26, 16 NRC 880 (1982)
 - personnel, considering sufficiency of, in operating license proceeding; DPRM-82-2, 16 NRC 1209 (1982)
 - See also Federal Rules of Civil Procedure
- NUCLEAR REGULATORY COMMISSION PROCEEDINGS**
 - application of res judicata/collateral estoppel to; CLI-82-23, 16 NRC 412 (1982)
 - conduct of parties to; ALAB-691, 16 NRC 897 (1982)
 - obligation of applicant or licensee to provide timely and accurate information in; ALAB-691, 16 NRC 897 (1982)
 - standard for judging lawyer conduct in; ALAB-691, 16 NRC 897 (1982)
 - standard for preparation of; ALAB-691, 16 NRC 897 (1982)
- NUCLEAR WEAPONS**
 - considerations of contentions on use of spent fuel to manufacture; LBP-82-53, 16 NRC 196 (1982)
- OPERATING HISTORY**
 - of Humboldt Bay facility; DD-82-7, 16 NRC 387 (1982)
- OPERATING LICENSE**
 - amendment for spent fuel reprocessing and waste disposal center, denial of intervenor's request for hearing on; ALAB-679, 16 NRC 121 (1982)
 - at Summer facility subject to seismic monitoring and design confirmation conditions; LBP-82-55, 16 NRC 225 (1982)
 - cost-benefit balance, consideration of "sunk costs in; LBP-82-63, 16 NRC 571 (1982)
 - full-term authorized subject to conditions relating to seismic safety, emergency preparedness, and steam generator tube problems; LBP-82-57, 16 NRC 477 (1982)
 - hearings, limitation on issues to be examined in; DPRM-82-2, 16 NRC 1209 (1982)
 - hearings, requirement for FEMA findings on adequacy of offsite emergency planning; LBP-82-70, 16 NRC 756 (1982)
 - procedures, responsibility of NRC Staff regarding compliance with NEPA and AEA; ALAB-693, 16 NRC 952 (1982)
- OPERATING LICENSE, FULL-POWER**
 - authorization of, in spite of pendency of low-power suspension and independent design verification program; LBP-82-70, 16 NRC 756 (1982)
 - continuation of, beyond 6 months, conditioned on resolution of offsite medical arrangements issue; CLI-82-14, 16 NRC 24 (1982)
 - emergency planning findings necessary for issuance of; LBP-82-68, 16 NRC 741 (1982)
 - suspension of, pending appellate review; ALAB-680, 16 NRC 127 (1982)
- OPERATING LICENSE, LOW-POWER**
 - procedures for authorization of issuance of; LBP-82-68, 16 NRC 741 (1982)
- OPERATING LICENSE PROCEEDINGS**
 - cure in defect in fairness of, through discovery and disclosure on potential conflict of interest; LBP-82-73, 16 NRC 974 (1982)
 - justification to reopen; CLI-82-20, 16 NRC 109 (1982)
 - limitations on matters to be resolved in; LBP-82-76, 16 NRC 1029 (1982)
 - litigability of financial qualifications in; LBP-82-63, 16 NRC 571 (1982)
 - See also Accident(s), Alternative Energy Sources, Record

SUBJECT INDEX

OPERATOR TRAINING

and examination, utility's responsibility for; LBP-82-56, 16 NRC 281 (1982)

PENALTY

monetary, Licensing Board jurisdiction to impose; LBP-82-56, 16 NRC 281 (1982)

PHYSICAL SECURITY PLAN(S)

for Diablo Canyon, publication of, with protected information deleted; CLI-82-19, 16 NRC 53 (1982)

for Diablo Canyon, release to intervenor's counsel of portions of; CLI-82-17, 16 NRC 48 (1982)

POLICY STATEMENTS

on psychological stress contentions, effect of, on Board's jurisdiction over; LBP-82-69, 16 NRC 751 (1982)

POPULATION DENSITY

around shutdown facility, NRC Staff consideration of; DD-82-7, 16 NRC 387 (1982)

at Indian Point, consideration of; CLI-82-25, 16 NRC 867 (1982)

PRESIDING OFFICER

over informal materials license amendment hearing, representatives and responsibilities of; CLI-82-21, 16 NRC 401 (1982)

PRESSURIZER HEATERS

safety standards for qualification of; LBP-82-70, 16 NRC 756 (1982)

PRIVILEGE

attorney-client, purpose and scope of; LBP-82-82, 16 NRC 1144 (1982)

executive, in NRC proceedings, related to discovery guidance in resolving claims of; LBP-82-82, 16 NRC 1144 (1982)

to avoid discovery, burden on party asserting; LBP-82-82, 16 NRC 1144 (1982)

See also Informer's Privilege, Work Product Doctrine

PROBABILISTIC RISK ASSESSMENT

rejection of contention asserting necessity for; LBP-82-76, 16 NRC 1029 (1982)

PROTECTIVE ORDERS

to avoid disclosure of documents, good cause for issuance of; LBP-82-82, 16 NRC 1144 (1982)

PSYCHOLOGICAL STRESS

caused by viewing cooling tower plume, rejection of contention concerning; LBP-82-71, 16 NRC 965 (1982)

contentions, effect of policy statement on litigation of; LBP-82-69, 16 NRC 751 (1982)

context for considering contentions on; LBP-82-71, 16 NRC 965 (1982)

legal standard for NEPA consideration of; LBP-82-53, 16 NRC 196 (1982)

reversal of decision accepting contention on; LBP-82-53A, 16 NRC 208 (1982)

QUALIFICATION

of power-operated relief valves and pressurizer heaters, safety standards for; LBP-82-70, 16 NRC 756 (1982)

QUALIFICATION TESTING

of equipment, admission of contention questioning applicant's compliance with interim requirement for; LBP-82-63, 16 NRC 571 (1982)

