NUREG-0750
Vol. 35, No. 4
Pages 145-187

NUCLEAR REGULATORY COMMISSION ISSUANCES

April 1992

U.S. NUCLEAR REGULATORY COMMISSION

Available from

Superintentendent of Documents
U.S. Government Printing Office
Post Office Box 37082
Washington, D.C. 20013-7082

A year's subscription consists of 12 softbound issues,
4 indexes, and 2-4 hardbound editions for this publication.

Single copies of this publication
are available from National Technical
Information Service, Springfield, VA 22161

Errors in this publication may be reported to the
Division of Freedom of Information and Publications Services
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(301/492-8925)

NUREG-0750
Vol. 35, No. 4
Pages 145-187

NUCLEAR REGULATORY COMMISSION ISSUANCES

April 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

CONTENTS

Issuances of the Nuclear Regulatory Commission

Issuances of the Atomic Safety and Licensing Boards

Commission Issuances

COMMISSION

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. 50-443-OL
50-444-OL
(Offsite Emergency
Planning Issues)

PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE, *et al.*
(Seabrook Station, Units 1 and 2)

April 3, 1992

The Commission affirms the Licensing Board's decision in LBP-91-24, 33 NRC 446 (1991) (granting summary judgment to Applicants) that the record in this proceeding now demonstrates that in all foreseeable circumstances evacuation — not sheltering — is the planned protective action option in a general radiological emergency, for the general beach population, within a 2-mile radius of the Seabrook facility. The Commission finds that Intervenors have failed to make the presentation required in 10 C.F.R. § 2.749(c) to obtain discovery to challenge Applicants' summary disposition request. The Commission further notes that given the record establishing that sheltering is not a planned protective action option, earlier Appeal Board directives to the Licensing Board to consider whether state planners had provided sufficient implementing measures for sheltering the beach population are now moot.

RULES OF PRACTICE: DISCOVERY; SUMMARY DISPOSITION

Under 10 C.F.R. § 2.749(c), a party asserting that it needs discovery to respond to a summary disposition motion must identify by affidavit what specific information it seeks to obtain; in the absence of such a showing, a Board is free to grant summary disposition (upon a determination that there are no genuine issues of material fact) without providing for discovery. *See Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 & n.32 (1982).

RULES OF PRACTICE: DISCOVERY; SUMMARY DISPOSITION

A party cannot complain that it has been deprived of any right to conduct discovery when it fails to make the specific showing required under 10 C.F.R. § 2.749(c) establishing what information it expects to gain through discovery and how that information is essential support for its opposition to a summary disposition motion.

[illegible]CY PLAN: PROTECTIVE ACTIONS; CONTENT ([illegible]G)

[illegible]rd reflects that under a state's radiological emergency response [illegible]g is not a planned protective action option in any foreseeable [illegible] then a previously identified issue of what actions that state need [illegible]ment such a protective action option is, as a practical matter, moot.

RULES OF PRACTICE: SUMMARY DISPOSITION (MATERIAL ISSUE)

When the provisions of a state's current radiological emergency response plan do not identify sheltering as a protective action option and when state emergency planning officials fully corroborate Applicants' position that no genuine issue of material fact exists relative to that state's intention not to use the sheltering option, to avoid a grant of summary disposition on that matter Intervenors would have to present contrary evidence that is so "significantly probative" as to create a material factual issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

