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Pages 83-144

NUCLEAR REGULATORY COMMISSION ISSUANCES

March 1992

U.S. NUCLEAR REGULATORY COMMISSION

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NUREG-0750
Vol. 35, No. 3
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NUCLEAR REGULATORY COMMISSION ISSUANCES

March 1992

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

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

U.S. NUCLEAR REGULATORY COMMISSION

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

COMMISSIONERS

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

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

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Cite as 35 NRC 83 (1992) CLI-92-5

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of | Docket No. 30-30870-OM (Byproduct Material License)

FEWELL GEOTECHNICAL ENGINEERING, LTD.
(Thomas E. Murray, Radiographer)

March 5, 1992

The Commission vacates on the grounds of mootness the Atomic Safety and Licensing Board's Initial Decision (LBP-91-29) which modified an order issued by the NRC Staff to Fewell Geotechnical Engineering, Ltd. Staff's original order modified Fewell Geotechnical Engineering, Ltd.'s license by barring Mr. Thomas E. Murray from working as a radiographer under the license for a period of 3 years.

RULES OF PRACTICE: MOOTNESS

Decisions below will normally be vacated when prior to the outcome of the appellate process, through happenstance, the proceeding becomes moot. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *Consumers Power Co.* (Palisades Nuclear Power Facility), CLI-82-18, 16 NRC 50, 51 (1982).

ORDER

This proceeding concerns an immediately effective order issued by the Nuclear Regulatory Commission (NRC) Staff to Fewell Geotechnical Engineering, Ltd. (Fewell). The order modified Fewell's byproduct materials license by barring Mr. Thomas E. Murray from working as a radiographer under that license for 3 years. *See* 55 Fed. Reg. 47,409 (Nov. 13, 1990). Mr. Murray requested a hearing on the order. After a hearing was conducted, the Atomic Safety and Licensing Board issued an Initial Decision that modified the NRC Staff's order by, *inter alia*, reducing the term of Mr. Murray's suspension from 3 years to 9 months. LBP-91-29, 33 NRC 561 (1991).

The NRC Staff filed an appeal before the Commission requesting reversal of the Licensing Board's Initial Decision. However, while the appeal was pending, the Executive Director for Operations notified the Commission that Fewell had requested termination of its byproduct materials license.

In view of Fewell's request, the NRC Staff was directed in an order dated September 12, 1991, to notify the Commission of the Staff's action on the termination request and then to advise the Commission as to whether the Staff wished to proceed with its appeal or whether the appeal should be dismissed in the event the license was terminated. On October 15, 1991, the NRC Staff filed its "Motion to Vacate the Licensing Board's Initial Decision, LBP-91-29," on the grounds of mootness and provided a copy of its letter informing Fewell that the license had been terminated. By order dated October 22, 1991, Mr. Murray was permitted until October 31, 1991, to file a reply if he so desired. Mr. Murray has not replied to Staff's motion.

We agree with Staff that the termination of Fewell's materials license has rendered this proceeding moot. The proceedings before the Licensing Board concerned Mr. Murray's challenge to the original order barring him from performing radiography under the Fewell license for 3 years. When Fewell's license was terminated, the original order ceased to have any operative effect or purpose. Thus, the proceeding is moot.

In cases such as this, when prior to the outcome of the appellate process, through happenstance, the proceeding becomes moot, the decision below normally will be vacated. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *Consumers Power Co.* (Palisades Nuclear Power Facility), CLI-82-18, 16 NRC 50, 51 (1982). Vacating the Licensing Board's decision eliminates it as precedent.[1]

---

[1] The Staff suggests that we may render an advisory opinion on the matters raised in its appeal. We decline the suggestion. Vacating the Licensing Board's decision obviates the need to review the Board's interpretation of the governing law and policy or, because it can have none, to consider its potential impact on future cases.

Accordingly, the NRC Staff's motion is *granted* and its appeal is *dismissed*. The Licensing Board's Initial Decision, LBP-91-29, 33 NRC 561 (1991), is *vacated as moot*. The proceeding is hereby terminated.

IT IS SO ORDERED.

For the Commission[2]

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of March 1992.

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

Cite as 35 NRC 86 (1992) CLI-92-5

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of	Docket Nos. 50-440-A 50-346-A (Suspension of Antitrust Conditions)

OHIO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1)

CLEVELAND ELECTRIC
ILLUMINATING COMPANY and
TOLEDO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1; Davis-Besse Nuclear
Power Station, Unit 1)

March 5, 1992

The Commission denies Applicants' motion for reconsideration of CLI-91-15, 34 NRC 269 (1991), in which the Commission *sua sponte* exercised its inherent supervisory power over an adjudicatory proceeding initiated by Applicants' request for amendments that would remove certain antitrust license conditions pertaining to the Perry and Davis-Besse nuclear plants. CLI-91-15 directed the Atomic Safety and Licensing Board to suspend consideration of all matters, except for two issues referred to as the "bedrock" legal issues.

LICENSING BOARD: CONSIDERATION OF NRC STAFF EVIDENCE

In general, the NRC Staff is only one party to a Commission adjudicatory proceeding. The Staff does not occupy a favored position and its presentations are subject to the same scrutiny as those of other parties. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), ALAB-304, 3 NRC 1, 6 (1976); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-268, 1 NRC 383, 399 (1975). On some questions, such as interpretation of statutes or judicial decisions, the Staff's submissions have no more weight than those of any other party. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 462 (1976).

DECISIONAL BIAS: NRC STAFF

When a case turns on a question of law, the Licensing Board and the Commission, on review, are capable of correcting party bias by providing independent decisions. In addition, a party dissatisfied with the outcome of a final Commission decision can seek review from an appropriate court, which is fully capable of correcting bias when a case turns on a question of law. *Gulf Oil Corp. v. FPC*, 563 F.2d 588, 612 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978).

ORDER

In CLI-91-15, 34 NRC 269 (1991), the Commission directed the Atomic Safety and Licensing Board to suspend consideration of all matters, except the so-called bedrock legal issue (or issues), in this proceeding involving applications for amendments to the operating licenses for the Perry and Davis-Besse nuclear plants. Ohio Edison Company (OE), Cleveland Electric Illuminating Company, and Toledo Edison Company (Applicants) have sought amendments to suspend certain antitrust conditions from the operating licenses. OE has filed a motion for reconsideration of CLI-91-15, requesting that the Commission vacate its order and allow the proceedings to continue as they were prior to the suspension. The NRC Staff opposes the motion.[1] For the reasons stated in this Order, OE's motion is *denied*.

---

[1] No other answers were received, although the City of Cleveland noted its opposition to OE's motion in its separate Motion for Commission Revocation of the Referral to ASLB and for Adoption of the April 24, 1991 Decision as the Commission Decision, at 4-6 (Dec. 27, 1991).

In its order memorializing its rulings during a prehearing conference, the Licensing Board ruled that it had jurisdiction to conduct the proceeding,[2] admitted OE's contention regarding decisional bias, and provided an opportunity for the parties' joint submission of a "bedrock" legal issue (or issues) that would be the subject of potentially dispositive motions for summary disposition. LBP-91-38, 34 NRC 229 (1991). In light of the potential for the bedrock legal issue to be dispositive of this proceeding, a point emphasized by OE, the Commission exercised its inherent supervisory power over adjudicatory proceedings and issued CLI-91-15, which directed the Licensing Board to suspend its consideration of all matters in the proceeding with the exception of the "bedrock" issue. By its terms, the suspension included OE's decisional bias issue.

OE objects to the suspension and asks that we reconsider our earlier order because, OE argues, this proceeding cannot be resolved fairly without reaching the decisional bias issue, even as to the bedrock legal issue. OE also objects to the suspension of other issues that may require consideration in the proceeding, such as the actual cost of Perry and Davis-Besse power. Additionally, OE suggests that we have misunderstood the "bedrock issue."[3]

As its primary basis for reconsideration, OE argues that the decisional bias issue must be decided in conjunction with or prior to the bedrock legal issue. This is so, OE maintains, because the decision on bias will affect the weight to be given the NRC Staff's position throughout the proceedings and will thus be relevant to the decision on the bedrock issue. We do not agree.

In general, the NRC Staff is only one party to a Commission adjudicatory proceeding. The Staff does not occupy a favored position and its presentations are subject to the same scrutiny as those of other parties. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), ALAB-304, 3 NRC 1, 6 (1976); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-268, 1 NRC 383, 399 (1975). We think it significant here that, as all parties agree, the bedrock issue is a *legal* question. In this context, we have specifically observed that "[o]n some questions, such as interpretation of statutes or judicial decisions, the staff submissions have no more weight than those of any other party." *Public Service Co. of New Hampshire*

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[2] The City of Cleveland's appeal of the Licensing Board's jurisdictional ruling is pending before the Commission. Our ruling today is without prejudice to our consideration of that appeal and Cleveland's separate motion (referenced in the preceding footnote) to remove the conduct of all proceedings from the Licensing Board to the Commission.

[3] OE notes that our corrected order, CLI-91-15, 34 NRC at 271 n.3, lumped the two issues that the parties agreed would be subject to motions for summary disposition under the general rubric "bedrock issue." Motion for Reconsideration at 4 n.4. Our intention was to ensure that the parties understood that they could proceed, as they had agreed, with the litigation of both those potentially dispositive issues before the Licensing Board. Our characterization of the issues solely for the purpose of the order did not change the meaning or the treatment being given to those two issues for any other purpose.

(Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 462 (1976).[4] OE has not explained why either the Licensing Board, or the Commission, on review, is incapable of rendering an independent decision regarding a question of law, even accepting *arguendo* some bias on the part of the Staff due to the alleged congressional interference.[5] Importantly, OE can seek review from an appropriate United States Court of Appeals, if it should be dissatisfied with the outcome of the proceeding. When a case turns on a question of law, "Judicial review is fully capable of correcting bias. . . ." *Gulf Oil Corp. v. FPC*, 563 F.2d 588, 612 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978). Thus, at least with respect to the legal issues being addressed by the parties at this time, we do not see a compelling reason to proceed with consideration of the decisional bias issue.[6]

Contrary to OE's suggestion, our order in CLI-91-15 is not inconsistent with representations made by the NRC in prior judicial proceedings. Although the NRC represented in prior judicial proceedings that the claim of decisional bias must be raised at the agency level, the NRC did not promise a decision on the merits of that issue. At most, the representations indicate that the issue must be raised before the Commission and that a final Commission decision on OE's amendment request, subject to judicial review, will be provided.[7] Suspending the bias issue from consideration while the parties address the bedrock legal issue is not contrary to these representations. Even if the issue of decisional bias were to be dismissed altogether, without a review of its merits, a final Commission decision on the amendment application would provide OE, if it were dissatisfied

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[4] In unusual situations (not the case here) where Staff is directed by the Commission to conduct a study and are subject to ongoing Commission review during the study, the Staff's views may be afforded more weight. *Seabrook*, CLI-76-17, *supra*, 4 NRC at 462. In this case, the Licensing Board has assured OE that it considers all lawyers to be on equal footing. Prehearing Conference Transcript at 78-79.

[5] In fact, counsel for OE assured the Licensing Board that OE was not "suggesting that this tribunal was adversely affected or is now somehow adversely influenced by threats from members of Congress." Prehearing Conference Transcript at 74. Moreover, OE has not alleged that the Commissioners are incapable of rendering a fair decision because they will be adversely affected by supposed threats from Congress.

[6] We recognize that bias or predisposition may bear on the credibility of a party's witnesses or evidence, although it is far from clear that bias is appropriate as a principal issue for litigation in NRC proceedings. However, as we decided in CLI-91-15, we need not reach that question or provide guidance on the further litigation of such questions pending resolution of the potentially dispositive legal issues proposed by the parties.

[7] Ohio Edison Company's Motion for Reconsideration of CLI-91-15 at 5-9. Specifically, OE claims support for its position in the following NRC statements before the district court (*see id.* at 6):

> If the NRC Staff determines initially to deny the requested amendment, plaintiff will have an opportunity for an adjudicatory hearing before an Atomic Safety and Licensing Board. That Board's on the record decision will in turn be reviewable by the Atomic Safety and Licensing Appeal Board and the Commission. It is through this agency process that Ohio Edison must first present its claims of improper congressional interference in the administrative process.

NRC Memorandum of Points and Authorities in Support of Motion to Dismiss at 4 (Aug. 22, 1988); and

> Subject matter jurisdiction over this claim rests with the NRC in the first instance, and, on appeal, exclusively in the Court of Appeals. Plaintiff will have ample opportunity to raise a charge of improper influence or bias in that forum.

Transcript of Hearing on Defendants' Motion to Dismiss at 5-7 (Dec. 13, 1988).

with the outcome, the opportunity for judicial review. In its order dismissing OE's petition for writ of mandamus, the District of Columbia Circuit Court of Appeals noted that OE did not show that it would be prevented from raising the issue of decisional bias on judicial review *after* the administrative process had been concluded. *In re Ohio Edison Co.*, No. 89-1014, slip op. at 4 (D.C. Cir. Apr. 27, 1989) (unpublished *per curiam* order). The Court did not state that an opportunity to litigate the issue of decisional bias would be provided by the NRC. Therefore, neither prior judicial proceedings nor NRC representations before the courts require us to allow OE to proceed with its decisional bias claims at this time.