See also Testing

QUALITY ASSURANCE

at Diablo Canyon, jurisdiction of Boards to reopen record on; ALAB-681, 16 NRC 146 (1982)

at Zimmer, dismissal of sua sponte contentions on; CLI-82-20, 16 NRC 109 (1982)

at Zimmer, sua sponte adoption of untimely contentions challenging; LBP-82-54, 16 NRC 210 (1982)

contention seen as an expedition seeking information; LBP-82-76, 16 NRC 1029 (1982)

for operation at Seabrook, admission of contentions on; LBP-82-76, 16 NRC 1029 (1982)

of design of Seabrook, litigation of, in operating license proceeding; LBP-82-76, 16 NRC 1029 (1982)

of heating, ventilating and air conditioning system, admission of contentions bearing on; LBP-82-63, 16 NRC 571 (1982)

at Summer Plant, history and acceptability of; LBP-82-57, 16 NRC 477 (1982)

RADIATION

effects on polymers; LBP-82-53, 16 NRC 196 (1982)

from normal nuclear power plant operation, estimation of health effects of; LBP-82-57, 16 NRC 477 (1982)

RADIATION HAZARDS

accuracy of Big Rock Point Plant's emergency planning pamphlet with regard to; LBP-82-60, 16 NRC 540 (1982)

SUBJECT INDEX

RADIOACTIVE CONTAMINATION

of crops and livestock during radiological emergency, license conditioned by requirement for plans to protect consumers from; LBP-82-57, 16 NRC 477 (1982)

RADIOACTIVE EMISSIONS

off-gas, at La Crosse Plant, summary disposition of contentions alleging excessive; LBP-82-58, 16 NRC 512 (1982)
routine, calculation of dose levels to humans from; LBP-82-79, 16 NRC 1116 (1982)

RADIOACTIVE RELEASES

denial of summary disposition of contention alleging underestimation of health effects of; LBP-82-57, 16 NRC 477 (1982)

from shutdown plant into Humboldt Bay, significance of; DD-82-7, 16 NRC 387 (1982)

to Lake Wylie from Catawba, specificity required of contentions on; LBP-82-51, 16 NRC 167 (1982)

RADIOACTIVE WASTE

disposal and spent fuel reprocessing center, denial of intervenor's request for hearing on; ALAB-679, 16 NRC 121 (1982)

high-level, responsibility for disposal of; DD-82-7, 16 NRC 387 (1982)

low-level, material alteration of application to store; CLI-82-26, 16 NRC 880 (1982)

See also Waste, Waste Disposal

REACTOR

demonstration liquid metal fast breeder, project history of; CLI-82-23, 16 NRC 412 (1982)

GE test, description of; LBP-82-64, 16 NRC 596 (1982)

REACTOR COOLANT SYSTEMS

at Vallecitos Nuclear Center, operation of, following scram/shutdown; LBP-82-64, 16 NRC 596 (1982)

contamination of, at TMI-1; CLI-82-12, 16 NRC 1 (1982)

REACTOR OPERATOR(S)

qualifications, admission of contention challenging; LBP-82-51, 16 NRC 167 (1982)

utility's responsibility for training, examination, and certification of; LBP-82-56, 16 NRC 281 (1982)

REBUTTABLE PRESUMPTION

on question of adequacy of emergency plans, FEMA findings on status of offsite emergency preparedness as; LBP-82-68, 16 NRC 741 (1982)

RECONSIDERATION

specificity required of motion for; LBP-82-68, 16 NRC 741 (1982)

RECORD

in operating license proceedings, justification for reopening of; CLI-82-20, 16 NRC 109 (1982)

on emergency planning, reopening after final FEMA findings filed; LBP-82-68, 16 NRC 741 (1982)

on quality assurance issues at Diablo Canyon, jurisdiction of Boards to reopen; ALAB-681, 16 NRC 146 (1982)

reopening of, in view of Applicant's failure to submit emergency planning informational brochure as evidence; LBP-82-66, 16 NRC 730 (1982)

reopening, on the basis of untimely contentions; LBP-82-54, 16 NRC 210 (1982)

See also Appeal Board

REENTRY AND RECOVERY

post-accident, adequacy of Diablo Canyon plans for; LBP-82-70, 16 NRC 756 (1982)

REGULATIONS

difference in App. Board and Licensing Board interpretations of; CLI-82-27, 16 NRC 883 (1982)

exemptions from, for first-of-a-kind projects; CLI-82-23, 16 NRC 412 (1982)

immediate effectiveness, application of, to manufacturing license proceeding; ALAB-686, 16 NRC 454 (1982)

interpretation of; ALAB-686, 16 NRC 454 (1982); ALAB-687, 16 NRC 460 (1982)

pre-construction permit/limited work authorization activities allowed by; CLI-82-23, 16 NRC 412 (1982)

RES JUDICATA

application of, to NRC proceedings; CLI-82-23, 16 NRC 412 (1982)

RESTRICTED DOCUMENTS

on physical security plans, publication of, with protected information deleted; CLI-82-19, 16 NRC 53 (1982)

REVIEW

discretionary interlocutory, failure of intervenor's petition to meet standards for; LBP-82-62, 16 NRC 565 (1982)

immediate effectiveness, of decision authorizing issuance of full power license; ALAB-680, 16 NRC 127 (1982)

immediate effectiveness, of manufacturing license proceeding; ALAB-686, 16 NRC 454 (1982)

of Appeal Board decision on bases of seismic design at Diablo Canyon declined; CLI-82-12A, 16 NRC 7 (1982)

SUBJECT INDEX

of Appeal Board decision, Commission dismissal of grant of; CLI-82-26, 16 NRC 880 (1982)
of Licensing Board decision in context of motion for stay pending appeal, standard of; ALAB-680, 16 NRC 127 (1982)

sua sponte, of final disposition of licensing proceeding, score of; ALAB-691, 16 NRC 897 (1982)

sua sponte, of Licensing Board initial decisions; ALAB-689, 16 NRC 887 (1982)

REVIEW, APPELLATE

of Licensing Board decision concerning integrity of hearing process; ALAB-691, 16 NRC 897 (1982)

of Licensing Board rulings on economic issues, intervention requests, or procedural matters, scope of; ALAB-691, 16 NRC 897 (1982)

portions of the record addressed during; ALAB-691, 16 NRC 897 (1982)

of special proceedings, scope of; ALAB-685, 16 NRC 449 (1982)

RISK

assessment in DES, of permanent dewatering on groundwater relationships; LBP-82-63, 16 NRC 571 (1982)

estimators used in calculating health effects from radiation resulting from normal nuclear power plant operation; LBP-82-57, 16 NRC 477 (1982)