DECISION

As part of their challenge to the adequacy of emergency planning for the Seabrook Station, various Intervenors questioned whether the New Hampshire Radiological Emergency Response Plan (NHRERP) made sufficient provisions for the use of the protective action option of sheltering. Their central concern in this regard was planners' utilization of sheltering for those members of the public who frequent the New Hampshire Atlantic Ocean beach areas that lie within ERPA A, the portion of the Seabrook plume exposure pathway emergency planning zone (EPZ) within a 2-mile radius from the facility. The matter is now before us pursuant to the appeal of Intervenors Massachusetts Attorney General (MassAG) and the New England Coalition on Nuclear Pollution (NECNP) from LBP-91-24, 33 NRC 446 (1991), a Licensing Board final ruling on this subject.[1] These Intervenors maintain that the Licensing Board erred in accepting Applicants' position that earlier Appeal Board directives to consider further whether State planners had provided sufficient implementing measures for sheltering the beach population are now moot. In doing so, they contest the Licensing Board's pivotal finding that the adjudicatory record now demonstrates that emergency planning officials for the State of New Hampshire (State) have concluded that in all foreseeable circumstances in a general emergency (the highest emergency action level classification), evacuation — not sheltering — is the planned protective action option for the general beach population (i.e., the 98% of the beach population that has evacuation transportation). Because we find that Intervenors' substantive and procedural challenges to the Licensing Board's summary disposition determination are unavailing, we uphold the Board's determination.

I. BACKGROUND

The controversy now before us has its roots in testimony presented to the Licensing Board in May 1988. Responding to assertions by appellant NECNP and other Intervenors that State planners had not properly employed sheltering as a protective action option for the general beach population, State emergency response officials (in conjunction with Applicants' planners) testified that they intended to utilize the plan's "shelter-in-place" option for the general beach

[1] In accordance with the Commission's interim procedures governing any appeal "as of right" filed in proceedings that were before an Appeal Board prior to October 25, 1990, *see* 55 Fed. Reg. 42,944 (1990), Intervenors' June 11, 1991 notice of appeal was filed with the Appeal Board conducting appellate review of Seabrook offsite emergency planning matters. With the dissolution of the Atomic Safety and Licensing Appeal Panel at the end of June 1991, the Appeal Board referred Intervenors' appeal to the Commission.

population.[2] It was, however, to be invoked only in a limited number of instances, namely when that protective action would afford "maximum dose reduction" or when local conditions (such as weather or road construction) presented impediments that made evacuation — the principal protective action option for the general beach population — impractical.[3] In addition, these State officials agreed with Applicants' planners that they could envision essentially one instance that would fulfill the "maximum dose reduction" prerequisite under condition 1: the so-called "puff release," a short-duration, non-particulate (gaseous) release that would arrive at the beach area within a relatively short time period when, because of a substantial beach population, evacuation time would be significantly longer than exposure duration.[4] Intervenors' own expert witness agreed that this scenario satisfied condition 1's "maximum dose savings" requirement, but asserted that other circumstances met this condition as well.[5] In their testimony concerning the use of sheltering under the NHRERP, officials of the Federal Emergency Management Agency (FEMA) supported the State's conclusion, declaring that "[t]here exists a technically appropriate basis for the choice made by the State of New Hampshire not to shelter the summer beach population except in very limited circumstances."[6]

In its December 1988 partial initial decision regarding intervenor challenges to the adequacy of the NHRERP, among the matters the Licensing Board addressed was the use of sheltering as a protective action option for the general beach population. *See* LBP-88-32, 28 NRC 667, 750-76 (1988). The Board concluded that Commission emergency planning requirements and guidance did not mandate that State planners adopt sheltering as a protective action option for the general beach population, but only that they give careful consideration

---

[2] Throughout the plan, references to "sheltering" are to be understood as invoking the concept of "shelter-in-place." In the version of the NHRERP initially admitted into evidence before the Licensing Board, the "shelter-in-place" option is described as follows:

> This concept provides for sheltering at the location in which the sheltering instruction is received. Those at home are to shelter at home; those at work or school are to be sheltered in the workplace or school building. Transients located indoors or in private homes will be asked to shelter at the locations they are visiting if this is feasible. Transients without access to an indoor location will be advised to evacuate as quickly as possible in their own vehicles (i.e., the vehicles in which they arrived). . . . If necessary, transients without transportation may seek directions to a nearby public building from local emergency workers. Public buildings may be set up and opened as shelters for transients, on an ad hoc basis, if any unfor[e]seen demand for shelter arises during an emergency.