Although OE focuses mainly on the Commission's suspension of the decisional bias issue, OE also complains of the suspension of consideration of other matters that might be germane if the Applicants were to prevail on the bedrock issue. OE suggests that the suspension implies that the Commission believes the only outcome will be that OE will lose the bedrock issue. As stated in CLI-91-15, by suspending consideration of these matters, the Commission intimates no opinion on the bedrock legal issue or any other matter. The Commission's order has suspended, but not precluded, consideration of other relevant matters as warranted upon resolution of the bedrock legal issue. If an evidentiary hearing is appropriate, in the event that Applicants win the bedrock issue, the Commission will provide appropriate instructions and guidance for the conduct of further proceedings.

For the reasons stated in this order, OE's motion for reconsideration is *denied*.

Commissioner Curtiss disapproved this order; his dissenting views are attached. Commissioner de Planque did not participate in this matter.

IT IS SO ORDERED.

For the Commission[8]

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of March 1992.

[8] Commissioner Remick was not present for the affirmation of this O[illegible] [illegible]e had been present, he would have approved it.

DISSENTING VIEWS OF COMMISSIONER CURTISS

I respectfully disagree with the Commission's decision to deny Ohio Edison's motion for reconsideration of CLI-91-15 and to continue the suspension of the consideration of the Staff "bias/predisposition" contention in this formal adjudicatory proceeding.

Instead, I believe that the Commission should take up the question of the admissibility of the bias/predisposition issue now, rather than defer consideration of that question until the Licensing Board decides the so-called "bedrock issues" in this proceeding.

The fact of the matter is that the Applicants' bias/predisposition contention raises a question about whether "the Licensing Board and the Nuclear Regulatory Commissioners [should] give no weight to the *recommendations of the NRC staff*" on the substantive issues in this case. LBP-91-38, 34 NRC 229, 257 n.92 (emphasis added). The NRC Staff has made, and will be making, recommendations to the Licensing Board on the "bedrock issues"[1] and to the Commission on the City of Cleveland's appeal on jurisdictional issues. In such a case, it seems evident that the challenge to the Staff's impartiality must be resolved prior to, not at the conclusion of, any proceedings on the substantive merits of the antitrust issue. For that reason, I believe the Commission should resolve the question of whether such a contention is admissible now.[2] To ignore the concerns that have been raised at this stage of the proceeding will, unfor-

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[1] Although the "bedrock issues" are primarily legal in nature, it is not clear that the parties' positions will be confined strictly to legal arguments (where bias/predisposition on the part of an individual party may be of lesser concern). In this regard, the Licensing Board itself acknowledged that —

> [a]t this juncture, . . . we are unable to parse the various controversies between the parties into the neat categories this analysis requires with a degree of certainty sufficient to convince us that threshold dismissal of these allegations [about Staff bias] is appropriate.

LBP-91-38, *supra*, 34 NRC at 256.

[2] On the question of whether a contention alleging Staff bias/predisposition should be admitted as a litigable issue, I have substantial doubts about allowing such contentions in our proceedings. While the credibility of a witness who presents evidence is always a consideration, I am not aware of any NRC proceeding in which a party's bias/predisposition *per se* was made a principal issue for litigation on the merits. Nor does the Staff's role in the agency's proceedings suggest a different conclusion. Indeed, in a formal adjudicatory proceeding, the Staff does not occupy a favored position; it is just another party to the proceeding. When a board comes to decide contested issues, it must evaluate the Staff's evidence and arguments in light of the same principles that apply to the presentations of the other parties. The Staff's views cannot be accepted without passing under the same scrutiny as those of the other parties. *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), ALAB-304, 3 NRC 1, 6 (1976); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB 268, 1 NRC 383, 399 (1975); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 532 (1973). In general, in these proceedings, the application is in issue, not the adequacy of the Staff's review of the application. A party may raise contentions challenging the particular action that is the subject of the proceeding, but it may not proceed on the basis of the allegations that the Staff has somehow failed in its performance. To the extent that a party seeks to litigate the adequacy of the Staff's work in a particular proceeding, it proposes a contention that is not litigable. *See Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 186 (1989); *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 55-56 (1985); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 809 (1983). In my view, these holdings raise serious questions about the admissibility of the bias/predisposition issue in the instant proceeding.

tunately, leave in place the cloud that has been cast on the Staff's impartiality and, as a consequence, on the arguments, evidence, and recommendations that the Staff will be advancing on the basic substantive issues that must be decided in this proceeding.

For the foregoing reasons, I respectfully dissent.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of Docket No. 70-3070-ML

LOUISIANA ENERGY SERVICES, L.P.
(Claiborne Enrichment Center) March 5, 1992*

The Commission decides issues before it relating to its hearing order that set forth standards by which this application for a license to construct and operate a uranium enrichment facility would be judged. Both the Applicant and the sole Intervenor in the proceeding sought reconsideration of various portions of the hearing order. The Commission clarifies that the existing 10 C.F.R. Part 140 be applied to the license application solely as guidance. The Commission orders that the *final* Commission rule on material control and accounting for enrichment facilities, instead of the proposed rule, shall be applied to this proceeding; that the hearing shall proceed as directed in the order; and that all other requests for reconsideration are denied.

ATOMIC ENERGY ACT: SECTION 193(e)

Congress dictated that the Price-Anderson Act liability insurance requirements will not be applied to uranium enrichment facilities. *See* Atomic Energy Act, § 193(e).

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*Re-served March 9, 1992.

REGULATIONS: INTERPRETATION AND APPLICATION (10 C.F.R. PART 140)

Of the existing NRC regulations under 10 C.F.R. Part 140, only sections 140.15-140.17 and Part 140, Appendix A are applicable to this proceeding, and then only as guidance or models as to proof of liability insurance.

NRC: HEARING STANDARDS (NATURE OF CONSIDERATION)

An intervenor's objection to the use of the word "reconsideration" in a hearing order that relates to Commission consideration of the hearing standards raises solely a semantic problem, as long as the nature of the reconsideration offered by the Commission is sufficient to meet the intervenor's objections and the Commission's obligations.

NRC: CHOICE OF RULEMAKING OR ADJUDICATION

When standards set forth in a hearing order to govern an adjudication have not been established by rulemaking, the Commission may provide an opportunity for parties to challenge the standards by seeking reconsideration.

RULES OF PRACTICE: HEARING STANDARDS (CHALLENGE; LACK OF ESTABLISHED RULE)

The status of an unchallenged hearing standard would not be simply that of a proposed standard; an unchallenged standard would be, without more, fully applicable to the matter being heard.

NRC: HEARING STANDARDS (NATURE OF CONSIDERATION)

It should be evident from the terms of a hearing order that requires among other things that petitions for reconsideration "must contain all technical or other arguments to support the petition," that the Commission intends to initiate a process in which each objection would be fully considered *de novo* and the parties provided with the Commission's reasoned decision.

URANIUM ENRICHMENT FACILITY: SITING CRITERIA (PLANT BOUNDARY LIMITS)

For purposes of siting and design of a uranium enrichment facility against accidental atmospheric releases of uranium hexafluoride, the Commission estab-

lished plant boundary limits that were intended to be generally equivalent to the Commission's reactor siting criteria found in 10 C.F.R. Part 100.

URANIUM ENRICHMENT FACILITY: SITING CRITERIA (PART 100 EQUIVALENCY)

The Commission's objective in applying the Part 100 siting criteria to a uranium enrichment facility, is equivalency to Part 100; it was never the intent to set levels below which *no* adverse effects would occur from hydrogen fluoride.

URANIUM ENRICHMENT FACILITY: DESIGN CRITERIA (PERFORMANCE-BASED SAFEGUARDS STANDARDS)

The Commission chose the approach of performance-based design standards for the contemplated enrichment facility. Those standards established "principal design criteria which are commensurate with their safety function." 53 Fed. Reg. at 13,278.

URANIUM ENRICHMENT FACILITY: DESIGN CRITERIA (PERFORMANCE-BASED SAFEGUARDS STANDARDS)

The Commission's design criteria for the contemplated enrichment facility did not include a performance-based safeguards standard directed at common defense and security.

URANIUM ENRICHMENT FACILITY: SAFEGUARDS (10 C.F.R. § 74.33)

The need for safeguards against unauthorized activities at uranium enrichment facilities was addressed primarily through creation of a new section 74.33 in NRC's existing material control and accounting regulations.

URANIUM ENRICHMENT FACILITY: MC&A SYSTEM (10 C.F.R. § 74.33)

The new section 74.33 of 10 C.F.R. includes as a performance-based requirement that each uranium enrichment licensee must establish, implement, and maintain an NRC-approved material control and accounting system.

URANIUM ENRICHMENT FACILITY: MC&A OBJECTIVES (PHYSICAL SECURITY REQUIREMENTS)

Specific requirements for the use of physical security measures in achieving material control and accounting objectives is unnecessary; physical security measures may be included in an applicant's program, but the applicant is free to develop its program in any manner as long as it meets the general performance objectives.

MEMORANDUM AND ORDER

Before us are issues related to the criteria that will govern the decision by the Nuclear Regulatory Commission ("NRC" or "Commission") whether to license Louisiana Energy Services, L.P. ("LES" or "Applicant")[1] to construct and operate the Claiborne Enrichment Center in Claiborne Parish, near Homer, Louisiana. The contemplated operation would involve the possession or use or both of byproduct, source, and special nuclear material for the purpose of enriching natural uranium to a maximum of 5% U-235 by the gas centrifuge process. The LES application for an enrichment facility license is the first since the NRC was required to consider such an application in a single, on-the-record adjud. tory hearing. The requirement appears in new section 193 of the Atomic Energy Act ("Act"), enacted as an amendment to the Act by section 5 of the Solar, Wind, Waste and Geothermal Power Production Incentives Act of 1990 (Pub. L. No. 101-575).[2]

I. BACKGROUND

The Commission published a notice of hearing on the LES license application (Hearing Order) on May 21, 1991. *See* 56 Fed. Reg. 23,310. In the Hearing Order the Commission referenced relevant, codified NRC regulations that would be applicable to the licensing decision and, in the absence of a final rule specifically addressed to licensing enrichment facilities,[3] set forth as Part III

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[1] LES is a limited partnership whose general partners are Urenco Investments, Inc. (a subsidiary of Urenco, Ltd.); Claiborne Fuels, L.P. (a subsidiary of Fluor Daniel, Inc.); Claiborne Energy Services, Inc. (a subsidiary of Duke Power Company); and Graystone Corporation (a subsidiary of Northern States Power Company). In addition, there are seven limited partners.

[2] *See* 42 U.S.C. § 2243(b).

[3] In 1990, the Commission sought comment on a proposed rule that was to establish new performance-based material control and accounting (MC&A) requirements that would be applicable to uranium enrichment facility licensees who produce significant quantities of special nuclear material (SNM) of low strategic significance and to applicants to construct and operate enrichment facilities. *See* 55 Fed. Reg. 51,726 (1990). Advance notice of proposed rulemaking on regulation of uranium enrichment had been given in early 1988 (*see* 53 Fed. Reg. 13,276), but the rulemaking was never initiated. 55 Fed. Reg. at 51,726, col. 2.

of the Hearing Order special standards by which LES's application would be judged and instructions for the hearing. An opportunity was offered for admitted hearing participants to petition directly to the Commission for reconsideration of any of Part III's provisions.

LES and the NRC Staff are parties to the hearing. The Atomic Safety and Licensing Board (Licensing Board) established to conduct the LES hearing admitted a sole intervenor to the proceeding, Citizens Against Nuclear Trash (CANT). CANT is an environmental organization whose membership is comprised mostly of residents of Claiborne Parish.[4] The State of Louisiana, Department of Environmental Quality, participates as an interested state agency. *See* 10 C.F.R. § 2.715(c).

The Commission's unusual involvement at this early stage of a proceeding responds to both LES and CANT who each sought reconsideration of the Hearing Order. LES specifies one objection to the Part III provisions and seeks leave to object late to a provision of Part IV. CANT asks for changes in three separate respects. We address Applicant's and CANT's objections in turn along with Staff's responses to those objections. Neither LES nor CANT commented on each other's objections.

II. LES'S REQUEST FOR RECONSIDERATION

A. Provision (from Part III) at Issue: Paragraph 6, establishing *terms for compliance with requirement for liability insurance*

Section 193 of the Act requires that "as a condition of the issuance" of a uranium enrichment facility license, the licensee "have and maintain liability insurance of such type and in such amounts as the Commission judges appropriate to cover liability claims. . . ." Section 193(d)(1). In Part III, ¶ 6, of the Hearing Order, the Commission acknowledged this liability insurance requirement as a licensing standard for LES. The Commission declined then to determine the precise terms or amount of the policy but noted that "10 CFR 140.15, 140.16, and 140.17 provide adequate guidance as to *proof of* financial protection (*insurance*). . . ." 56 Fed. Reg. 23,312 (emphasis added). The Commission also referenced Appendix A of Part 140 for the availability of "models" for form, content, and coverage of such liability insurance. The burden of establishing the amount needed was left to LES "in the first instance," the amount to be justified "in terms of a reasonable evaluation of the risks required to be covered" by Pub. L. No. 101-575, but in any case the amount need be no greater than the maximum amount available from commercial insurers.