Licensing Board request for Commission guidance on treatment of testimony on; LBP-82-61, 16 NRC 560 (1982)

seismic, to GE test reactor; LBP-82-64, 16 NRC 596 (1982)

See also Accident(s), Anticipated Transients Without Scram, Cancer, Probabilistic Risk Assessment

RULEMAKING

consideration of issues that are the subject of; LBP-82-53, 16 NRC 196 (1982); LBP-82-63, 16 NRC 571 (1982)

to amend Classification Guide for Safeguards Information, denial of petition for; DPRM-82-1, 16 NRC 861 (1982)

RULES OF PRACTICE

administrative fairness relative to conflict of interest; LBP-82-73, 16 NRC 974 (1982)

admissibility of late-filed contentions; LBP-82-53, 16 NRC 196 (1982); LBP-82-54, 16 NRC 210 (1982)

admission of untimely contentions where factor (i) has not been satisfied; LBP-82-63, 16 NRC 571 (1982)

analogy between Commission's summary disposition procedures and Federal Rules of Civil Procedure; LBP-82-58, 16 NRC 512 (1982)

Appeal Board acceptance of Licensing Board referrals; ALAB-687, 16 NRC 460 (1982)

appellate procedure for filing of exceptions; ALAB-694, 16 NRC 958 (1982)

appellate standard for undertaking interlocutory review; ALAB-687, 16 NRC 460 (1982)

application of informer's privilege to NRC practice; LBP-82-59, 16 NRC 533 (1982); LBP-82-87, 16 NRC 1195 (1982)

assertion of claims of privilege to avoid discovery; LBP-82-82, 16 NRC 1144 (1982)

burden of proof for demonstrating compliance of offsite emergency plan; LBP-82-77, 16 NRC 1096 (1982)

burden of proof for summary disposition motions; LBP-82-58, 16 NRC 512 (1982)

burden of proof on adequacy of applicant's emergency planning public information brochure; LBP-82-66, 16 NRC 730 (1982)

burden of proof to demonstrate existence of satisfactory public notification system; LBP-82-60, 16 NRC 540 (1982)

cause for dismissal of summary disposition motions; LBP-82-58, 16 NRC 512 (1982)

certification of issues; LBP-82-69, 16 NRC 751 (1982)

challenges to security plans; LBP-82-51, 16 NRC 167 (1982)

circumstances appropriate for interlocutory appeals; ALAB-683, 16 NRC 160 (1982)

conditional admission of nonspecific contentions; ALAB-687, 16 NRC 460 (1982)

conduct of counsel; LBP-82-87, 16 NRC 1195 (1982)

conduct of parties to NRC proceedings; ALAB-691, 16 NRC 897 (1982)

consequences of failure to file proposed findings; ALAB-691, 16 NRC 897 (1982)

consideration of applicant's financial qualifications in operating license proceeding; LBP-82-67, 16 NRC 734 (1982)

consideration of issues involved in rulemaking; LBP-82-63, 16 NRC 571 (1982)

consolidation of hearings on power reactor units; DPRM-82-2, 16 NRC 1209 (1982)

contention requirement for intervention; LBP-82-74, 16 NRC 981 (1982)

contention requirements for intervention; ALAB-687, 16 NRC 460 (1982)

contents of briefs for appeals; ALAB-693, 16 NRC 952 (1982)

criteria for acceptance of untimely contentions; ALAB-687, 16 NRC 460 (1982)

criteria for determining whether to grant stay pending appeal; ALAB-680, 16 NRC 127 (1982)

determination of whether a document is privileged; LBP-82-82, 16 NRC 1144 (1982)

discussion of issue in draft EIS as good cause for filing contention late; LBP-82-79, 16 NRC 1116 (1982)