NHRERP, Vol. 1, at 2.6-6 (Rev. 2, August 1986) (admitted as Applicants' Exhibit 5).

[3] Applicants' Direct Testimony No. 6 (Sheltering), fol. Tr. 10,022, at 19. *See also id.* App. 1, at 7-8 (Letter from R. Strome to H. Vickers (Feb. 11, 1988), encl. 1, at 5-6).

Planning officials also stated in this testimony that sheltering would be utilized as a protective action for those beach transients without transportation when evacuation is the recommended protective action option for the beach population. *Id.* at 19-20. Appellants raise no issues before us concerning the New Hampshire plan's utilization of sheltering for this portion of the beach population.

[4] *See* Tr. 10,719-20.

[5] *See* Tr. 11,461-64.

[6] Amended Testimony of William R. Cumming and Joseph H. Keller on Behalf of [FEMA] on Sheltering/Beach Population Issues, fol. Tr. 13,968, at 11.

to the use of that option.[7] The Board accepted FEMA's technical findings endorsing the State's limited use of sheltering as a protective action option for the beach population and concluded that the State had given adequate consideration to sheltering the New Hampshire beach population. In doing so, it rejected Intervenors' additional assertion that the New Hampshire plan was inadequate because it lacked implementing detail for the sheltering option as applied to the general beach population. The Licensing Board found that, given the uncertainties involved in invoking this option, it was better left without implementing details so that decisionmakers would not misunderstand its utility.

Various Intervenors challenged this and other aspects of the Licensing Board's determination before the Appeal Board. The Appeal Board addressed their claims regarding sheltering for the beach population in a November 1989 decision. ALAB-924, 30 NRC 331, 362-73 (1989). The Appeal Board rejected Intervenors' assertion that the FEMA technical evaluation was insufficient to support the Licensing Board's findings regarding the adequacy of the State's choice to utilize sheltering for the general beach population only in the limited circumstances outlined in conditions 1 and 2 (i.e., when it achieved maximum dose reduction or when evacuation was a physical impossibility). The Appeal Board, however, did not accept the Licensing Board's conclusion that no additional implementing measures were necessary. Instead, the Appeal Board found that implementing detail was required to provide decisionmakers with an understanding of that protective action's benefits and constraints, thereby allowing them to make an informed judgment about whether to utilize sheltering in the circumstances, albeit limited, apparently contemplated by State planners. The Appeal Board also rejected Applicant and Staff arguments that the low probability that the sheltering option would be employed justified the lack of implementing details. As a consequence, the Appeal Board remanded this matter (along with several others) to the Licensing Board for appropriate corrective action.

The efforts of the Licensing Board to comply with this Appeal Board ruling spawned a series of party filings and Board decisions in which the central focus became the intent of State planners regarding the use of sheltering as a protective action option for the ERPA A general beach population under condition 1 (i.e., maximum dose reduction). *See* ALAB-939, 32 NRC 165 (1990); LBP-91-8, 33 NRC 197 (1991); LBP-90-12, 31 NRC 427 (1990). Ultimately, in its response to the second of two Licensing Board certified questions regarding its remand directive, the Appeal Board observed that the decisional process relative to its remand had culminated in State, FEMA, and Staff filings that "make clear that

---

[7] As our effectiveness determination in this proceeding suggests, the Board's analysis in this regard was correct. *See* CLI-90-3, 31 NRC 219, 244 (1990), *aff'd sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 112 S. Ct. 275 (1991).

the entities most directly responsible for the administration and evaluation of the NHRERP now insist that sheltering is not a planned protective action option for the general beach population in any foreseeable circumstance." ALAB-945, 33 NRC 175, 177 (1991). The Appeal Board advised that if the adjudicatory record in fact reflected that this " 'evolution' of the consideration of sheltering as a protective action for the general beach population has reached the point where it effectively has been discarded as such an option," then the sheltering issues previously identified by the Appeal Board would be moot. *Id.* The Appeal Board, however, left it to the Licensing Board to ensure that the administrative record, as developed through appropriate procedural avenues, reflected whatever information was necessary to support this resolution.