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[4] *See* this docket, LBP-91-41, 34 NRC 332, 333, 360 (1991).

Objection and Requested Relief

LES asks that we reconsider our use of the term "financial protection" and that the term should be replaced in the cited sections of Part 140 by the term "liability insurance." LES maintains that this should be done because the term "financial protection" is used in the context of the Price-Anderson Act and Pub. L. No. 101-575 precluded the application of section 170 (Price-Anderson) to uranium enrichment facilities. As a final paragraph, LES states:

> Further, the aspects of Part 140 dealing with the Price-Anderson Act, specifically, secondary financial protection and waiver of defenses, should not be applied.

Staff's Response

The NRC Staff opposed the reconsideration, arguing that NRC's codified regulations implementing Price-Anderson requirements were "cited only as providing 'guidance' as to proof of insurance and 'models' for the form, content and coverage of such insurance. . . ." The Staff concluded that the Commission's framework for evaluating LES's compliance with the liability insurance requirements was a reasonable one, fully consistent with recent enactments. Staff's Response, dated August 12, 1990.

Commission Decision

The Staff's response is squarely on target, and we need not repeat it. No reading of ¶6 — no matter how contrived — can raise a serious question of applying a requirement for financial protection from public liability different from or beyond the liability insurance required by Congress in Pub. L. No. 101-575.[5] Moreover, we are unable to discern the slightest reason why further assurance is sought or needed that *Price-Anderson requirements will not be applied to LES's enrichment facility*; Congress has so dictated. *See* Act, § 193(e). The Commission cannot ignore such a congressional command and has evidenced no inclination or intent to do so. We find no need to amend our hearing notice.

Reconsideration on this basis is denied.

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[5] "Financial protection" is defined in Part 140 as the "ability to respond in damages for public liability and to meet the cost of investigating and defending claims and settling suits for such damages." 10 C.F.R. § 140.3(d). Section 140.14(a)(1) lists a policy of liability insurance from private sources as a means of providing primary financial protection. Related sections cited in Part III discuss the adequacy of proof of such liability insurance. *See* section 140.15, *et seq.*

B. Provision (from Part IV) at Issue: *Applying Part 140* of the NRC rules (codified in Title 10) to the hearing by including Part 140 in a list of regulations to be applied "according to their terms"

LES's Objection and Requested Relief

Following shortly upon Staff's August 12 response, LES moved for leave to file to replace an incorrect caption and to supplement its motion for reconsideration. This time, LES challenged Part IV of the *Federal Register* notice where Part 140 was included among NRC regulations that would be applied "according to their terms."

Staff's Response

Staff noted that LES failed to explain why this additional objection could not have been raised in LES's original motion, but on the substance found that the supplemental argument did not change the Staff's position — "i.e., there is no dispute that Congress specifically excluded uranium enrichment facilities from Price-Anderson Act applicability." Staff's Response, dated September 6, 1991, at 2-3.

Commission Decision

The Commission accepts LES's additional filing. We believe that the hearing notice erred in a minor respect in including existing Part 140[6] among the regulations that applied *by their terms*. Only the sections of existing Part 140 designated in Part III of the Hearing Order are applicable and then only by the terms of the Hearing Order, i.e., as guidance or models. Thus, the reconsideration is granted, and the Commission clarifies that existing Part 140 is not applicable by its terms.

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[6] Note that the Commission currently is engaged in rulemaking concerning the licensing of uranium enrichment facilities to reflect changes made to the Atomic Energy Act by the Solar, Wind, Waste and Geothermal Power Production Incentives Act of 1990. *See* Notice of Proposed Rulemaking — Uranium Enrichment Regulations, 56 Fed. Reg. 46,739 (Sept. 16, 1991). That rulemaking includes proposed modifications to 10 C.F.R. Part 140 to address the "financial protection required of uranium enrichment facility licensees pursuant to section 193 of the Atomic Energy Act of 1954 . . . ." 56 Fed. Reg. at 46,745. The Commission has not yet made any determination on the final rules in this area.

III. CANT'S OBJECTIONS TO OUR PART III PROVISIONS

A. Provision at Issue: Unnumbered paragraph, authorizing motions for *reconsideration of the standards* for this hearing set forth by the Hearing Order

CANT's Objection and Requested Relief

CANT objects to the use of the term "reconsideration" and maintains that the standards set forth for the hearing must receive impartial and thorough consideration and that the Commission must respond to all comments with reasoned justification for its position.

Staff's Response

The Staff asserts that no reconsideration of the use of the term "reconsideration" is warranted.

Commission Decision

As the Staff noted, CANT's objection raises solely a semantic problem; the nature of the reconsideration offered by the Commission is sufficient to meet CANT's objection and the Commission's obligations.[7] It has long been established that the Commission may proceed by rulemaking or adjudication. *See SEC v. Chenery Corp.*, 318 U.S. 80 (1942). *See also* Pub. L. No. 101-575, § 5(b). Because the standards set forth in Part III to govern the instant adjudication had not been established by rulemaking, the Commission provided opportunity for parties to challenge them by seeking reconsideration; however, the status of an unchallenged standard would not be simply that of a proposed standard, as CANT's formulation would suggest. An unchallenged standard would, without more, be fully applicable to the matter being heard. As to the standards challenged, it should have been evident from the terms of the Hearing Order, which required among other things that petitions for reconsideration "must contain all technical or other arguments to support the petition" and allowed response by the parties, that the Commission intended to initiate a process in which each objection would be fully considered *de novo* and the parties provided with the Commission's reasoned decision. In any event, as demonstrated by this Order, that is the process being followed, and CANT is

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[7] Our rules attach no special significance to the term "reconsideration" used in the present context. *Cf.* 10 C.F.R. § 2.771 (petitions for reconsideration of a final decision).

receiving the process it perceives as its due regardless of the nomenclature. Thus, we conclude that no modification of our Hearing Order is warranted.

B. Provision at Issue: Paragraph 3, adopting *criteria from NUREG-1391* (entitled "Chemical Toxicity of Uranium Hexafluoride Compared to Acute Effects of Radiation") *for purposes of siting and design of the facility against accidental atmospheric releases of uranium hexafluoride*[8]

CANT's Objection and Requested Relief

CANT objects to the Commission's proposed siting criteria as too lax to protect public health adequately. In support of that objection, CANT incorporates by reference its Contention (G) and the affidavit supporting Contention (G) which in turn rely on statements in EPA's comments on the Commission's Advance Notice of Proposed Rulemaking which was published at 53 Fed. Reg. 13,726 (1988). EPA commented that the NRC's specified limits "may not adequately protect the public from exposure to hydrogen fluoride (HF)." Letter from Robert E. Sanderson, EPA to NRC, July 22, 1988. CANT affirmatively seeks imposition of a boundary limit of 2.5 mg/m^3 for 15 minutes or its effective equivalent.

Position of the Staff

Reconsideration was opposed by the Staff based on its demonstration by affidavit that CANT's reliance on the EPA letter is misplaced. Staff's thesis was that EPA's conclusion was faulty because EPA had relied on an incorrectly published formula stated in the work of another organization (corrected in later publication) and on only part of a definition included in a different work.

Commission Decision

The Commission established plant boundary limits that were intended to be generally equivalent to the Commission's reactor siting criteria published at 10 C.F.R. Part 100, i.e., the limits were intended to be quantities or concentration values that produced a level of adverse health effects generally equivalent to the adverse health effects that are associated with the dose guideline values

[8] The criterion applies the following limitations to the boundary of the site under control of the applicant: A limiting intake of 10 milligrams of uranium in soluble form, and a limiting exposure to hydrogen fluoride at a concentration of 25 milligrams per cubic meter of air for 30 minutes. For exposure times (t) other than 30 minutes, the limiting concentration (C) of hydrogen fluoride in air shall be calculated using the equation $C = 25\ mg/m^3\ (30\ min/t)^{0.5}$.

in Part 100. We believe that Dr. Maguire's affidavit, submitted by the Staff, considered in conjunction with the rationale for NRC's specified limits in NUREG-1391 amply rebuts CANT's arguments. It bears emphasis that the objective is equivalency to Part 100; it was never the intent to set levels below which *no* adverse effects would occur from HF.

The Commission's standard is appropriate in that it approximates or is stricter than the standard adopted by the Commission in its previous Part 100 rulemaking: as discussed in NUREG-1391, the significant health effects from exposure at the Part 100 guideline values are in excess of those that might be expected from exposures at the chosen HF values. For the foregoing reasons, we decline to consider the issue further.

C. Provision at Issue: Paragraph 2, applying the draft "*General Design Criteria" for uranium enrichment* published in the Advanced Notice of Proposed Rulemaking noticed on April 22, 1988 (*see* 53 Fed. Reg. 13,276)

CANT's Objection and Requested Relief

CANT complains of the lack of performance objectives addressed to safeguarding nuclear materials in the design objectives made applicable by ¶2. CANT proposes that we incorporate the following design criterion:

> The design of a uranium enrichment facility, including hardware, shall be conducive to implementation of effective advanced national and international safeguards techniques and procedures.

CANT also asks that we consider in establishing nuclear safeguard performance criteria the issues raised in four CANT contentions, (L) through (O). We read that as a request to establish licensing standards to ensure effective monitoring by the International Atomic Energy Agency (IAEA) that would require (1) online enrichment monitoring for all cascades at the plant and inner diameters of all process pipes measuring at least 110 mm; (2) effective monitoring of sampling ports, process valves, and flanges; and (3) transparent walls around small cells of centrifuges.

Staff's Position

Here as well, the Staff opposes reconsideration. Staff's first reason is that any lack of material control and accounting (MC&A) requirements has been addressed by issuance of the Commission's final rule, published October 31, 1991 (56 Fed. Reg. 55,991) which established MC&A requirements for

enrichment facilities.[9] In addition, Staff argues, the Commission's statement of considerations on the final rule resolved that NRC requirements need not encompass as a design criterion the assurance that ready access is available to IAEA inspectors. Staff also argued that an aspect of the detailed criterion proposed that would establish a prohibition against opaque cell walls for centrifuges would be technically irrelevant because the LES design does not appear to contemplate such walls. Staff's Response at 9-10.

Commission Decision

The General Design Criteria from our 1988 Advance Notice of Proposed Rulemaking were made applicable to this proceeding by the Commission in the Hearing Order. In so doing, we chose the approach of performance-based standards. Those standards established "principal design criteria which are commensurate with their safety function." 53 Fed. Reg. at 13,278. Since the rules were linked to "safety" considerations as distinct from "common defense and security" considerations,[10] the criteria did not include a performance-based safeguards standard directed at common defense and security goals such as those to be achieved by the IAEA safeguards regime. This possible gap was addressed by the Commission's Notice of Proposed Rulemaking on MC&A requirements for uranium enrichment facilities. 55 Fed. Reg. at 51,726. Part IV of the Hearing Order (56 Fed. Reg. at 23,313) made the proposed rules for 10 C.F.R. Part 74 relating to MC&A (*see* 55 Fed. Reg. 51,730, *et seq.*) applicable to this proceeding and anticipated conformance to the final rules when issued, noting that if there were not final rules at the conclusion of this proceeding, any license granted LES would be appropriately conformed to final rules on their issuance. The Commission also noted the applicability of already codified regulations on physical security and information control.

In issuing its final rule on MC&A requirements for uranium enrichment facilities (*see* 56 Fed. Reg. 55,991 (Oct. 31, 1991)), the Commission explained that the need for safeguards against unauthorized activities was addressed "primarily through creation of a new § 74.33 in NRC's existing material control and accounting regulations." *Id.* The final rule replaced the proposed rule and became applicable to this proceeding, and lest there be any doubt, by this Order

[9] CANT's reconsideration request reflected that CANT was well aware that the Commission had published a proposed rule regarding MC&A. *See* 55 Fed. Reg. 51,726 (1990). Indeed, one of the individual commenters apparently has close ties to CANT and essentially made CANT's point with respect to IAEA access in the rulemaking.

[10] "Safety" in our parlance refers to protection of public health and safety from the design, construction, and operation of the plant; the protection of the common defense and security of the United States relates to such matters as protection of classified information and against international diversion of materials from peaceful and non-explosive uses.

we amend our Hearing Order accordingly. The final rule resolves CANT's issue; the Commission explained its choice of performance-based rather than prescriptive standards in establishing safeguards-directed performance standards in the new section 74.33.

The new section 74.33 includes as a performance-based requirement that each uranium enrichment licensee must establish, implement, and maintain an NRC-approved MC&A system. That system must, among other things, protect against production of uranium enriched to 10% or more of U-235 and any unauthorized production of uranium of low strategic significance, and in the unlikely event that protection is thwarted, must be able to detect the consequent unauthorized production. 10 C.F.R. § 74.33(2) and (3). The Commission concluded that specific requirements for the use of physical security measures in achieving MC&A objectives were unnecessary. Physical security measures may be included by an applicant in its MC&A program, but the applicant is free to develop its program in any manner as long as it meets the general performance objectives and has the system features and capabilities specified.