SUBJECT INDEX

effect of Statement of Policy on Board jurisdiction; LBP-82-69, 16 NRC 751 (1982)
establishing interest for standing to intervene in materials license proceedings; ALAB-682, 16 NRC 150 (1982)
exception to Commission's rule against interlocutory appeal; LBP-82-62, 16 NRC 565 (1982)
fulfillment of standing, injury in fact, and interests requirements by an organization; LBP-82-74, 16 NRC 981 (1982)
good cause for acceptance of late-filed contentions; LBP-82-63, 16 NRC 571 (1982)
grounds for defense of Licensing Board decision; ALAB-691, 16 NRC 897 (1982)
guidance in resolving claims of executive privilege related to discovery; LBP-82-82, 16 NRC 1144 (1982)
immediate effectiveness review of decision authorizing issuance of full-power license; ALAB-680, 16 NRC 127 (1982)
immediate effectiveness review of manufacturing license proceeding; ALAB-686, 16 NRC 454 (1982)
interests encompassed by 10 CFR 2.714; LBP-82-52, 16 NRC 183 (1982)
interlocutory appeals involving the scheduling of hearings or timing of admission of evidence; ALAB-688, 16 NRC 471 (1982)
interpretation of the term "reasonable assurance"; LBP-82-66, 16 NRC 730 (1982)
intervention by groups opposing nuclear power; CLI-82-15, 16 NRC 27 (1982)
jurisdiction of Boards over issues relating to compliance with and implementation of Board orders; ALAB-684, 16 NRC 162 (1982)
justification for nontimely intervention; LBP-82-74, 16 NRC 981 (1982)
method by which NRC ensures due process; LBP-82-87, 16 NRC 1195 (1982)
need for discussion of alternatives in EIA with respect to spent fuel pool expansion; LBP-82-79, 16 NRC 1116 (1982)
objections to discovery requests; LBP-82-82, 16 NRC 1144 (1982)
obligations of intervenors in NRC licensing proceedings; ALAB-693, 16 NRC 952 (1982)
official notice of information in separate proceedings; ALAB-682, 16 NRC 150 (1982)
participation of amicus curiae in hearings; ALAB-679, 16 NRC 121 (1982)
post-hearing resolution of emergency planning issues; LBP-82-66, 16 NRC 730 (1982)
preparation of environmental impact statement for spent fuel pool expansion; LBP-82-79, 16 NRC 1116 (1982)
procedures for correcting deficiencies in emergency plans; LBP-82-77, 16 NRC 1096 (1982)
release of portions of security plans for nuclear plants; LBP-82-80, 16 NRC 1121 (1982)
reopening the record; LBP-82-54, 16 NRC 210 (1982)
resolution of factual questions in considering admissibility of contentions; LBP-82-63, 16 NRC 571 (1982)
responses to requests for production of documents; LBP-82-82, 16 NRC 1144 (1982)
responsibility of parties to disclose potential conflicts of interest; LBP-82-73, 16 NRC 974 (1982)
scheduling findings of fact and conclusions of law; LBP-82-51A, 16 NRC 180 (1982)
scope of applicant's response to interrogatories; LBP-82-67, 16 NRC 734 (1982)
scope of sua sponte review of final disposition of licensing proceeding; ALAB-691, 16 NRC 897 (1982)
showing required of pro se intervenor, for admission of late-filed contentions; LBP-82-63, 16 NRC 571 (1982)
significance of requirement to file proposed finding of fact; ALAB-691, 16 NRC 897 (1982)
specificity required of motion for reconsideration; LBP-82-68, 16 NRC 741 (1982)
standard for briefs of pro se intervenors; ALAB-693, 16 NRC 952 (1982)
standard for discretionary interlocutory review; LBP-82-62, 16 NRC 565 (1982)
standard for judging lawyer conduct in; ALAB-691, 16 NRC 897 (1982)
standards for admission of nontimely contentions arising from TMI-2 accident; LBP-82-63, 16 NRC 571 (1982)
standards for evaluating admissibility of untimely petition for intervention; LBP-82-63, 16 NRC 571 (1982)
standing of an organization to intervene as representative of its members; LBP-82-52, 16 NRC 183 (1982)
stay to reopen proceeding; LBP-82-84, 16 NRC 1183 (1982)
sua sponte adoption of excluded contentions; LBP-82-79, 16 NRC 1116 (1982)
test of "finality" for appeal purposes; ALAB-690, 16 NRC 893 (1982)
threshold showing of basis and specificity for admission of contention; LBP-82-75, 16 NRC 986 (1982)
time limits for filing exceptions; ALAB-684, 16 NRC 162 (1982)
treatment of issues raised for first time on appeal; ALAB-691, 16 NRC 897 (1982)
unreasonable expectations of intervenors; LBP-82-63, 16 NRC 571 (1982)
use of Federal Rules of Civil Procedure to interpret NRC rules; LBP-82-82, 16 NRC 1144 (1982)
use of protective orders to avoid disclosure of documents; LBP-82-82, 16 NRC 1144 (1982)

SUBJECT INDEX

- vacation of unreviewed judgments because of mootness; CLI-82-18, 16 NRC 50 (1982)
- validity of Commission rules; LBP-82-53, 16 NRC 196 (1982)
- RUMORS
 - evidentiary weight of; LBP-82-56, 16 NRC 281 (1982)
- SABOTAGE
 - radiological, interpretation of "several" as used in 10 CFR 73.1 (a)(1) to describe design basis threat of; CLI-82-19, 16 NRC 53 (1982)
- SAFEGUARDS INFORMATION
 - denial of petition for rulemaking to amend classification guide for; DPRM-82-1, 16 NRC 861 (1982)
 - interpretation of "several" as used in design basis threat as; CLI-82-19, 16 NRC 53 (1982)
- SAFETY
 - at GE test reactor, structures, systems, and components important to; LBP-82-64, 16 NRC 596 (1982)
 - information, denial of intervenors' petition for investigation of concealment of; CLI-82-22, 16 NRC 405 (1982)
 - of Humboldt Bay facility during shutdown; DD-82-7, 16 NRC 387 (1982)
- SAFETY ISSUES
 - uncontested, NRC Staff responsibility regarding findings on; ALAB-680, 16 NRC 127 (1982)
 - unresolved, relevance of, to spent fuel pool modification; LBP-82-65, 16 NRC 714 (1982)
- SAFETY STANDARDS
 - for qualification of equipment; LBP-82-70, 16 NRC 756 (1982)
- SANCTIONS
 - for failure of party to comply with prehearing conference order; LBP-82-75, 16 NRC 986 (1982)
 - for NRC Staff refusal to obey Licensing Board order; LBP-82-87, 16 NRC 1195 (1982)
 - imposition of, on NRC Staff, for refusal to name informants; LBP-82-59, 16 NRC 533 (1982)
- SCHEDULE
 - phased, for findings of fact and conclusions of law, denial of Staff motion to reconsider; LBP-82-51A, 16 NRC 180 (1982)
- SECURITY
 - nuclear power plant, qualifications of expert in; LBP-82-51, 16 NRC 167 (1982)
- SECURITY PLANS
 - for Shoreham, release of portions to intervenors; LBP-82-80, 16 NRC 1121 (1982)
 - intervenors' responsibilities in challenging; LBP-82-51, 16 NRC 167 (1982)
 - See also Discovery, Physical Security Plan(s)
- SEGMENTATION
 - of major federal actions, under NEPA; CLI-82-23, 16 NRC 412 (1982)
- SEISMIC DESIGN
 - of Diablo Canyon, declination of review of Appeal Board Decision on bases of; LBP-82-12A, 16 NRC 7 (1982)
 - of Humboldt Bay Plant, adequacy of; DD-82-7, 16 NRC 387 (1982)
 - See also Tau Effect
- SEISMICITY
 - in area of GE test reactor; LBP-82-64, 16 NRC 596 (1982)
 - reservoir-induced, license conditioned for continued monitoring of; LBP-82-57, 16 NRC 477 (1982)
 - reservoir-induced, occurrence of, after impoundment; LBP-82-55, 16 NRC 225 (1982)
 - See also Fault(s)
- SERVICE OF DOCUMENTS
 - rejection of applicant's objection to; LBP-82-51, 16 NRC 167 (1982)
- SHOW CAUSE PROCEEDING
 - regarding construction deficiencies at La Salle, denial of 2.206 petition requesting; DD-82-9, 16 NRC 396 (1982)
 - to consider licensee's alleged lack of financial qualifications, denial of 2.206 petition requesting; DD-82-8, 16 NRC 394 (1982)
- SHUTDOWN
 - cold, at Seabrook, adequacy of provisions for achieving; LBP-82-76, 16 NRC 1029 (1982)
- SOUTH CAROLINA
 - reservoir-induced seismicity in; LBP-82-55, 16 NRC 225 (1982)
- SPECIAL MASTER
 - authority of, adoption of report of, results of hearing before, weight given to reported direct observations of witness demeanor by, weight given to report of; LBP-82-56, 16 NRC 281 (1982)