Applicants responded to this guidance by filing a motion for summary disposition with the Licensing Board. In support of that motion, Applicants submitted a statement of material issues not in dispute that declared "[s]heltering is not a planned protective action option under the NHRERP for the general beach population in ERPA-A in a general emergency or in any other for[e]seeable circumstance."[8] Applicants justified this statement by reference to (1) a Licensing-Board-ordered "Common Reference Document" that the parties stipulated contains all NHRERP provisions associated with an ERPA A general emergency protective action response from the August 1986 record version of the plan through the current February 1990 version of the plan, and (2) a January 1991 State memorandum, as attested to by State Emergency Management Director George Iverson during a later telephone conference with the Board. Intervenors countered with a statement that there were genuine issues in dispute concerning "[w]hether sheltering is an anticipated and thus, planned, protective action option under the NHRERP," and "[w]hether sheltering as it is presently a protective action option under the NHRERP accomplishes the stated goal of maximizing dose savings for the beach population of ERPA-A under the current provisions of the plan which contain no implementing procedures for that option and which apparently distinguish between different classes of beach goers."[9] As support for their statement, Intervenors submitted the affidavit of Jeffrey Hausner, a self-employed emergency planning consultant who, for 3 years prior to April 1991, was the principal radiological emergency response official for the Commonwealth of Massachusetts.

In a May 1991 order, the Licensing Board ruled upon Applicants' summary disposition request. LBP-91-24, 33 NRC 446 (1991). Refusing to accept Intervenors' statement of material issues in dispute, the Licensing Board declared

---

[8] Licensees' Motion for Summary Disposition of Record Clarification Directive in ALAB-939 (Mar. 29, 1991) at 3.

[9] Opposition of the MassAG and NECNP to the Licensee[s'] Motion for Summary Disposition (Apr. 22, 1991) at 9 [hereinafter Intervenors' Summary Disposition Opposition].

that their statement was based upon the already rejected assumption "that New Hampshire *should* [shelter the general beach population] because of the advantages of that option and because of the guidance in NUREG-0654/FEMA REP 1." *Id.* at 451 (emphasis in original). Instead, finding that Applicants' statement that there is no genuine issue to be heard was supported by the administrative record, the Licensing Board granted summary disposition in favor of Applicants and declared that the Appeal Board's prior concerns regarding the sheltering issue were now moot. Intervenors appeal this determination.[10]

II. ANALYSIS

Intervenors challenge the Licensing Board's summary disposition decision on two grounds, one procedural and one substantive. They assert initially that the Licensing Board improperly granted Applicants' summary disposition request without first permitting them to undertake discovery. Intervenors also attack the merits of the Board's ruling, claiming that its decision in Applicants' favor was grounded upon a misinterpretation of the term "planned" as State emergency response officials have employed it to describe the use of evacuation as the protective action option for the ERPA A general beach population. According to Intervenors, the Licensing Board incorrectly concluded that the State's description of evacuation as the only "planned" option for the beach population was equivalent to saying that the shelter-in-place option had been discarded, as opposed to simply not planned for, as a protective action choice for that population. As support for this premise, they rely principally upon Mr. Hausner's conclusion, as set forth in his affidavit, that on the basis of his review of the relevant portion of the record and his experience in emergency planning matters he believes that the State still contemplates using the shelter-in-place option for the general beach population. Intervenors assert that his declaration

---

[10] In ALAB-924, the Appeal Board remanded three other matters to the Licensing Board in addition to the issue of the adequacy of the NHRERP's provisions regarding sheltering for the general beach population. *See* 30 NRC at 373. The Licensing Board previously issued other rulings resolving those issues, *see* LBP-90-44, 32 NRC 433 (1990); LBP-90-12, 31 NRC 427 (1990), from which Intervenors also noted an appeal, *see* Notice of Appeal (June 11, 1991) at 1-2. In their merits brief filed with the Commission, Intervenors nonetheless have limited their appellate challenge solely to the Licensing Board's beach population sheltering decision in LBP-91-24.