CANT's remaining suggested standards appear to be prescriptive and oriented toward the physical construction of the facility, whereas the Commission has made a reasoned policy choice in the rulemaking to regulate by performance-based standards for MC&A programs. Licensees may, of course, choose or need to employ the CANT-suggested means to achieve an appropriate level of safeguards; however, those means are not necessarily the exclusive solutions to meeting the Commission's performance requirements. Indeed, in some cases those means may be irrelevant because of the design chosen for the facility. Finally, we note that CANT has withdrawn its objection to the lack of a requirement that centrifuge cell walls be transparent. Presumably this was because no provision was apparent that opaque walls were intended. *See, e.g.*, Staff's Response at 10.

In light of the foregoing, the hearing should proceed as directed, substituting the final rule on MC&A for the proposed rule and applying existing Part 140 solely as guidance. All other requests for reconsideration are denied.

It is so ORDERED.

For the Commission[11]

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland
this 5th day of March 1992.

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

Atomic Safety and Licensing Boards Issuances

ATOMIC SAFETY AND LICENSING BOARD PANEL

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Robert M. Lazo,* *Deputy Chief Administrative Judge (Executive)*
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Permanent panel members

LICENSING BOARDS

Cite as 35 NRC 107 (1992) LBP-92-3

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Robert M. Lazo, Chairman
Jerry R. Kline
Peter S. Lam

In the Matter of	**Docket Nos. 50-528-OLA-3** **50-529-OLA-3** **50-530-OLA-3** **(ASLBP No. 92-654-01-OLA-3)** **(Automatic Closure Interlock for Shutdown Cooling Valves)**
ARIZONA PUBLIC SERVICE COMPANY, *et al.* **(Palo Verde Nuclear Generating Station Units 1, 2, and 3)**	**March 4, 1992**

RULES OF PRACTICE: INTERVENTION

The Atomic Energy Act does not confer the automatic right of intervention upon anyone. The Commission may condition the exercise of that right upon the meeting of reasonable procedural requirements.

RULES OF PRACTICE: INTERVENTION

Prior to the first prehearing conference, the petitioner must file a supplement to his or her petition to intervene which sets forth the contentions the petitioner seeks to have litigated and the basis for each contention. 10 C.F.R. § 2.714.

RULES OF PRACTICE: DISMISSAL OF PARTIES

LICENSING BOARDS: AUTHORITY TO REGULATE PROCEEDINGS

Pursuant to 10 C.F.R. § 2.707, the Licensing Board is empowered, on the failure of a party to comply with any prehearing conference order to make such orders in regard to the failure as are just.

RULES OF PRACTICE: DISMISSAL OF PARTIES (DEFAULT)

LICENSING BOARDS: AUTHORITY TO REGULATE PROCEEDINGS

Dismissal of a party is the ultimate sanction applicable to an intervenor. Where a party fails to carry out the responsibilities imposed by the fact of its participation in the proceeding, such a party may be found to be in default and the Licensing Board may make such orders in regard to the failure as are just. 10 C.F.R. §§ 2.707, 2.718.

MEMORANDUM AND ORDER FINDING MITCHELL PETITIONERS IN DEFAULT

(Dismissal of Proceeding)

On October 30, 1991, the NRC published in the *Federal Register* a notice of application by the Arizona Public Service Co. *et al.* ("Licensees") for license amendments to the licenses for Palo Verde Nuclear Generating Station, Units 1, 2, and 3, to permit the Licensees to remove the automatic closure interlocks for shutdown cooling valves on these units, and of an opportunity for hearing on that application. 56 Fed. Reg. 55,940, 55,942 (Oct. 30, 1991). The notice provided that petitions for leave to intervene with respect to the application could be filed by November 29, 1991, in accordance with 10 C.F.R. § 2.714; that the petition should specifically explain why intervention should be permitted, with particular reference to, *inter alia*, the nature of petitioner's right to intervene under the Atomic Energy Act, as amended; and that the petition should identify the specific aspects of the subject matter of the proceeding as to which petitioner wishes to intervene. 56 Fed. Reg. at 55,941.

Allan L. Mitchell and Linda E. Mitchell ("Petitioners") filed a petition ("Petition") to intervene on November 25, 1991. Licensees and the NRC Staff have opposed the Mitchell's petition.

The Atomic Safety and Licensing Board ("Board") issued a "Notice of Prehearing Conference and Order Scheduling Filing of Pleadings" on January 2,

1992 ("Order"). 57 Fed. Reg. 938 (Jan. 9, 1992). In this Order, the Board required that "petitioners . . . file *no later than January 27, 1992* a Supplemental Petition which must include a list of the contentions which petitioners seek to have litigated in the hearing and which satisfy the requirements of paragraph (b)(2) of § 2.714 of the Commission's Rules of Practice." Order at 2. Additionally, the pleadings were "to be in the hands of the Licensing Board and other parties on the due date." *Id.* at 3.

On January 27, 1992, the Mitchell Petitioners filed a Notice with the Licensing Board and the other parties stating that they do not intend to comply with the Board's order to submit proposed contentions and moved "to voluntarily dismiss these proceedings." Licensees and NRC Staff do not object to dismissal of this proceeding.

The deliberate decision by the Mitchell Petitioners not to comply with the Licensing Board's Prehearing Order of January 2, 1992, places them in default in this proceeding. Accordingly, pursuant to the provisions of 10 C.F.R. § 2.707, the Petition for Leave to Intervene and Request for Hearing, filed by Allan L. Mitchell and Linda E. Mitchell on November 25, 1991, is hereby denied and the Mitchell Petitioners are dismissed from this proceeding, with prejudice.

There being no other matters outstanding, this licensing proceeding is hereby terminated.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Robert M. Lazo, Chairman
ADMINISTRATIVE JUDGE

Issued at Bethesda, Maryland,
this 4th day of March 1992.

Cite as 35 NRC 110 (1992) LBP-92-3A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Marshall E. Miller, Chairman
Frederick J. Shon
Dr. James H. Carpenter

In the Matter of	**Docket Nos. 030-05980**
	030-05981
	030-05982
	030-08335
	030-08444
	(ASLBP Nos. 89-590-01-OM
	90-598-01-OM-2)
SAFETY LIGHT CORPORATION,	
et al.	
(Bloomsburg Site Decontamination)	**March 16, 1992**

ORDER

(Ruling on Licensees' Motion to Compel Deposition Discovery from the NRC Staff)

On January 31, 1992, USR Industries, Inc., and Safety Light Corporation filed a Motion to Compel Deposition Discovery from the NRC Staff. The NRC Staff on February 18, 1992, filed its Answer in Opposition to Licensees' Motion to Compel Deposition Discovery. At the end of its Answer, the NRC Staff included a request for the entry of a protective order precluding the taking of the requested depositions (Staff Answer at 12).

On February 24, 1992, the Licensees (USR Industries) and Safety Light Corporation filed a Motion for Leave to File a Reply in Support of Motion to

Compel Deposition Discovery. That motion and the proposed reply attached to it were specifically directed only to the NRC Staff's Motion for a Protective Order contained in its filing dated February 18, 1992. The Licensees' Motion for Leave to File a Reply is hereby granted, and the tendered Reply in Support of Motion to Compel Deposition Discovery is received and filed *instanter* insofar as it pertains to the Staff's request for a protective order.

At a conference between counsel and the Licensing Board on January 7, 1992, the parties agreed to the following issues for the evidentiary hearing to be held in these proceedings:

> 1. Does the NRC have jurisdiction over USR Industries and USR subsidiaries (recognizing that the Staff has pending before the Nuclear Regulatory Commission an appeal at this present time with regard to this issue)?
>
> 2. Was there adequate basis in 1989 for making either or both of the 1989 orders immediately effective?
>
> 3. Should the Staff's orders of March and August 1989 be sustained, denied or modified as appropriate?

January 9, 1992 Licensing Board Order (unpublished) at 1-2.

The Licensees have requested the discovery depositions of three individuals, one identified by name (Kevin Null, an employee of NRC Region III) and two others identified under the following categories:

> An NRC Staff official who prepared or has specific knowledge of the Policy and Processing for Material Licensing Applications Involving Change of Ownership, dated February 11, 1986.[1]
>
> An NRC Staff official who prepared or has specific knowledge of the basis for the statements in SECY-91-096 and SECY-91-334 related to "the lack of clear standards for unrestricted release of residual radioactivity" (SECY-91-096 at 4) a "existing NRC regulations do not contain generally applicable and definitive decontamination criteria" (SECY-91-334 at 8).

Under the provisions of 10 C.F.R. § 2.720(h)(2)(i), where discovery is sought from the NRC Staff, it is required to "make available one or more witnesses designated by the Executive Director for Operations for oral examinations at the hearing or on deposition regarding any matter, not privileged, which is relevant to the issues in the proceeding." The Staff correctly points out the relevancy requirement of this provision, but then cites the Federal Rules of Evidence (Rule 401) as the sole criterion for determining what is relevant in the pending motion to compel discovery. We have always held that a more liberal definition of relevance may be used in the context of discovery. Such information need not

[1] The Staff stated in its Answer, at page 8, footnote 10, that the "correct title of this document is 'Policy and Guidance Directive FC 86-2; Processing Material License Applications Involving Change of Ownership.'"

be admissible *per se*, as would be the case at trial. It is sufficient if the requested discovery could reasonably lead to obtaining evidence that would be admissible at the future evidentiary hearing on this proceeding.

I. DEPOSITION OF KEVIN HULL

The Staff has not objected to the depositions of John D. Kinneman or Francis Costello. Until they have been deposed, the Licensees can make no real showing whether or not the deposition of Kevin Null is needed upon a showing of "exceptional circumstances" as required by 10 C.F.R. § 2.720(f)(2)(i). Accordingly, the Licensees should first depose John D. Kinneman and Francis Costello. If thereafter the Licensees still wish to make a case for compelling the deposition of Kevin Null, they may do so.

II. DEPOSITION OF A STAFF WITNESS REGARDING STAFF GUIDANCE OF FEBRUARY 11, 1986

Here the Licensees have not asked for the deposition of a named individual and hence need not make the difficult threshold showing required by section 2.720(h)(2)(i). As we have noted *supra*, the standard for compelling discovery is much less stringent than that for the admissibility of evidence, and need only involve information that might lead to admissible evidence. Accordingly, we direct the Staff to supply for deposition discovery some individual familiar with the issuance of the guide.

III. DEPOSITION OF A STAFF WITNESS FAMILIAR WITH EXISTENCE OR LACK OF DECONTAMINATION CRITERIA

Here also there is no request for named witnesses. The Staff has offered other witnesses who may be questioned upon this matter. We note that the Staff in issuing its recent orders denying renewal of licenses has now set forth specific decontamination criteria for this specific site. However, the Licensees have always contended that there is a significant difference between the required decontamination of a manufacturing site utilizing licensed nuclear materials, and the cleanup required after the termination of licensed operations. We express no view on this situation. However, if the deposition of some witnesses on this

point shows a clear need for additional depositions, the Licensees may renew the request. The NRC Staff's Motion for a Protective Order is denied.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
March 16, 1992

Cite as 35 NRC 114 (1992) LBP-92-4

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Richard F. Cole
Dr. Charles N. Kelber

In the Matter of **Docket No. 50-440-OLA-3**
(ASLBP No. 91-650-13-OLA-3)

CLEVELAND ELECTRIC ILLUMINATING COMPANY, ***et al.***
(Perry Nuclear Power Plant, Unit 1) **March 18, 1992**

In this Memorandum and Order, the Licensing Board finds that the petitioners lack standing to intervene in this operating license amendment proceeding and, therefore, it denies the petitioners' intervention petition.

RULES OF PRACTICE: STANDING TO INTERVENE

The Commission long ago held that "contemporaneous judicial concepts of standing" are to be used in determining whether a petitioner has alleged a sufficient "interest" within the meaning of section 189(a) of the Atomic Energy Act and the agency's regulations to intervene as a matter of right in an NRC licensing proceeding. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

RULES OF PRACTICE: STANDING TO INTERVENE

To establish standing, a petitioner must demonstrate an injury in fact from the action involved and an interest arguably within the zone of interests protected by the statutory provisions governing the proceeding. *See Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983).

RULES OF PRACTICE: STANDING TO INTERVENE

The same in injury in fact and zone of interest requirements must be met regardless of whether the petitioner is an individual or an organization seeking to intervene in its own right. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 529 (1991).

RULES OF PRACTICE: STANDING TO INTERVENE

When an organization seeks to intervene as the authorized representative of one of its members, the standing of the organizational petitioner is, *inter alia*, dependent upon that individual member having standing in his own right. *Turkey Point*, 33 NRC at 530-31. *See also Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 342-43 (1977).

RULES OF PRACTICE: STANDING TO INTERVENE

Current judicial standing doctrine holds that the injury in fact requirement has three components: injury, cause, and remedial benefit. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

RULES OF PRACTICE: STANDING TO INTERVENE

To meet the injury in fact test in proceedings other than those for construction permits and operating licenses, injury to individuals living in reasonable proximity to a plant must be based upon a showing of "a clear potential for offsite consequences" resulting from the challenged action. *St. Lucie*, 30 NRC at 329.