SUBJECT INDEX

SPENT FUEL

reprocessing and waste disposal center, denial of intervenor's request for hearing on operating license amendment for: ALAB-679, 16 NRC 121 (1982)
storage capacity, withdrawal of application to increase: LBP-82-83, 16 NRC 1181 (1982)
transportation and storage conditions, reaffirmation of rejection of: LBP-82-51, 16 NRC 167 (1982)
use of, to manufacture nuclear weapons, consideration of contentions on: LBP-82-53, 16 NRC 196 (1982)

SPENT FUEL CASKS

adequacy of administrative controls on handling: LBP-82-77, 16 NRC 1096 (1982)

SPENT FUEL POOL

affirmation of decision permitting modification of: ALAB-685, 16 NRC 962 (1982)
amendment of license to permit reracking in: LBP-82-65, 16 NRC 714 (1982)
amendment to increase number of fuel assemblies to be stored in: LBP-82-60, 16 NRC 540 (1982)
floor, loads imparted to, during seismic events: LBP-82-65, 16 NRC 714 (1982)
modification, adequacy of environmental impact appraisal on: LBP-82-79, 16 NRC 1116 (1982)
See also Alternatives

STANDING

of an organization, representational requirement for: LBP-82-54, 16 NRC 210 (1982)
of intervenor in decontamination proceeding to litigate waste disposal issues: LBP-82-52, 16 NRC 183 (1982)
of organizations representing members residing near a nuclear facility: LBP-82-52, 16 NRC 183 (1982)
to intervene by organization, requirements for: LBP-82-74, 16 NRC 981 (1982)
to intervene in materials license proceedings: ALAB-682, 16 NRC 150 (1982)

STATION BLACKOUT

as a design basis event: LBP-82-63, 16 NRC 571 (1982)

STAY

pending appeal of decision authorizing issuance of full-power license, denial of motion for: ALAB-680, 16 NRC 127 (1982)
to reopen proceeding, factors considered in determining whether to grant: LBP-82-84, 16 NRC 1183 (1982)

STEAM GENERATOR TUBES

at TMI-1, sua sponte issue raised on corrosion of: CLI-82-12, 16 NRC 1 (1982)
inadequacy of in-service inspection of: LBP-82-76, 16 NRC 1029 (1982)

STEAM GENERATORS

at Seabrook, resistance of, to degradation: LBP-82-76, 16 NRC 1029 (1982)

SUA SPONTE ISSUES

Commission dismissal of QA and management competence contentions adopted by Licensing Board as: CLI-82-20, 16 NRC 109 (1982)
denial of Appeal Board request to hear: CLI-82-12, 16 NRC 1 (1982)
raising excluded contention as: LBP-82-79, 16 NRC 1116 (1982)
scope of appellate review of: ALAB-685, 16 NRC 449 (1982)
See also Review

SUMMARY DISPOSITION

analogy between Federal Rules of Civil Procedure and: LBP-82-58, 16 NRC 512 (1982)
cause for dismissal of motion for: LBP-82-58, 16 NRC 512 (1982)
See also Burden of Proof

SUSPENSION

of licensee's obligation to answer Board question on environmental qualification: ALAB-685, 16 NRC 449 (1982)
of low-power license, authorization of full-power license in spite of pendency of: LBP-82-70, 16 NRC 756 (1982)

SYNERGISM

between airborne effluents from coal and nuclear power plants: LBP-82-58, 16 NRC 512 (1982)

SYSTEMS INTERACTION

contention, intervenors plead lack of technical qualifications in objection to rejection of: LBP-82-51, 16 NRC 167 (1982)
need to perform comprehensive analysis of, at Seabrook: LBP-82-76, 16 NRC 1029 (1982)

TAU EFFECT

use of, in seismic design of nuclear power plants: LBP-82-12A, 16 NRC 7 (1982)

TESTIMONY

certification of Board questions asking clarification of scope of: CLI-82-25, 16 NRC 867 (1982)

SUBJECT INDEX

in NRC proceedings, standard for preparation of; ALAB-691, 16 NRC 897 (1982)
See also Accident(s)

TESTING

of protection systems and actuation devices, admission of contention on; LBP-82-76, 16 NRC 1029 (1982)
See also Qualification Testing

THORIUM

ore mill, inactive, license amendment sought to establish water collection and retention system at; CLI-82-21, 16 NRC 401 (1982)

THREE MILE ISLAND

preparation of supplemental EIS on psychological health of residents in area of; CLI-82-13, 16 NRC 21 (1982)
probability of aircraft crash at; ALAB-692, 16 NRC 921 (1982)

TRAINING

needs for emergency planning, estimating; LBP-82-77, 16 NRC 1096 (1982)
of emergency response personnel, admission of contention citing inadequacies in plans for; LBP-82-75, 16 NRC 986 (1982)
of operations personnel at Seabrook, contention admitted with limitations on categories of personnel; LBP-82-75, 16 NRC 1029 (1982)
radiological emergency response, at Diablo Canyon, adequacy of; LBP-82-70, 16 NRC 756 (1982)

TRANSMISSION LINES

from Seabrook, aesthetic and health and safety effects of; LBP-82-76, 16 NRC 1029 (1982)

TRANSPORTATION

during evacuation because of radiological emergency at Summer facility, defects in planning for; LBP-82-57, 16 NRC 477 (1982)

TURBINE MISSILES

protection of Seabrook safety systems from; LBP-82-76, 16 NRC 1029 (1982)
See also Missiles

URANIUM FUEL CYCLE

denial of summary disposition of contention alleging underestimation of health effects of; LBP-82-57, 16 NRC 477 (1982)
See also Nuclear Fuel Cycle