Also in this regard, as was noted earlier, *see supra* p. 149, in ALAB-924 the Appeal Board suggested that sheltering implementation would be necessary to ensure the appropriate use of that protective action option in situations falling under condition 2 involving physical impediments to evacuation, such as fog, snow, hazardous bridge or road conditions, or highway construction. In LBP-90-12, the Licensing Board found additional planning for condition 2 circumstances unnecessary because it involves a response to the complicating effects of a low-probability event occurring independently of the accident sequence that triggered the emergency response. *See* 31 NRC at 453 (citing *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-12, 20 NRC 249, *aff'd sub nom. San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1288 (D.C. Cir. 1984), *vacated in part and reh'g en banc granted*, 760 F.2d 1320 (D.C. Cir. 1985), *aff'd en banc*, 789 F.2d 26 (D.C. Cir.), *cert. denied*, 479 U.S. 923 (1986)). Before us, Intervenors have not contested that ruling.

created a material issue of fact that precluded the Board from entering summary judgment in Ap, .cants' favor.

Both Applicants and the Staff urge us to reject these Intervenor challenges. They assert that Intervenors were not entitled to any discovery because they failed to comply with the requirements of 10 C.F.R. § 2.749(c) concerning discovery relating to summary disposition motions. Both of these parties also contend that Applicants' showing established that sheltering is not a protective action option for the ERPA A general beach population and that Mr. Hausner's affidavit was insufficient to establish any genuine issue of material fact in this regard.

A. Looking first to Intervenors' discovery entitlement claim, it is apparent that section 2.749(c) furnishes the template against which we must gauge Intervenors' procedural concern. That section provides:

> Should it appear from the affidavits of a party opposing the motion [for summary disposition] that he cannot, for reasons stated, present by affidavit facts essential to j. fy his opposition, the presiding officer may refuse the application for summary decision or may order a continuance to permit affidavits to be obtained or make such other order as is appropriate and a determination to that effect shall be made a matter of record.

In line with this provision, a party asserting that it needs discovery to respond to a summary disposition motion must identify by affidavit what specific information it seeks to obtain; in the absence of such a showing, a Board is free to grant summary disposition (upon a determination that there are no genuine issues of material fact) without providing for discovery. *See Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 & n.32 (1982).

In this instance, in responding to Applicants' summary disposition request, Intervenors made only a general statement suggesting that further discovery should be permitted and, thereafter, a hearing should be held.[11] They did not, by affidavit or otherwise, make a specific showing establishing what information they expected to gain through discovery and how that information was essential support for their opposition to Applicants' summary disposition motion. Because they failed to make the appropriate presentation consistent with section 2.749(c), Intervenors cannot now complain that they have been deprived of any right to conduct discovery. We thus find no foundation for this assignment of error.

B. Turning to Intervenors' substantive complaint, we did note previously in this proceeding, although as part of our effectiveness decision, that "so long as sheltering remains a potential, albeit unlikely, emergency response option for

---

[11] *See* Intervenors' Summary Disposition Opposition at 7-8.

the beach population, the NHRERP should contain directions as to how this choice is to be practicably carried out." CLI-90-3, 31 NRC 219, 248 (1990), *aff'd sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 112 S. Ct. 275 (1991). We observed further that one way to resolve the Appeal Board's concerns would be "identification of the location of sufficient available shelter together with the means to notify the beach population as to where this shelter is located," an exercise we believed would not be "especially difficult or time-consuming." *Id.* This, however, assumes that sheltering is to be utilized as a protective action option for the general beach population. As the Appeal Board later acknowledged in ALAB-945, if the record in this proceeding now reflects that under the NHRERP "sheltering is not a planned protective action option for the general beach population in any foreseeable circumstance," 33 NRC at 177, then the previously identified issue of what actions the State need take to implement such a protective action option is, as a practical matter, moot.