RULES OF PRACTICE: STANDING TO INTERVENE

Standing cannot be properly predicated upon the denial of a purported procedural right that is uncoupled from any injury caused by the substance of the challenged license amendment. *See United Transp. Union v. ICC*, 891 F.2d 908, 918 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 3271 (1990).

MEMORANDUM AND ORDER
(Ruling on Intervention Petition)

This matter is before us to determine whether the petitioners, Ohio Citizens for Responsible Energy, Inc. (OCRE) and Susan L. Hiatt, have standing to challenge an operating license amendment sought by the applicants, Cleveland Electric Illuminating Company, *et al.*, for their Perry Nuclear Power Plant located on the shores of Lake Erie in Lake County, Ohio. The amendment removes the reactor vessel material surveillance program withdrawal schedule from the plant's technical specifications and relocates it in the updated safety analysis report for the facility. For the reasons that follow, we find that the petitioners lack standing to intervene. Accordingly, their petition to intervene is denied.

I.

A. To put the petitioners' standing claims in the proper context, it is helpful initially to sketch the regulatory background underlying this license amendment proceeding.

Pursuant to section 182(a) of the Atomic Energy Act,[1] the operating license for a commercial nuclear power plant must include the "technical specifications" for the facility. That section further provides that the technical specifications include, *inter alia*, information on "the specific characteristics of the facility, and such other information as the Commission . . . deem[s] necessary . . . to find that the [plant] . . . will provide adequate protection to the health and safety of the public."[2] The Commission has implemented this statutory directive through 10 C.F.R. § 50.36. That provision states that each operating license "will include technical specifications . . . [to] be derived from the analyses and evaluation included in the safety analysis report, and amendments thereto, . . . [and] such additional technical specifications as the Commission finds appropriate."[3] The

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[1] 42 U.S.C. § 2232(a) (1988).
[2] *Id.*
[3] 10 C.F.R. § 50.36(b).

regulation then generally describes, under six category headings, the types of items that must be included in the technical specifications, such as safety limits, limiting safety system settings, limiting control settings, limiting conditions for operations, surveillance requirements, and facility design features that, if altered, would have an effect on safety.[4]

The Commission has recognized, however, that the lack of well-defined criteria in the regulations for determining precisely what should be included in a plant's technical specifications has led licensees to be over-inclusive in developing them. As the Commission stated in its interim policy statement on technical specification improvements,

> [t]he purpose of Technical Specifications is to impose those conditions or limitations upon reactor operation necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety by establishing those conditions of operation which cannot be changed without prior Commission approval and by identifying those features which are of controlling importance to safety.[5]

The Commission went on to observe that, "since [the technical specification rule was promulgated], there has been a trend towards including in Technical Specifications not only those requirements derived from the analyses and evaluation included in the safety analysis report but also essentially all other Commission requirements governing the operation of nuclear power reactors."[6] According to the Commission, this trend has had the deleterious effect of increasing the volume of technical specifications to the point where they have become unnecessarily burdensome, diverting the attention of licensees and plant operators from the plant conditions most important to safety, and substantially increasing the number of license amendment applications to make minor changes in the technical specifications — all of which "has resulted in an adverse but unquantifiable impact on safety."[7]

In an effort to eliminate these negative impacts, the Commission initiated, with the issuance of its interim policy statement, a voluntary program designed to encourage licensees to improve their technical specifications. As a small part of this ongoing program, the staff issued Generic Letter 91-01, providing guidance on the preparation of a license amendment application to remove from the technical specifications the schedule for the withdrawal of reactor vessel material surveillance specimens.[8] In addition to explaining the ministerial

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[4] *Id.* § 56.36(c).

[5] 52 Fed. Reg. 3788, 3790 (1987). *See generally Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261, 273 (1979).

[6] 52 Fed. Reg. at 3789.

[7] *Id.*

[8] Generic Letter 91-01 (Jan. 4, 1991).

function of the surveillance capsule withdrawal schedule and its relationship to other surveillance requirements designed to protect against reactor vessel embrittlement, the staff guidance letter states that the Commission's regulations already require that a licensee obtain NRC approval for any changes to the withdrawal schedule.[9] This, the staff maintains, makes it duplicative to retain regulatory control over the schedule through the license amendment process. Finally, the staff guidance letter directs that an application to effectuate this change should include the licensee's commitment to place the NRC-approved version of the specimen withdrawal schedule in the next revision of the licensee's updated safety analysis report.

B. After the staff issued the generic letter, the applicants filed a supplement to a pending license amendment application seeking to remove the reactor vessel material surveillance program withdrawal schedule from the Perry technical specifications. Thereafter, the agency published a notice of opportunity for hearing and a proposed no significant hazards consideration determination concerning the applicant's request.[10] In support of the staff's no significant hazards consideration determination,[11] the notice stated that the relocation of the surveillance capsule withdrawal schedule was purely an administrative change and hence did not (1) involve a significant increase in the probability or consequences of a previously evaluated accident; (2) affect any previous accident analyses; or (3) change any existing margin of safety.[12]

Responding to the Commission's notice, the petitioners filed a timely petition to intervene and request for a hearing on the capsule withdrawal schedule portion of the operating license amendment.[13] The applicants and the staff opposed the intervention petition on the grounds that the petitioners lacked standing to intervene.[14] We then issued an order that fixed a schedule for filing any amended petition, provided the petitioners with the opportunity to address the arguments of the applicants and the staff, and requested that the petitioners explain why several standing cases we cited were not persuasive in the circumstances presented.[15] The petitioners filed an "amended" intervention petition in which they addressed the arguments of the applicants and the staff and

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[9] *See* 10 C.F.R. Part 50, Appendix H, § II.B.3.

[10] 56 Fed. Reg. 33,950, 33,961 (1991). *See generally* 42 U.S.C. § 2239(a)(2)(A)-(B) (1988); 10 C.F.R. § 50.91.

[11] *See generally* 10 C.F.R. § 50.92(c).

[12] 52 Fed. Reg. at 33,962.

[13] Petition for Leave to Intervene and Request for a Hearing (Aug. 23, 1991) [hereinafter Petition].

[14] Licensees' Answer to Petition for Leave to Intervene and Request for Hearing (Sept. 6, 1991); NRC Staff Answer to Petition for Leave to Intervene (Sept. 12, 1991).

[15] Order (Oct. 28, 1991) (unpublished).

the cases we cited, but made no substantive changes in their standing claims.[16] Finally, the applicants and the staff filed replies to the petitioners' filing.[17]

The intervention petition asserts that petitioner OCRE is a nonprofit Ohio corporation whose purpose is to engage in reactor safety research and advocacy with the goal of advancing the use of the highest standards of safety for nuclear plants. The petition recites that some of OCRE's members live and own property within fifteen miles of the Perry plant and that one member, Susan L. Hiatt, has authorized OCRE to represent her interests in the proceeding. Attached to the petition is the affidavit of Ms. Hiatt stating that she is a member and officer of OCRE who resides about thirteen miles from the Perry facility. The affidavit states that, in addition to appearing pro se, Ms. Hiatt has authorized OCRE to represent her interests in this amendment proceeding and, in turn, OCRE has empowered her, as an officer of the organization, to represent it before the agency. With respect to petitioner Hiatt, the petition reiterates that she lives and owns property within fifteen miles of the Perry plant. The petition then states that

> Petitioners have a definite interest in the preservation of their lives, their physical health, their livelihoods, the value of their property, a safe and healthy natural environment, and the cultural, historical, and economic resources of Northeast Ohio. Petitioners also have an interest in preserving their legal rights to meaningful participation in matters affecting the operation of the Perry Nuclear Power Plant which may impact these above-mentioned interests.[18]

After setting forth the petitioners' purported interests, the petition states that the "Petitioners agree with the Licensee and NRC Staff that this portion of the proposed amendment is purely an administrative matter which involves no significant hazards considerations."[19] The petition then claims that the petitioners wish only to raise a single legal issue, i.e., the challenged amendment violates section 189(a) of the Atomic Energy Act[20] by depriving the public of the right to notice and an opportunity for a hearing on any changes to the withdrawal schedule. According to the petition, the withdrawal schedule traditionally has been part of the applicants' technical specifications and hence the Perry operating license so that, pursuant to section 189(a), changes to the schedule can be made only after public notice and an opportunity for a hearing. The petitioners next argue that under the challenged amendment the licensees henceforth will be able

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[16] Petitioners' Amended Petition for Leave to Intervene (Nov. 22, 1991).

[17] Licensees' Response to Amended Petition for Leave to Intervene (Dec. 17, 1991); NRC Staff Response to Amended Petition (Dec. 17, 1991).

[18] Petition at 2-4.

[19] *Id.* at 5.

[20] 42 U.S.C. § 2239(a) (1988).

to make de facto license amendments to the withdrawal schedule, without any notice or hearing, in violation of their rights under section 189(a).[21]

II.

A. Parroting the language of section 189(a) of the Atomic Energy Act, the Commission's regulations provide that "[a]ny person whose interest may be affected by a proceeding" may seek to intervene by filing a petition.[22] The regulations further provide that the petition shall "set forth with particularity the interest of the petitioner in the proceeding [and] how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene."[23] The Commission long ago held that "contemporaneous judicial concepts of standing" are to be used in determining whether a petitioner has alleged a sufficient "interest" within the meaning of section 189(a) and the agency's regulations to intervene as a matter of right in an NRC licensing proceeding.[24] According to the Commission, those familiar standing principles require that a petitioner demonstrate an injury in fact from the action involved and an interest arguably within the zone of interests protected by the statutory provisions governing the proceeding.[25] The same showing is required regardless of whether the petitioner is an individual or an organization seeking to intervene in its own right.[26] Additionally, when an organization seeks to intervene as the authorized representative of one of its members, the standing of the organizational petitioner is, *inter alia*, dependent upon that individual member having standing in his own right.[27]

As the Supreme Court has recognized, "[g]eneralizations about standing to sue are largely worthless as such."[28] It nevertheless is current judicial standing doctrine that the injury in fact requirement has three components: injury, cause, and remedial benefit. As articulated by the Supreme Court,

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[21] Petition at 6-10.

[22] 10 C.F.R. § 2.714(a)(1).

[23] *Id.* § 2.714(a)(2).

[24] *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

[25] *Id.; see Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983).

[26] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 529 (1991); *see TMI*, 18 NRC at 332.

[27] *Turkey Point*, 33 NRC at 530-31. *See also Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 342-43 (1977).

[28] *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151 (1970).

> the party who invokes the court's authority [must] "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976).[29]

Although variously described, the asserted injury must be "distinct and palpable"[30] and "particular [and] concrete,"[31] as opposed to being " 'conjectural . . . [,] hypothetical,' "[32] or "abstract."[33] The injury need not already have occurred but when future harm is asserted, it must be "threatened,"[34] " 'certainly impending,' "[35] and " 'real and immediate.' "[36] Additionally, there must be a causal nexus between the asserted injury and the challenged action. In other words, the alleged harm must have "resulted" in a "concretely demonstrable way" from the claimed infractions.[37] There also must be a sufficient causal connection between the alleged harm and the requested remedy so that the complaining party "stand[s] to profit in some personal interest."[38]

B. Here, it is clear that the petitioners fail to satisfy the injury in fact test for standing. This being so, we need not reach any question concerning the zone of interest requirement. Further, we need address only Ms. Hiatt's standing claims because OCRE's standing as the representative of its member is, *inter alia*, dependent upon Ms. Hiatt's standing and, to the extent OCRE seeks to intervene as an organization in its own right, both petitioners have alleged the same interests.[39] Thus, because Ms. Hiatt has failed to establish an injury in fact, OCRE's claim likewise must fail.

1. In the intervention petition, Ms. Hiatt first asserts that she lives and owns property within fifteen miles of the Perry facility and that she has an interest in preserving her health, livelihood, property, and environment as well as the cultural, historical, and economic resources of northeastern Ohio, all of which

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[29] *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). *See generally* 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3531.4-.6 (1984).

[30] *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

[31] *United States v. Richardson*, 418 U.S. 166, 177 (1974).

[32] *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

[33] *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. at 40.

[34] *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973).

[35] *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)).

[36] *Los Angeles v. Lyons*, 461 U.S. at 102.

[37] *Warth v. Seldin*, 422 U.S. at 504.

[38] *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. at 39.

It should be noted that when the requested relief is the cessation of the putatively illegal conduct, the analysis of the causal nexus between the alleged injury and the challenged action (i.e., the "fairly traceable" analysis) and the asserted harm and the requested relief (i.e., the "redressability" analysis), is the same. *See Allen v. Wright*, 468 U.S. 737, 759 n.24 (1984).