VALVES

power-operated relief, safety standards for qualification of; LBP-82-70, 16 NRC 756 (1982)

WASTE

generated by decontamination, consideration of; LBP-82-52, 16 NRC 183 (1982)
See also Radioactive Waste

WASTE DISPOSAL

consideration of, in NEPA analyses; LBP-82-53, 16 NRC 196 (1982)
solid, radioactive, produced during normal operations at Seabrook, means to control; LBP-82-76, 16 NRC 1029 (1982)

WELDS

reactor vessel, admission of contention asserting need for ultrasonic testing of; LBP-82-76, 16 NRC 1029 (1982)

WITHDRAWAL

of construction permit application, conditions on; LBP-82-81, 16 NRC 1128 (1982)

WITNESSES

expert, in nuclear power plant security, demonstration of credentials of; LBP-82-51, 16 NRC 167 (1982)
procedural context of Licensing Board's calling of independent experts as; LBP-82-55, 16 NRC 225 (1982)

WORK PRODUCT DOCTRINE

documents privileged from discovery by; LBP-82-82, 16 NRC 1144 (1982)

FACILITY INDEX

BIG ROCK POINT PLANT; Docket No. 50-155
 SPENT FUEL POOL AMENDMENT; September 14, 1982; INITIAL DECISION; LBP-82-77, 16 NRC 1096 (1982)
 SPENT FUEL POOL AMENDMENT; September 15, 1982; INITIAL DECISION; LBP-82-78, 16 NRC 1107 (1982)

BIG ROCK POINT PLANT; Docket No. 50-155-OLA
 SCHEDULING; July 8, 1982; MEMORANDUM; LBP-82-51A, 16 NRC 180 (1982)
 SPENT FUEL POOL AMENDMENT; August 6, 1982; INITIAL DECISION; LBP-82-60, 16 NRC 540 (1982)

BROWNS FERRY NUCLEAR PLANT, Units 1, 2 and 3; Docket Nos. 50-259-OLA, 50-260-OLA, 50-296-OLA
 OPERATING LICENSE AMENDMENT; September 15, 1982; ORDER; CLI-82-26, 16 NRC 880 (1982)

CATAWBA NUCLEAR STATION, Units 1 and 2; Docket Nos. 50-413, 50-414
 LIMITED WORK AUTHORIZATION; August 19, 1982; MEMORANDUM AND ORDER; ALAB-687, 16 NRC 460 (1982)
 SPECIAL PROCEEDING; July 8, 1982; MEMORANDUM AND ORDER; LBP-82-51, 16 NRC 167 (1982)

CLINCH RIVER BREEDER REACTOR PLANT; Docket No. 50-537
 LIMITED WORK AUTHORIZATION; August 25, 1982; MEMORANDUM AND ORDER; ALAB-688, 16 NRC 471 (1982)

CLINCH RIVER BREEDER REACTOR PLANT; Docket No. 50-537 (Exemption request under 10 CFR 50.12)
 CONSTRUCTION PERMIT EXEMPTION; August 12, 1982; MEMORANDUM AND ORDER; CLI-82-22, 16 NRC 405 (1982)
 CONSTRUCTION PERMIT EXEMPTION; August 17, 1982; MEMORANDUM AND ORDER; CLI-82-23, 16 NRC 412 (1982)

COBALT-60 STORAGE FACILITY; Docket No. 30-6931 (Renewal of Byproduct Materials License No. 19-08330-03)
 BYPRODUCT MATERIALS LICENSE RENEWAL; July 16, 1982; DECISION; ALAB-682, 16 NRC 150 (1982)

COMANCHE PEAK STEAM ELECTRIC STATION, Units 1 and 2; Docket Nos. 50-445 50-446
 OPERATING LICENSE; September 30, 1982; ORDER DENYING RECONSIDERATION; LBP-82-87, 16 NRC 1195 (1982)
 SHOW CAUSE; August 4, 1982; ORDER TO SHOW CAUSE; LBP-82-59, 16 NRC 553 (1982)

DIABLO CANYON NUCLEAR POWER PLANT, Units 1 and 2; Docket Nos. 50-275, 50-276
 OPERATING LICENSE; September 23, 1982; DIRECTOR'S DECISION UNDER 10 CFR 2.206; DD-82-10, 16 NRC 1205 (1982)

DIABLO CANYON NUCLEAR POWER PLANT, Units 1 and 2; Docket Nos. 50-275-OL 50-323-GL
 OPERATING LICENSE; March 18, 1982; DECLINATION OF REVIEW; CLI-82-12A, 16 NRC 7 (1982)
 OPERATING LICENSE; July 16, 1982; MEMORANDUM AND CERTIFICATION TO THE COMMISSION; ALAB-681, 16 NRC 146 (1982)
 OPERATING LICENSE; August 31, 1982; INITIAL DECISION; LBP-82-70, 16 NRC 756 (1982)
 OPERATING LICENSE; September 27, 1982; MEMORANDUM IN RESPONSE TO NRC STAFF'S MOTION FOR CLARIFICATION OF THE LICENSING BOARD'S INITIAL DECISION DATED AUGUST 31, 1982; LBP-82-85, 16 NRC 1187 (1982)
 PHYSICAL SECURITY; July 30, 1982; ORDER; CLI-82-19, 16 NRC 53 (1982)

DRESDEN NUCLEAR POWER STATION, Unit No. 1; Docket No. 50-10-OLA
 OPERATING LICENSE AMENDMENT; July 12, 1982; MEMORANDUM AND ORDER; LBP-82-52, 16 NRC 183 (1982)

DRESDEN NUCLEAR POWER STATION, Units 2 and 3; Docket Nos. 50-237, 50-249
 SPENT FUEL POOL MODIFICATION; September 29, 1982; DECISION; ALAB-695, 16 NRC 962 (1982)

FACILITY INDEX

DRESDEN NUCLEAR POWER STATION, Units 2 and 3; Docket Nos. 50-237-SP, 50-249-SP
SPENT FUEL POOL AMENDMENT; August 17, 1982; FINAL INITIAL DECISION, LBP-82-65, 16 NRC 714 (1982)