In their motion for summary disposition, Applicants sought to establish that the State's position is as the Appeal Board suggested. As support for this supposition, Applicants relied upon two factors. One is the NHRERP's current provisions regarding protective action options for the general beach population. As is reflected in the relevant portions of the current version of the plan contained in the "Common Reference Document" accepted by the parties, sheltering is not identified as a protective action option for the general beach population in ERPA A in a general emergency.[12] In addition, Applicants referenced statements in a January 1991 pleading, which was signed by a State Deputy Attorney General and confirmed in a sworn statement given by the State's emergency planning director shortly thereafter.[13] Intervenors' protestations to the contrary notwithstanding,[14] on their face these declarations by responsible State officials provided substantial support for Applicants' position that the State does not plan to utilize sheltering as a protective action option for the general beach population in ERPA A in any circumstance it can now foresee.[15]

---

[12] *See* Licensees' Response to Memorandum and Order of January 24, 1991 (Jan. 28, 1991) at 71-109 (NHRERP, Vol. 8, at 6.0-1 to 6.10-4 & Form 210A (Rev. 3, February 1990)).

[13] *See* Memorandum in Support of Licensees' Motion for Summary Disposition of Record Clarification Directive in ALAB-939 (Mar. 29, 1991) at 5 (citing Memorandum of the [State] on ALAB-939 (Jan. 10, 1991) at 1-2; Tr. 28,493).

[14] The thrust of Intervenors' attack upon these record statements by State officials is that they do not reflect the State's actual intention regarding use of sheltering for the beach population. In light of Intervenors' failure to provide any concrete evidence that these officials' statements cannot be taken at face value, *see infra* p. 154, we see no reason not to do so. This is particularly so given the State's failure to object to Applicants' representations regarding its emergency planning posture, an action that it previously has shown itself more than willing to undertake if it perceives that its position is being misstated. *See* [State]'s Comments Regarding Applicants' Response to Licensing Board Order of January 11, 1990 (Feb. 16, 1990) at 2.

[15] *See also* Tr. 28,468. At earlier points in this proceeding, the record was unclear regarding the State's plan for sheltering, and the State's plan, as originally understood by the parties, seems to have evolved. *See* ALAB-939, 32 NRC at 173-79. As currently understood, however, the State's plan not to include the shelter-in-place option

(Continued)

In the face of the plan's current provisions and these statements "straight from the horse's mouth" that both fully corroborate Applicants' position that no genuine issue of material fact exists relative to the State's intention not to use the shelter-in-place option for the general beach population, to avoid summary disposition on this matter Intervenors had to present contrary evidence that was so "significantly probative" as to create a material factual issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). In his affidavit, Mr. Hausner does declare that the State intends to utilize sheltering as a protective action option for the beach population. As his affidavit nonetheless makes clear, Mr. Hausner's position in this regard is not based upon any concrete, first-hand knowledge about what the State intends to do. Rather, he provides what is at best an "educated guess" about the State's intentions. His speculation in this regard can hardly be described as so "significantly probative" that it creates a material factual issue.

Simply put, Intervenors failed to counter the Applicants' showing that was based upon the record before the Licensing Board and established that no material issue of fact now exists regarding the State's intention not to use sheltering as a protective action option for the general beach population in ERPA A in a general emergency. Because the matters remanded by the Appeal Board were rooted in the central premise that it was the State's intent to employ sheltering in some form as a protective action option for this population, Applicants also were correct in asserting that those matters are no longer at issue. Therefore, contrary to Intervenors' claim, the Licensing Board acted appropriately in granting summary disposition in favor of Applicants.