[39] *See supra* notes 26-27 and accompanying text.

may be impacted by the operation of the plant. But petitioner's mere interest in these enumerated matters, without a great deal more, is woefully insufficient to establish that she has suffered some actual or threatened injury from the challenged license amendment. Generalized interests of the kind asserted by the petitioner do not comprise an injury that is distinct and palpable or particular and concrete. Rather, the petitioner's asserted interests are abstract and conjectural grievances that fall far short of the kind of real or threatened harm essential to establish an injury in fact.[40] As the Supreme Court has stated, "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the [Administrative Procedure Act]."[41] Similarly, the concerns listed by the petitioner are inadequate to demonstrate her "interest" in this proceeding within the meaning of the Commission's regulations.

As previously indicated, to satisfy the injury in fact requirement, the alleged harm to the petitioner also must have been caused by the challenged licensing action. Yet, the amendment at issue only removes the reactor vessel material surveillance withdrawal schedule from the Perry technical specifications and places it in the updated safety analysis report. Ms. Hiatt concedes that the license amendment is purely an administrative matter that involves no significant hazards considerations. As solely an administrative change, the instant licensing action has no effect on any of the petitioner's asserted interests in preserving her life, health, livelihood, property, or the environment. Hence, the essential causal nexus between the petitioner's alleged harm and the challenged license amendment is missing.

Nor is the petitioner's position enhanced by her claim that she lives within fifteen miles of the Perry facility and that her interests, therefore, may be impacted by matters affecting the operation of the plant. Such a speculative claim is far too tenuous a causal link between the petitioner's alleged injury and the licensing action at issue to meet the injury in fact test. The Commission has emphasized that, in proceedings other than those for construction permits and operating licenses, injury to individuals living in reasonable proximity to a plant must be based upon a showing of "a clear potential for offsite consequences" resulting from the challenged action.[42] Not only has the petitioner not made any such showing here, but her gratuitous admission in the intervention petition that the license amendment is purely an administrative matter with no significant hazards considerations precludes it.

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[40] *See TMI*, 38 NRC at 332-33; *Turkey Point*, 33 NRC at 530.

[41] *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

[42] *St. Lucie*, 30 NRC at 329.

2. Ms. Hiatt's second claim of injury is as unavailing as her first. She asserts that she has an interest in preserving her "legal right" to meaningful participation in matters affecting the operation of the Perry facility. This claim of injury, however, also fails to meet the injury in fact test.

Setting aside for the moment the petitioner's declaration that she has a legal right to participate in NRC licensing proceedings, we note initially that the injury claimed by Ms. Hiatt is a future one. She does not allege any actual present harm from the license amendment. Indeed, she concedes it is merely an administrative matter with no safety implications. Instead, the petitioner complains that if future changes in the withdrawal schedule occur, there will be no future license amendment proceedings so she will lose her right to participate meaningfully in matters affecting the operation of the Perry plant.

Although a future injury can meet the injury in fact test, it must be one that is realistically threatened and immediate.[43] Here, however, the petitioner's alleged future injury is speculative.[44] Before the petitioner's alleged harm can occur, a number of uncertain and unlikely events must take place including, most obviously, a change in the withdrawal schedule. But Ms. Hiatt has not asserted that future changes in the withdrawal schedule will be made or even that such changes are likely.[45]

Equally damaging to her argument, however, is the fact that the speculative harm asserted by the petitioner is footed on an erroneous premise. Without citing any direct authority, Ms. Hiatt declares that pursuant to section 189(a) of the Atomic Energy Act she has a "legal right" to participate in NRC license amendment proceedings. From this thesis, she argues that the challenged license amendment violates that right with respect to future changes in the specimen withdrawal schedule — changes she characterizes as de facto license amendments made without notice and an opportunity for a hearing. Contrary to the petitioner's apparent belief, section 189(a) does not give the petitioner an absolute, automatic right to intervene in NRC licensing proceedings. That provision bestows no legal or vested right on her to participate in agency licensing actions. As the United States Court of Appeals for the District of Columbia Circuit recently stated, "we have long recognized that Section

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[43] *See supra* notes 34-36 and accompanying text.

[44] *See Juidice v. Vail*, 430 U.S. 327, 332-33 & n.9 (1977) (plaintiff previously imprisoned and fined for contempt for ignoring deposition subpoena regarding outstanding judgment lacked standing to enjoin future enforcement of state statutory contempt procedures because prospect of future contempt was speculative conjecture even though judgment remained unsatisfied). *See also Los Angeles v. Lyons*, 461 U.S. at 105; *O'Shea v. Littleton*, 414 U.S. 488, 496-97 (1974); *United Transp. Union v. ICC*, 891 F.2d 908, 913-14 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 3271 (1990).

[45] Additionally, the petitioner has failed to identify the chain of circumstances culminating in "offsite consequences" that must be linked to those future changes before she reasonably can claim to be threatened by the operation of the Perry facility. *See supra* p. 122.

189(a) 'does not confer the automatic right of intervention upon anyone.' "[46] Rather, section 189(a) grants participatory rights only to those persons who first establish, *inter alia*, that they have standing to intervene. Here, of course, the petitioner has not demonstrated that she has standing so section 189(a) cannot be used as the bootstrap to establish it.

Finally, the purported harm claimed by the petitioner fails to pass the injury in fact test for another reason: it has no causal link to any substantive regulatory impact. For example, the petitioner does not allege that the removal of the withdrawal schedule from the Perry technical specifications violates 10 C.F.R. § 50.36, the Commission's substantive rule prescribing the matters that must be included in a plant's technical specifications. Rather, Ms. Hiatt claims only the deprivation of a purported procedural right to have notice and an opportunity to request a hearing on future changes to the withdrawal schedule. Stated otherwise, she alleges a right to participate in a license amendment hearing as an end in itself.[47] But standing cannot be properly predicated upon the denial of a purported procedural right that is uncoupled from any injury caused by the substance of the challenged license amendment. As the District of Columbia Circuit has stated, "before we find standing in procedural injury cases, we must ensure that there is some connection between the alleged procedural injury and a substantive injury that would otherwise confer . . . standing. Without such a nexus, the procedural injury doctrine could swallow [the injury in fact] standing requirements."[48]

Illustrative of this substantive nexus principle is the same circuit's decisions in *Capital Legal Foundation v. Commodity Credit Corp.*[49] There, Capital Le-

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[46] *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55 (D.C. Cir. 1990) (quoting *BPI v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974)).

[47] Additionally, the petitioner argues that, if the amendment is granted, the only mechanism available for public participation in future changes to the withdrawal schedule is through 10 C.F.R. § 2.206. According to the petitioner, that provision provides neither meaningful participation nor a right to judicial review. This argument, like the one above, is bottomed on the erroneous, albeit implicit, notion that the petitioner has a legal right, without more, to participate in NRC licence amendment proceedings. As previously stated, section 189(a) of the Atomic Energy Act grants no right to the petitioner to participate in agency proceedings for the sake of participating. Whether Ms. Hiatt has other avenues to challenge future changes in the specimen withdrawal schedule is irrelevant to the determination of her standing to intervene in *this* license amendment proceeding, which must rest on a showing that the instant amendment results in an actual or threatened injury in fact.

[48] *United Transp. Union v. ICC*, 891 F.2d at 918 (citation omitted).

Interestingly, in its decision, the court of appeals went on to posit an example that is closely analogous to the situation at hand:

> Consider, for example, what would happen if the ICC adopted a rule stating that any American could intervene in an ICC proceeding to challenge any interlocking directorate between two railroads, and then later repealed that rule. Would every American be entitled to sue alleging that he or she suffered a procedural injury when the right to intervene was revoked? Surely some showing that interlocking directorates would be likely to injure the complainant should be required. Indeed, if a procedural injury alone suffices to confer Article III standing, any American could sue any agency alleging that it is arbitrary and capricious not to have a procedure by which they can challenge agency action.

Id. at 918-19.

[49] 711 F.2d 253 (D.C. Cir. 1983).

gal Foundation (Capital) sought declaratory and injunctive relief against the Commodity Credit Corporation (CCC) for offering to assume certain Polish government debts owed to American creditors and guaranteed by the agency, without first complying with the requirement of the CCC's regulation that the creditors declare the Polish debts in default. Capital, an organization involved in monitoring agencies engaged in economic regulation, claimed that the CCC's violation of the default provisions in its regulations was a de facto rule amendment undertaken without compliance with the notice and comment rulemaking procedures of the Administrative Procedure Act. Capital alleged it was harmed by the CCC's action because it had been deprived of its procedural right to comment on the rule change. It also conceded that it suffered no other injury stemming from the CCC's action. The court held that Capital lacked standing because it was not injured by the CCC's action.[50]

Capital's injury claim directly parallels Ms. Hiatt's claim that the challenged license amendment harms her procedural right to notice and an opportunity to request a hearing on future changes to the withdrawal schedule.[51] And like Capital, Ms. Hiatt effectively concedes she has no other injury by admitting the challenged amendment is purely an administrative matter with no significant hazards considerations. Given these circumstances, the same result must obtain here for Ms. Hiatt and OCRE which stands her stead.

C. Although the petitioners do not rely upon or even mention it in their filings, we think it incumbent upon us to account for our divergence from another Licensing Board's decision in an earlier *Perry* license amendment proceeding that the applicants and the staff brought to our attention.[52] There, in circumstances indistinguishable from those before us, the Board found that OCRE had standing. We decline to follow that ruling.

In the earlier proceeding, OCRE, as the representative of its member Ms. Hiatt, challenged a license amendment that removed the cycle-specific core operating limits and other cycle-specific fuel information from the Perry technical specifications and replaced them with an agency-approved calculation methodology and acceptance criteria. As in this case, OCRE conceded that the amendment involved purely an administrative matter that involved no significant haz-

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[50] 711 F.2d at 255-57, 259-60. *See also United Transp. Union v. ICC*, 891 F.2d at 918-19; *Telecommunications Research and Action Center v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 1990); *Wilderness Society v. Griles*, 824 F.2d 4, 19 (D.C. Cir. 1987).

[51] The petitioner seeks to distinguish *Capital Legal Foundation* on the ground that Capital claimed injury only to procedural rights conferred upon everyone by the Administrative Procedure Act. In contrast, she argues that her injury is to the substantive right to a hearing on license amendments given by the Atomic Energy Act to the special class of citizens living in close proximity to a nuclear plant. The petitioner's argument is meritless. As previously indicated, section 189(a) of the Atomic Energy Act does not confer upon anyone an automatic right of intervention in NRC licensing proceedings. *See supra* pp. 123-24. Further, mere residence in the vicinity of a nuclear plant is insufficient by itself to confer standing on a person seeking to intervene in an operating license amendment proceeding. *See supra* p. 122.

[52] LBP-90-15, 31 NRC 501, 506, *reh'g denied*, LBP-90-25, 32 NRC 21, 24 (1990).

ards considerations. And, as here, OCRE claimed that it was harmed because the challenged license amendment would permit future core operating limit changes without notice and an opportunity to request a hearing. Similarly, OCRE asserted that it wished to raise the single legal issue of whether the challenged amendment violated section 189(a) of the Atomic Energy Act by depriving the public of the right to notice and an opportunity to request a hearing on future core operating limit changes.[53]

In holding that OCRE had standing, it appears the Board determined that, because the Commission's regulations allow the filing of a contention raising only a legal issue, and OCRE raised such an issue, OCRE had standing to intervene.[54] Further, in its ruling denying motions for reconsideration, the Board appears to have concluded that OCRE's injury claim was sufficient because the challenged amendment deprived OCRE of its "legal right" to notice and an opportunity to request a hearing on future cycle-specific parameter limits. Additionally, the Board apparently found persuasive OCRE's argument that if the amendment were granted OCRE would have no effective opportunity to confront future cycle-specific operating limit changes.[55]

In our view, the regulatory requirement that a petitioner must establish standing to intervene is independent of, and unrelated to, the type of issue, i.e., legal or factual, a petitioner seeks to raise. The requirement of 10 C.F.R. § 2.714(b)(1) that a petitioner must proffer at least one admissible legal or factual contention in order to obtain a hearing has nothing to do with the separate requirement that the petitioner establish its standing. Moreover, for the reasons already detailed herein, we conclude that section 189(a) of the Atomic Energy Act grants no automatic hearing rights and that the lack of other avenues for challenging the changes permitted by the amendment is irrelevant to the determination of the petitioner's standing.[56] Accordingly, we do not concur with the reasoning or the ruling of the previous *Perry* Board.

Order

For the foregoing reasons, we find that both petitioner Hiatt and petitioner OCRE lack sufficient interest within the meaning of 10 C.F.R. § 2.714(a)(1) to intervene in this operating license amendment proceeding. Accordingly, the intervention petition of Ms. Hiatt and OCRE is *denied*.

[53] 31 NRC at 503-05.
[54] *Id.* at 506.
[55] 32 NRC at 24.
[56] *See supra* pp. 122, 123-24, 124 n.47.