FLOATING NUCLEAR POWER PLANTS; Docket No. STN 50-437-ML
MANUFACTURING LICENSE; August 11, 1982; MEMORANDUM AND ORDER, ALAB-686, 16 NRC 454 (1982)
MANUFACTURING LICENSE; September 1, 1982; MEMORANDUM AND ORDER, ALAB-689, 16 NRC 887 (1982)

GENERAL ELECTRIC MORRIS OPERATION; Docket No. 70-1308 (Application to Modify License No. SNM-1265 to Increase Spent Fuel Storage Capacity)
OPERATING LICENSE AMENDMENT; September 21, 1982; ORDER GRANTING MOTION TO WITHDRAW APPLICATION AND DISMISSING PROCEEDING WITHOUT PREJUDICE, LBP-82-83, 16 NRC 1181 (1982)

HUMBOLDT BAY POWER PLANT, Unit 3; Docket No. 50-133
DECOMMISSIONING; July 7, 1982; DIRECTOR'S DECISION UNDER 10 CFR 2.206; DD-82-7, 16 NRC 387 (1982)

INDIAN POINT, Unit 2; Docket No. 50-247
SPECIAL PROCEEDING; July 27, 1982; MEMORANDUM AND ORDER, CLI-82-15, 16 NRC 27 (1982)
SPECIAL PROCEEDING; September 15, 1982; ORDER, CLI-82-24, 16 NRC 865 (1982)
SPECIAL PROCEEDING; September 17, 1982; ORDER, CLI-82-25, 16 NRC 867 (1982)
SPECIAL PROCEEDING; August 9, 1982; MEMORANDUM AND CERTIFICATION, LBP-82-61, 16 NRC 560 (1982)

INDIAN POINT, Unit 3; Docket No. 50-286
SPECIAL PROCEEDING; July 27, 1982; MEMORANDUM AND ORDER, CLI-82-15, 16 NRC 27 (1982)
SPECIAL PROCEEDING; August 9, 1982; MEMORANDUM AND CERTIFICATION, LBP-82-61, 16 NRC 560 (1982)
SPECIAL PROCEEDING; September 15, 1982; ORDER, CLI-82-24, 16 NRC 865 (1982)
SPECIAL PROCEEDING; September 17, 1982; ORDER, CLI-82-25, 16 NRC 867 (1982)

LA CROSSE BOILING WATER REACTOR; Docket Nos. 50-409-FTOL, 50-409-SC
OPERATING LICENSE; August 2, 1982; MEMORANDUM AND ORDER, LBP-82-58, 16 NRC 512 (1982)

LASALLE COUNTY GENERATING STATION, Units 1 and 2; Docket Nos. 50-373, 50-374
SHOW CAUSE; July 19, 1982; DIRECTOR'S DECISION UNDER 10 CFR 2.206; DD-82-9, 16 NRC 396 (1982)

LIMERICK GENERATING STATION, UNITS 1 and 2; Docket Nos. 50-352, 50-353
OPERATING LICENSE; September 2, 1982; MEMORANDUM AND ORDER, LBP-82-71, 16 NRC 965 (1982)
OPERATING LICENSE; September 3, 1982; MEMORANDUM AND ORDER, LBP-82-72, 16 NRC 968 (1982)

MIDLAND PLANT, Units 1 and 2; Docket Nos. 50-329-CP, 50-330-CP
REMAND; September 9, 1982; DECISION, ALAB-691, 16 NRC 897 (1982)

MIDLAND PLANT, Units 1 and 2; Docket Nos. 50-329-OM&OL, 50-330-OM&OL
MODIFICATION ORDER AND OPERATING LICENSE; July 27, 1982; MEMORANDUM AND ORDER, ALAB-684, 16 NRC 162 (1982)
MODIFICATION ORDER AND OPERATING LICENSE; August 14, 1982; PREHEARING CONFERENCE ORDER, LBP-82-63, 16 NRC 571 (1982)

PALISADES NUCLEAR POWER FACILITY; Docket No. 50-255-SP
VACATION OF DECISION; July 30, 1982; MEMORANDUM AND ORDER, CLI-82-18, 16 NRC 50 (1982)


PALO VERDE NUCLEAR GENERATING STATION, Units 1, 2 and 3; Docket Nos. STN-50-528-OL, STN-50-529-OL, STN-50-530-OL
OPERATING LICENSE; August 12, 1982; MEMORANDUM AND ORDER, LBP-82-62, 16 NRC 565 (1982)

PERKINS NUCLEAR STATION, Units 1, 2 and 3; Docket Nos. STN-50-488, STN-50-489, STN-50-490
CONSTRUCTION PERMIT; September 20, 1982; MEMORANDUM AND ORDER AUTHORIZING WITHDRAWAL OF APPLICATION FOR CONSTRUCTION PERMIT WITHOUT PREJUDICE, LBP-82-81, 16 NRC 1128 (1982)

PERRY NUCLEAR POWER PLANT, Units 1 & 2; Docket Nos. 50-440-OL, 50-441-OL
OPERATING LICENSE; July 12, 1982; MEMORANDUM AND ORDER, LBP-82-53, 16 NRC 196 (1982)
OPERATING LICENSE; July 19, 1982; MEMORANDUM AND ORDER, LBP-82-53A, 16 NRC 208 (1982)
OPERATING LICENSE; August 18, 1981; ORDER, LBP-82-67, 16 NRC 734 (1982)