---

for the general beach population in a general emergency is fully consistent with evidence on the record on the limited value of sheltering as a protective option. *See* LBP-88-32, 28 NRC at 759-68. Indeed, the evolution in the State's plan (or at least the parties' understanding of that plan) has been in a direction that makes the plan more consistent with the weight of evidence on the record than it was at the time of LBP-88-32, the Licensing Board's initial decision addressing sheltering.

III. CONCLUSION

For the foregoing reasons, the Licensing Board's decision in LBP-91-24, 33 NRC 446, is *affirmed*.

IT IS SO ORDERED.

For the Commission[16]

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 3d day of April 1992.

[16] Commissioner de Planque abstained, and Commissioners Curtiss and Remick did not participate in this matter.

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. 030-05980
030-05982
030-08335
030-08444

SAFETY LIGHT CORPORATION
UNITED STATES RADIUM
CORPORATION
USR INDUSTRIES, INC.
USR CHEMICAL PRODUCTS, INC.
USR METALS, INC.
USR LIGHTING, INC.
U.S. NATURAL RESOURCES, INC.
LIME RIDGE INDUSTRIES, INC.
METREAL, INC.
(Bloomsburg Site Decontamination)

April 10, 1992

The Commission denies the NRC Staff's petition for review of the Licensing Board's orders framing issues for resolution in the proceeding with respect to jurisdictional matters and the Licensees' financial resources. The Commission observes, however, that an earlier Appeal Board ruling in the proceeding, ALAB-931, 31 NRC 350 (1990), constitutes the law of the case and that the Licensees' financial resources cannot be a deciding factor in deciding the necessity of the safety measures at issue in the proceeding.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

A petition for review of an interlocutory order must meet one or more of the criteria in 10 C.F.R. §§ 2.786(b) and 2.786(g).

RULES OF PRACTICE: INTERLOCUTORY REVIEW

The expansion of issues for litigation in a proceeding rarely affects the basic structure of a proceeding in such a pervasive or unusual way as to warrant interlocutory review.

ATOMIC ENERGY ACT: SAFETY STANDARDS

The extent of Licensees' financial resources cannot be a deciding factor in determining whether the actions ordered by the Staff are necessary to adequately protect public health and safety. The Licensees' solvency has no relevance to determining the hazard or the need for action to address the hazard at a site potentially requiring decontamination or other remedial action.

LICENSING BOARDS: AUTHORITY

RULES OF PRACTICE: LAW OF THE CASE

Licensing Boards are obligated to adhere to the decision of higher tribunals in the Commission's adjudicatory system. Thus, the decision of an appellate tribunal, even at an interlocutory phase of the proceeding, constitutes the law of the case as to questions actually decided or decided by necessary implication.

MEMORANDUM AND ORDER

The NRC Staff has petitioned the Commission for review of an unpublished interlocutory order of the Atomic Safety and Licensing Board, dated December 13, 1991, in which the Board denied the Staff's request for clarification or reconsideration of certain issues that the Board identified in a September 10, 1991 order as germane to the resolution of this proceeding. Safety Light Corporation and USR Industries (hereinafter "Licensees") urge the Commission to deny the petition. For the reasons stated in this Order, we deny Staff's petition for review.

Before we address Staff's petition for review, the appropriate standards for review of interlocutory orders merit reiteration because neither Staff nor the

Licensees have properly addressed those standards in their filings before us.[1] Staff relies on 10 C.F.R. § 2.786(b) as the basis for the Commission's taking review of the disputed aspects of the Licensing Board's orders. However, in addition to showing that one or more of the five criteria in section 2.786(b)(i)-(v) are met, Staff is also obligated to demonstrate that its petition meets one of the criteria in 10 C.F.R. § 2.786(g) because the orders for which review is sought are essentially interlocutory in nature.