Pursuant to 10 C.F.R. § 2.714a, the petitioners, within 10 days of service of this Memorandum and Order, may appeal this Order to the Commission by filing a notice of appeal and accompanying brief.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Dr. Charles N. Kelber
ADMINISTRATIVE JUDGE

Bethesda, Maryland
March 18, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman
Dr. Richard F. Cole
Dr. Jerry R. Kline

In the Matter of	**Docket No. 030-20541-OM**
	(ASLBP No. 92-658-04-OM)
	(Byproduct Material License No. 52-21350-01)
	(EA 91-171)
JOSE A. RUIZ CARLO	**March 24, 1992**

MEMORANDUM AND ORDER
(Approving Settlement Agreement and Terminating Proceeding)

On February 21, 1992, the parties to this enforcement proceeding, the NRC Staff and Mr. Jose A. Ruiz Carlo, filed with the Atomic Safety and Licensing Board (1) a Settlement Agreement that has been accepted and signed by both parties and the Licensee, and (2) a joint motion requesting the Board's approval of the Agreement and entry of an order terminating this proceeding, together with a proposed Order.[1] The Board has reviewed the Settlement Agreement under 10 C.F.R. § 2.203 to determine whether approval of the Settlement Agreement and consequent termination of this proceeding is in the public interest. We have requested and received additional explanation. Based upon its review, the Board

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[1] Licensee, Alonso and Carus Iron Works, Inc., while it did not request a hearing, is [illegible] a signatory to the Agreement for reasons set out therein.

is satisfied that approval of the Settlement Agreement and termination of this proceeding based thereon is in the public interest.

Accordingly, the Board approves the Settlement Agreement attached hereto and, pursuant to sections 81 and 161 of the Atomic Energy Act of 1954, as amended (42 U.S.C. §§ 2111 and 2201), incorporates the Settlement Agreement by reference into this Order. Pursuant to 10 C.F.R. § 2.203, the Board hereby terminates this proceeding on the basis of the Settlement Agreement.

THE ATOMIC SAFETY AND
LICENSING BOARD

Richard F. Cole
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
March 24, 1992

Cite as 35 NRC 130 (1992) LBP-92-6

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman
Peter S. Lam, Ph.D.
Harry Rein, M.D.

In the Matter of	Docket No. 55-8615-SC (ASLBP No. 91-646-02-SC) (Senior Reactor Operator License No. SOP-10561-1) (EA 91-054)
DAVID M. MANNING (Senior Reactor Operator)	March 31, 1992

MEMORANDUM AND ORDER
(Terminating Proceeding)

We have before us the NRC Staff's motion of February 24, 1992, to terminate this proceeding. The background of this and the related *FitzPatrick* proceeding is set out in our Memorandum and Order (Terminating FitzPatrick Proceeding), *New York Power Authority* (James A. FitzPatrick Nuclear Power Plant), LBP-92-1, 35 NRC 11 (1992).

In sum, David M. Manning held a senior operator's license in connection with his employment with the New York Power Authority (NYPA) at the FitzPatrick plant. This proceeding was initiated upon Mr. Manning's request for a hearing

on an enforcement action by the NRC Staff suspending his license. Since then Mr. Manning's employment with NYPA has been terminated.[1]

The Staff's motion is grounded upon 10 C.F.R. § 55.55(a) which provides that each senior operator license expires "upon termination of employment with the facility licensee . . . ." Thus, in the Staff's view, this proceeding is moot and should therefore be terminated. Mr. Manning did not answer Staff's motion.

ORDER

Staff's motion is granted. This proceeding is moot and is therefore terminated.

THE ATOMIC SAFETY AND
LICENSING BOARD

Peter S. Lam, Ph.D.
ADMINISTRATIVE JUDGE

Harry Rein, M.D.
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
March 31, 1992

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[1] *See* Board Notifications 92-01 and 92-02. Board Notification 92-02 enclosed a letter dated January 24, 1992, from NYPA to NRC Region I advising that Mr. Manning is no longer employed by NYPA and requesting that his license be terminated in accordance with 10 C.F.R. § 55.55. Since NYPA is required to report this information under 10 C.F.R. § 50.74(b), the Board takes official notice of its accuracy.

Directors'
Decisions
Under
10 CFR 2.206

DIRECTORS' DECISIONS

Cite as 35 NRC 133 (1992) DD-92-1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of	**Docket Nos. 50-528**
	50-529
	50-530
ARIZONA PUBLIC SERVICE COMPANY, *et al.*	
(Palo Verde Nuclear Generating Station, Units 1, 2, and 3)	**March 16, 1992**

The Director of the Office of Nuclear Reactor Regulation denies a petition filed by Messrs. David K. Colapinto and Stephen M. Kohn, requesting action with regard to the Palo Verde Nuclear Generating Station Units 1, 2, and 3. Specifically, the Petition alleged that: a hydrogen leak in the main generator of Unit 2 could pose a fire hazard; fire pumps at the plant have malfunctioned and cannot pump water in the event of a fire; the cooling towers are crumbling and are unsafe; the plant has been operating outside of safety regulations under "justifications for continued operation"; the Licensee has not identified the electrical circuit breakers for fire protection such that, in the event of a fire, it would not know what equipment could be damaged; it is rumored that Unit 2 has a primary-to-secondary leak of 2 gallons per minute; the Licensee has willfully operated Palo Verde Nuclear Generating Station in violation of unspecified licensing requirements and willfully failed to report unspecified safety violations to the NRC through Licensee event reports; the Licensee has never moved the portable hydrogen recombiner from one unit to another, has no procedure to do so, and has no backup recombiner; the Licensee failed to correctly implement a design change for the reactor control element drive mechanisms on Unit 3; the Licensee has engaged in widespread harassment and retaliation against employees who raise safety concerns. The Petitioners request emergency action to shut down Palo Verde Units 1, 2, and 3, and that the NRC

appoint a special investigative team to monitor and inspect conditions at the plant.

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

I. INTRODUCTION

On June 6, 1991, Messrs. David K. Colapinto and Stephen M. Kohn sent a letter addressed to the Chairman of the U.S. Nuclear Regulatory Commission (NRC) which presented ten allegations regarding various facets of plant operation at the Palo Verde Nuclear Generating Station, and requested that the three units be immediately shut down until matters raised in the letter are resolved. The letter also stated that a special investigative team should be appointed to monitor and inspect conditions at the plant. The letter is being treated as a request for action (petition) under the NRC's regulations contained in section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206). By letter dated August 15, 1991, Petitioners' request for emergency action to shut down Palo Verde Units 1, 2, and 3 was denied, and receipt of the petition was acknowledged.

II. DISCUSSION

In the June 6, 1991 letter, the Petitioners presented 10 concerns as bases for Petitioners' request. Petitioners' concerns are summarized as follows: a hydrogen leak in the main generator of Unit 1 could pose a fire hazard. Fire pumps at the plant have malfunctioned and cannot pump water in the event of a fire. The cooling towers are crumbling and are unsafe. The plants have been operating outside of safety regulations under "justifications for continued operation." The Arizona Public Service Company (APS, the Licensee) has not identified the electrical circuit breakers for fire protection such that, in the event of a fire, it would not know what equipment could be damaged. It is rumored that Unit 2 has a primary-to-secondary leak of 2 gallons per minute. The Licensee has willfully operated Palo Verde in violation of unspecified licensing requirements and willfully failed to report unspecified safety violations to the NRC through licensee event reports, as required. The Licensee has never moved the portable hydrogen recombiner from one unit to another, has no procedure to do so, and has no backup recombiner. The Licensee failed to correctly implement a design change for the reactor control element drive mechanisms on Unit 3. The Licensee has engaged in widespread harassment and retaliation

against employees who raise safety concerns.[1] Additional details regarding the condition of the cooling towers were provided in a supplemental letter of January 14, 1992.

I will address each of these items below.

A. Unit 1 Hydrogen Leak

Petitioners allege the following:

> A hydrogen leak in Palo Verde Unit 1 has been ongoing since late 1990 or early 1991. This has created an extremely dangerous and volatile condition which could ignite in a catastrophic fire. It is believed that APS has known of this condition for at least six months but has not fixed the problem. Moreover, APS had an opportunity to resolve the problem during a planned outage earlier this year but failed to do so.

The NRC has no specific regulations regarding hydrogen leakage from the generator portion of the turbine generator. However, good fire protection practices would require that such fire and explosion hazards be minimized. Hydrogen leakage from generators *is* normal, and hydrogen does leak from the Unit 1 generator. The rate of hydrogen leakage has been as high as 4600 cubic feet per day (cfd). Contrary to the allegation, the Licensee performed extensive work during the Unit 1 outage in February 1991 to reduce the hydrogen leakage to approximately one-third (1300 cfd) of its former value. The leakage rate had increased to about 2000 cfd just prior to the unit shutdown for refueling in February 1992. During this refueling, a modification is being made to the unit generator which is expected to reduce hydrogen leakage. The generator area is well ventilated and has notices posted regarding the possible presence of hydrogen and a prohibition of smoking in the area. Specific portions of the generator hydrogen seal oil system are vented outside of the turbine building in an isolated area to minimize the fire hazard. Additionally, the Licensee has procedures for monitoring the hydrogen concentration levels during plant operation. The levels of hydrogen detected to date are indicative of no significant risk of fire.

A lack of hydrogen purity in the generator is an explosion hazard. Procedures at Palo Verde require that the hydrogen concentration in the main generator be maintained between 90 and 100% to ensure adequate cooling of the generator and to avoid a flammable mixture of hydrogen and oxygen. The concentration

[1] The NRC's Office of Investigations is investigating the matter of alleged intimidation, harassment, and retaliation against employees who raise safety concerns at Palo Verde in response to a Petition of May 22, 1990, filed under 10 C.F.R. § 2.206 by Mr. Colapinto on behalf of Ms. Linda Mitchell. As stated in the Director's Decision issued on October 31, 1990 (DD-90-7, 32 NRC 273), this matter will be the subject of a separate Director's Decision. Therefore, this Decision will not address that allegation.

is normally 97%, which is above the specified minimum 90% and well above a flammable limit of 75%. APS has not had a problem maintaining the generator hydrogen purity for Palo Verde.

Consequently, based on all of the above, there is no basis to conclude that the hydrogen leak in the Unit 1 generator is either a fire hazard or a substantial safety concern.

B. Fire Pump Reliability

Petitioners allege the following:

> It has been recently discovered that the plant's fire pumps malfunction due to a lack of adequate maintenance. Although this equipment was upgraded to quality augmented system in 1990 APS has failed to perform adequate QA and routine maintenance. Thus, in the event of a fire at the plant there exists an unacceptable risk that the fire pumps would be unable to pump water to extinguish a fire.

Palo Verde has three permanently installed 50% capacity fire pumps, one powered by a motor and two powered by diesels. The site's fire pumper truck is also a backup pump that the Licensee can connect to the fire main system to compensate for the extended loss of a single pump. The three-pump concept allows for one pump to fail because two of the pumps will provide 100% capability. The NRC reviewed pump test data and found that the maintenance history for these pumps has varied annually. Since 1987, the Licensee has initiated four to twelve individual pump outages each year for corrective maintenance. The total number of hours for corrective maintenance outages for all three pumps has varied from 624 to 2706 hours each year since 1987.

The Licensee also periodically tests the pumps in accordance with its NRC-approved fire protection program which requires monthly testing he pumps. The Palo Verde fire insurer, American Nuclear Insurers, requires eekly pump tests. During both the weekly and monthly tests, individual pumps have failed to produce the required flow six times since 1988. This number of failures is a very small percentage of the total number of test starts over the period. The maintenance history of the pumps indicates that the Licensee could give a higher priority to completing required maintenance. However, in its review, the NRC did not identify any occasions when the Licensee failed to meet the NRC's requirement of 100% available capacity for the fire pumps. Therefore, the Petitioners have raised no substantial safety concern regarding the reliability of the plant's fire pumps.

C. **Cooling Towers**

Petitioners allege the following:

> The cooling towers for all three Palo Verde units are crumbling and are unsafe. In fact, a portion of one of the cooling towers for Unit 1 recently collapsed. APS has not proposed a solution to this problem, and it is believed that APS plans to continue to operate Unit 1 at full power even though a portion of its cooling tower is incapacitated. It is also believed that APS has known for an extended period of time about the weaknesses in the concrete material used to construct the cooling towers but has failed to correct these deficiencies.

The cooling towers at Palo Verde are *not* safety-related structures. If the cooling tower were incapacitated, this could result in Unit 1 operating less efficiently than possible, which would be an economic penalty to APS but not a safety problem. However, falling debris is a hazard to personnel. Two sections of louvers, which direct air and deflect cooling water back into the tower, deteriorated and fell from a Unit 1 cooling tower. The Licensee addressed this problem by restricting access to the area surrounding the cooling towers with rope barriers for personnel safety.

The Licensee also found indications of concrete spalling caused by the corrosion of the reinforced steel within the precast concrete. APS is conducting an engineering evaluation to determine corrective measures for the cooling tower deterioration. A schedule will follow when the corrective measures have been determined.

In summary, the cooling towers have no safety function and consequently there is no substantial nuclear safety concern with their condition.

D. **Justifications for Continued Operation**

Petitioners allege the following:

> In numerous areas the NRC has permitted APS to operate Palo Verde outside safety regulations by accepting letters of Justification for Continued Operation ("JCO"). This is an unacceptable and highly dangerous practice. First, APS has not fully committed to permanent solutions for these JCO's. For example, APS has not proposed a permanent solution for the JCO governing problems with its Reactor Coolant Seals. Second, APS has been permitted to violate Technical Specifications and other licensing conditions for unreasonable and extensive periods of time and JCO's are not resolved in a timely fashion. Third, neither APS nor the NRC has conducted safety evaluations of these JCO's. Fourth, there are no procedures governing the writing and control of JCO's. Fifth, given the sheer volume of JCO's in effect it is believed that the operators are not fully cognizant of operating conditions.