FACILITY INDEX

OPERATING LICENSE; August 30, 1982; MEMORANDUM AND ORDER; LBP-82-69, 16 NRC 751 (1982)
 OPERATING LICENSE; September 15, 1982; MEMORANDUM AND ORDER; LBP-82-79, 16 NRC 1116 (1982)
 PILGRIM NUCLEAR POWER STATION, Docket No. 50-293 (EA-81-63)
 OPERATING LICENSE MODIFICATION; July 30, 1982; ORDER; CLI-82-16, 16 NRC 44 (1982)
 SAN ONOFRE NUCLEAR GENERATING STATION, Units 2 and 3; Docket Nos. 50-361-OL, 50-362-OL
 OPERATING LICENSE; July 16, 1982; DECISION; ALAB-680, 16 NRC 127 (1982)
 OPERATING LICENSE; July 16, 1982; ORDER; CLI-82-24, 16 NRC 24 (1982)
 OPERATING LICENSE; August 6, 1982; MEMORANDUM AND ORDER; LBP-82-60A, 16 NRC 555 (1982)
 OPERATING LICENSE; September 24, 1982; ORDER; CLI-82-27, 16 NRC 883 (1982)
 SEABROOK NUCLEAR STATION, Units 1 and 2; Docket Nos. 50-443, 50-444
 SHOW CAUSE; July 6, 1982; DIRECTOR'S DECISION UNDER 10 CFR 2.206; DD-82-8, 16 NRC 394 (1982)
 SEABROOK NUCLEAR STATION, Units 1 and 2; Docket Nos. 50-443-OL, 50-444-OL (ASLBP No. 82-471-02-OL)
 OPERATING LICENSE; September 13, 1982; MEMORANDUM AND ORDER; LBP-82-76, 16 NRC 1029 (1982)
 SHOREHAM NUCLEAR POWER STATION, Unit 1; Docket No. 50-322-OL
 OPERATING LICENSE; July 30, 1982; ORDER; CLI-82-17, 16 NRC 48 (1982)
 OPERATING LICENSE; September 3, 1982; MEMORANDUM AND ORDER; LBP-82-73, 16 NRC 974 (1982)
 OPERATING LICENSE; September 7, 1982; MEMORANDUM AND ORDER; LBP-82-75, 16 NRC 986 (1982)
 SHOREHAM NUCLEAR POWER STATION, Unit 1; Docket No. 50-322-OL (Emergency Planning)
 OPERATING LICENSE; September 22, 1982; MEMORANDUM AND ORDER; LBP-82-82, 16 NRC 1144 (1982)
 SHOREHAM NUCLEAR POWER STATION, Unit 1; Docket No. 50-322-OL-2 (ASLBP No. 82-478-05-OL)
 SECURITY; September 16, 1982; MEMORANDUM, ORDER AND NOTICE OF SECOND IN CAMERA CONFERENCE OF COUNSEL; LBP-82-80, 16 NRC 1121 (1982)
 SKAGIT/HANFORD NUCLEAR POWER PROJECT, Units 1 and 2; Docket Nos. 50-522, 50-523
 CONSTRUCTION PERMIT; July 27, 1982; MEMORANDUM AND ORDER; ALAB-683, 16 NRC 160 (1982)
 CONSTRUCTION PERMIT; September 3, 1982; MEMORANDUM AND ORDER; LBP-82-74, 16 NRC 981 (1982)
 SUSQUEHANNA STEAM ELECTRIC STATION, Units 1 and 2; Docket Nos. 50-387-OL, 50-388-OL
 OPERATING LICENSE; September 28, 1982; MEMORANDUM AND ORDER; ALAB-693, 16 NRC 952 (1982)
 THREE MILE ISLAND NUCLEAR STATION, Unit No. 1; Docket No. 50-289
 RESTART; July 16, 1982; ORDER; CLI-82-12, 16 NRC 1 (1982)
 RESTART; July 16, 1982; ORDER; CLI-82-13, 16 NRC 21 (1982)
 RESTART; July 27, 1982; PARTIAL INITIAL DECISION; LBP-82-56, 16 NRC 281 (1982)
 RESTART; September 29, 1982; MEMORANDUM AND ORDER; LBP-82-36, 16 NRC 1190 (1982)
 THREE MILE ISLAND NUCLEAR STATION, Unit No. 1; Docket No. 50-289-SP
 RESTART; August 2, 1982; MEMORANDUM AND ORDER; ALAB-685, 16 NRC 449 (1982)
 THREE MILE ISLAND NUCLEAR STATION, Unit No. 2; Docket No. 50-320-OLA
 OPERATING LICENSE AMENDMENT; September 14, 1982; DECISION; ALAB-692, 16 NRC 921 (1982)
 VALLECTOS NUCLEAR CENTER — GENERAL ELECTRIC TEST REACTOR; Docket No. 50-70-SC
 SHOW CAUSE; August 16, 1982; INITIAL DECISION; LBP-82-64, 16 NRC 596 (1982)
 VIRGIL C. SUMMER NUCLEAR STATION, Unit 1; Docket No. 50-395-OL
 OPERATING LICENSE; July 20, 1982; PARTIAL INITIAL DECISION; LBP-82-55, 16 NRC 225 (1982)
 OPERATING LICENSE; August 4, 1982; SUPPLEMENTAL PARTIAL INITIAL DECISION; LBP-82-57, 16 NRC 477 (1982)
 OPERATING LICENSE; September 24, 1982; MEMORANDUM AND ORDER; LBP-82-84, 16 NRC 1183 (1982)
 OPERATING LICENSE; September 28, 1982; MEMORANDUM AND ORDER; ALAB-694, 16 NRC 958 (1982)
 WATERFORD STEAM ELECTRIC STATION, Unit 3; Docket No. 50-382-OL
 OPERATING LICENSE; August 17, 1982; MEMORANDUM AND ORDER; LBP-82-66, 16 NRC 730 (1982)
 REMAND; September 7, 1982; MEMORANDUM AND ORDER; ALAB-690, 16 NRC 893 (1982)
 WEST CHICAGO RARE EARTHS FACILITY; Docket No. 40-2061
 MATERIALS LICENSE AMENDMENT; August 6, 1982; ORDER; CLI-82-21, 16 NRC 401 (1982)
 WESTERN NEW YORK NUCLEAR SERVICE CENTER, Docket No. 50-201-OLA
 OPERATING LICENSE AMENDMENT; July 8, 1982; MEMORANDUM AND ORDER; ALAB-679, 16 NRC 121 (1982)



FACILITY INDEX

WM. H. ZIMMER NUCLEAR POWER STATION, Unit 1; Docket No. 50-358-OL
OPERATING LICENSE; July 15, 1982; MEMORANDUM AND ORDER; LBP-82-54, 16 NRC 210 (1982)
OPERATING LICENSE; July 30, 1982; ORDER; CLI-82-20, 16 NRC 109 (1982)
OPERATING LICENSE; August 24, 1982; MEMORANDUM AND ORDER; LBP-82-68, 16 NRC 741 (1982)

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