Petitioners allege that the APS's use of JCOs has created an unacceptable and dangerous practice. Appendix B to 10 C.F.R. Part 50 requires APS to

establish measures to ensure that conditions adverse to quality, such as failures, malfunctions, deficiencies, deviations, defective material and equipment, and nonconformances are promptly identified and corrected. However, resolution of some of these issues may take a considerable amount of time to develop design changes and procedures and install hardware. APS prepares Justifications for Continued Operation (JCOs) which document the manner in which it can continue to safely operate the plant until it resolves such deficiencies. JCOs are also prepared in support of Temporary Waivers of Compliance (discussed in section 2, below).

1. Reactor Coolant Pump Seals

Petitioners allege that APS has not proposed a permanent solution for the JCO governing the reactor coolant pump seals. Neither APS nor NRC is aware of any JCO on reactor coolant pump seals. The JCO to which the Petitioners refer appears to be the JCO submitted to the NRC for the interface between the nuclear cooling water system and the high-pressure seal cooler for the reactor coolant pump (RCP). The rupture of the high-pressure seal cooler for the RCP was a postulated accident that was not considered for Palo Verde. However, the Licensee analyzed this scenario in response to the NRC's Information Notice 89-54, "Potential Overpressurization of the Component Cooling Water System," of June 23, 1989. APS has presented analyses demonstrating that the doses from such an accident are well within the 10 C.F.R. Part 100 guidelines but are subject to certain operating constraints. The NRC technical staff has reviewed this matter and has documented its approval in safety evaluations of March 12, May 20, and October 9, 1991. APS has committed to correct the design deficiency on Unit 1 during its refueling outage beginning February 1992. APS will modify Units 2 and 3 during their next refueling outages.

2. Violation of Technical Specifications

Petitioners allege that APS has been permitted to violate technical specifications and other license conditions for unreasonable and excessive periods of time. The allegation appears to refer to NRC issuance of Temporary Waivers of Compliance (TWOC). A TWOC is issued upon request and justification by a utility to the NRC and allows the utility to deviate from its technical specifications or other license conditions for a short time if the deviation will result in no significant hazards or irreversible environmental consequences. The TWOC requires a written request from a utility which includes the following:

a. a discussion of the requirements for which a waiver is requested;
b. a discussion of the circumstances surrounding the situation, including the need for prompt action and a description of the reasons that the situation could not have been avoided;
c. a discussion of any compensatory actions;
d. an evaluation of the safety significance and consequences of the proposed request;
e. a discussion that justifies the duration of the request;
f. the basis for the licensee's conclusion that the request does not involve a significant hazards consideration; and
g. the basis for the licensee's conclusion that the request does not involve irreversible environmental consequences.

Such requests are reviewed by the NRC and approved in writing. The NRC will not act on a utility's request until the Licensee has confirmed that the action has been reviewed and approved by the Plant Operations Review Committee (PORC) or its equivalent and the NRC is clearly satisfied that issuance of a TWOC is consistent with protecting the public health and safety.

The NRC issues a TWOC to allow a utility a short period of time beyond that allowed by technical specifications to fix equipment without requiring a plant shutdown or preventing startup. In many cases, shutting down the plant would involve more risk than allowing a short period of time to fix equipment.

3. *Safety Evaluation of JCOs, Timeliness of Resolution, and Procedures for Writing and Control of JCOs*

Petitioners allege that neither APS nor the NRC conducts safety evaluations of JCOs, APS does not resolve JCOs in a timely fashion, and APS has no procedures governing the writing and control of JCOs. APS has a procedure that establishes the process for preparing, reviewing, and approving JCOs. Licensing Department personnel prepare JCOs for Palo Verde. The JCOs are reviewed by the affected plant managers, managers of departments providing technical support, and the Nuclear Safety Group, and are approved by the Plant Review Board. The JCOs are made available to the NRC upon request. NRC can and has reviewed the Licensee's JCOs. In some cases, this review has resulted in changes in some of the JCOs.

Petitioners allege that operators are not fully cognizant of operating conditions because the JCOs do not require them to be. When a JCO requires compensatory measures, APS provides instructions to address the specific condition by revising appropriate Palo Verde procedures such as those for operating, maintenance, and surveillance testing. Operations personnel are also briefed about the deficient condition. APS has instructions for initiating and processing JCOs,

and operators know of the JCOs because they are distributed to the control room and are kept in marked binders.

The time needed to resolve the issues discussed in a JCO might involve design changes, revised procedures, or hardware changes. Resolution time varies depending on such matters. The JCO that has been active for the longest period was approved in July 1990 to justify interim operation while APS better defined and implemented the requirements in the quality assurance program for fire protection and related systems. The time required is not unreasonable considering the work that needed to be done.

Petitioners do not identify any issue regarding writing, controlling, evaluating, or using JCOs that raises a substantial safety concern.

E. Appendix R Electrical Circuit Breakers

Petitioners allege the following:

> APS has not identified nor coordinated Appendix R breakers throughout the units. Thus, in the event of a fire APS would not know what pieces of equipment would be lost.

The Licensee has studied circuits for fire protection, spurious actuations, and breaker coordination to ensure that the plant can be shut down safely in the event of a fire. In March 1985, the NRC inspected the Licensee's analyses for associated circuits and fuse and breaker coordination and found them acceptable (Inspection Report 50-528/85-06).

Technical Specification 3.3.3.5 lists the electrical equipment, including switches, breakers, and circuits, needed to shut down the plant safely in the event of a fire or any other event that requires the operators to leave the control room. The Palo Verde pre-fire strategies manual lists equipment that would be unavailable or could malfunction during a fire. This manual also lists the equipment or set of components that the Licensee would use to achieve safe shutdown (safe shutdown train B). The NRC has reviewed the Licensee's safe shutdown analysis methodology and spurious actuation analyses and accepted them (Supplemental Safety Evaluation Reports 5 and 7, of November 1983 and December 1984, respectively). Contrary to the allegation, APS has identified the equipment affected by a postulated fire and evaluated the methods to be used to achieve safe shutdown.

Therefore, the NRC finds no reason to conclude that Petitioners have raised a substantial safety concern with regard to Appendix R electrical circuit breakers.

F. Rumor of a Primary-to-Secondary Leak

Petitioners allege the following:

> It has been rumored that APS has experienced a primary to secondary leak over 2 gpm in Unit 2 but has failed to properly notify the NRC or shut down the unit. If this is true, then the secondary system in Unit 2 has been contaminated with radiation.

The Palo Verde technical specifications state that leakage from the reactor coolant system shall be limited to a rate of 1 gallon per minute (gpm) of total primary-to-secondary leakage through all steam generators, and of 720 gallons per day through any one steam generator. The Palo Verde technical specifications also require the plant to be shut down if the rate of primary-to-secondary leakage exceeds the technical specification limit. Palo Verde has detection equipment installed in each unit that would alert operators to primary-to-secondary leakage. This system enables the Licensee to detect leakage on the order of hundredths of a gallon per minute. The Licensee can also detect primary-to-secondary leakage by conducting radiochemical analyses of the secondary system, which the technical specifications require to be performed at least once every 3 days. The NRC has examined plant data from Palo Verde Unit 2 and could not verify the rumored primary-to-secondary leakage.

The rumor may have arisen because of coolant from the Palo Verde Unit 2 primary system which leaked at a rate of approximately 2.9 gpm to collection systems. However, this coolant did not leak to the secondary system. Palo Verde has technical specification limits on the primary system leakage of 10.0 gpm on identified primary system leakage and 1.0 gpm on unidentified leakage (TS 3.4.5.2). APS found 2.8 gpm of the 2.9 gpm leakage resulted from a leaking thermal relief valve for the seal injection heat exchanger of the reactor coolant pump. During an outage in August 1991, APS replaced this valve and reduced the primary system leakage substantially.

The Petitioners stated that the secondary side of Unit 2 could become contaminated in the event of primary-to-secondary leakage. This would be true for any pressurized water reactor (PWR) experiencing primary-to-secondary leakage. However, Unit 2 did not have a 2-gpm primary-to-secondary leak, but had only a leak to collection systems, and was within limits. Although such contamination would represent an operational inconvenience, it does not present a significant safety concern. Consequently, there is no reason to conclude that Petitioners have raised a substantial safety concern.

G. Willful Violations of Safety Requirements and Willful Failure to Report Safety Violations to the NRC

Petitioners allege the following:

> APS has covered up and knowingly failed to report safety violations to the NRC via Licensee Event Reports ("LERs"). APS has knowingly and willfully operated Palo Verde while not in compliance with its licensing requirements.

Petitioners must "set forth the facts that constitute the basis" for their request according to 10 C.F.R. § 2.206(a). However, the Petitioners have made a general allegation and provided no facts to support it. Moreover, NRC maintains resident inspectors at Palo Verde, who monitor the Licensee's operations to ensure that the facility operates in conformance with its technical specifications and licensing requirements. The NRC knows of no instance in which APS has covered up safety violations or willfully violated the Palo Verde licensing requirements.

Accordingly, the NRC has no basis to conclude that Petitioners have raised a substantial safety concern.

H. Portable Hydrogen Recombiner

Petitioners allege the following:

> Although APS committed to be able to move its hydrogen recombiner from one unit to another in a 72 hour period, it has never done so and has no procedure to move it. Moreover, APS does not have a back up hydrogen recombiner (although it committed to have one).

For a multi-unit site, the NRC requires only one set of recombiners. Palo Verde has a redundant set consisting of two recombiners installed in Unit 1. The NRC has no requirement to move the recombiners periodically and allows the recombiners to reside at one unit. However, the NRC reviewed and approved a plant-specific analysis in which the Licensee committed to be able to move the recombiners to one of the other units within 72 hours if accident conditions require it. The Licensee also has procedures by which to disconnect and reconnect the recombiners. The Licensee has demonstrated through a mockup of the recombiners that the recombiners for Unit 1 could be moved to Units 2 and 3 within 72 hours. The Licensee found that a lighting panel interfered with its ability to move the recombiner from Unit 1. The Licensee has since removed the interfering lighting panel. Palo Verde meets its licensing requirements for recombiners.

The NRC finds no reason to conclude that there is a substantial safety concern related to the hydrogen recombiners.

I. Implementation of Control Element Assembly Design Change

Petitioners allege the following:

> APS failed to properly implement its Design Change Package ("DCP") for Control Element Drive Mechanisms ("CEDM's") in Unit 3 (RCTS #039846). This DCP was designed incorrectly resulting in pulling the wrong group of rods during testing. However, rather than resolve this problem APS removed the DCP in order to restart Unit 3 without committing to permanent resolution. It is alleged that the CEDM problem is a generic one at Palo Verde.

During the Unit 3 refueling outage in March and April 1991, the Licensee performed substantial work on the control system for the control element drive mechanisms. This work included reversing the polarity of the current to the lower gripper coil on all control element assemblies (CEAs). The Licensee also removed and realigned all CEA timing cards, overhauled power supplies, modified the ground fault detector, calibrated the undervoltage relays, and tested individual CEA circuit breakers with some replacements. In performing this work, APS caused a large number of expected problems with rod control during initial CEA testing and obtained preliminary timing settings that could be refined only during testing. A few timing cards had not been properly seated and some failed and had to be replaced. The Licensee anticipated and corrected these problems before startup. During the tests, some CEAs did not move when called upon to move and some slipped when called upon to move, as alleged. The Licensee corrected each of these anomalies.

During and after startup, all CEAs moved as called upon by the control switches. A position indication anomaly occurred after startup during low-power physics testing. The Licensee performed troubleshooting and found that the problem resulted from the recent work that it had performed to reverse the polarity of the CEA lower gripper coil. The Licensee restored the CEA coil wiring to the configuration used successfully during the last operating cycle. The vendor, Combustion Engineering, Incorporated, concurred with this decision. After restoring the coil polarity to the previous state, the Licensee tested all CEAs again and found that CEA control and position indication were normal.

Accordingly, the NRC finds no basis in fact to conclude that there is a substantial safety concern regarding the control element drive mechanisms.

III. CONCLUSION

Petitioners requested an immediate shutdown of the Palo Verde Generating Station and appointment of an investigative team to inspect and monitor operations at Palo Verde. The institution of proceedings in response to a request for action under 10 C.F.R. § 2.206 is appropriate only when substantial health

and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). I have applied this standard to determine if any action is warranted in response to safety allegations in the request. The NRC Staff and resident inspectors at Palo Verde investigated thoroughly the Petitioners' allegations. All available information is sufficient to conclude that no substantial safety issue has been raised regarding safe operation of Palo Verde. Therefore, I conclude that, for the reasons discussed above, no basis exists for taking the actions requested by the Petitioners. Petitioners' requests for immediate shutdown of the Palo Verde Nuclear Generating Station and for an investigative team to inspect and monitor Palo Verde are denied.

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

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 16th day of March 1992.