When the Commission adopted its revised appellate procedures last year, the Commission preserved the existing case law standard for interlocutory review. *Procedures for Direct Commission Review of Decisions of Presiding Officers*, 56 Fed. Reg. 29,403 (June 27, 1991). As a general rule, interlocutory review has been disfavored and is not allowed under our rules of practice. 10 C.F.R. § 2.730(f). Over the years, the former Atomic Safety and Licensing Appeal Board recognized certain limited exceptions to this prohibition in extraordinary circumstances under which a party could ask the Licensing Board to refer a matter for interlocutory appellate review or could seek "directed certification" from the Appeal Board itself.[2] In establishing the new appellate structure under which the Commission will conduct any appellate review of decisions and actions of presiding officers in agency adjudications, the Commission codified in section 2.786(g) the existing standard governing interlocutory review pursuant to 10 C.F.R. §§ 2.718(i) and 2.730(f). Thus, in addition to meeting one of the criteria in section 2.786(b), the petitioner seeking interlocutory review must also show that the certified question or referred ruling either

> (1) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision, or
>
> (2) Affects the basic structure of the proceeding in a pervasive or unusual manner.

10 C.F.R. § 2.786(g).

In this context, Staff's petition for review is properly understood as a request for directed certification. In particular, Staff asks the Commission to undertake review and reverse the Licensing Board insofar as the Board adopted the following two issues:

> What fiscal resources are actually available to the Licensees, either as probable payments under their insurance policies or as expenditures from their own corporate resources?

---

[1] The Licensees quote a superseded version of our rules in their answer to Staff's petition. Our current rule, effective July 29, 1991, was published at 56 Fed. Reg. 29,403, 29,409-10 (June 27, 1991).

[2] 10 C.F.R. § 2.718(i); *see, e.g., Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371 (1983); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977).

and

> Since the Board has already noted (Tr. 563-564) that there is at this point no law of the case on such matters as jurisdiction, are there any matters of fact needed to clarify this issue so that we can rule on it with finality?

Order (unpublished) at 6-7 (Sept. 10, 1991). Staff contends that the Licensing Board's refusal in its December 13 order to reconsider the adoption of the two issues is "contrary to established law and constitutes a prejudicial procedural error which threatens to affect the basic structure of the proceeding in a pervasive manner." NRC Staff's Petition at 2.[3] The Licensees support the Board's adoption of the issues and suggest that neither warrants Commission review.

Whatever the merits of Staff's position on the particular issues, we do not believe that our review is necessary at this time. The harm, if any, that Staff may suffer is largely prospective in nature. The Licensing Board has not precluded Staff from putting on its own case or from ultimately demonstrating that the questions are not determinative of whether Staff's orders should be sustained. At most, the Licensing Board has included within the scope of its deliberations two questions that *may* shape its final decision. In earlier proceedings, even if there was a conflict with prior precedent, the mere expansion of issues rarely has been found to affect the basic structure of a proceeding in such a pervasive or unusual way as to warrant interlocutory review.[4] We think the same principle holds true in the circumstances now before us and, thus, do not believe that interlocutory review is warranted under the criteria of section 2.786(g).

By declining review, we do not mean to imply that the soundness of the Licensing Board's actions is free from doubt. Although the extent of the Licensees' financial resources, even by Staff's admission, has some relevance to this proceeding, the extent of the Licensees' financial resources cannot be a deciding factor in determining whether the actions ordered by the Staff are necessary to adequately protect the public health and safety. *See Union of Concerned Scientists v. NRC*, 824 F.2d 108, 114-18 (D.C. Cir. 1987). The Licensees' solvency has no relevance to determining the hazard at the Bloomsburg site or the need for action to deal with that hazard.

Moreover, the Board's generalization that there is no "law of the case" appears to be too sweeping. Under the "law of the case" doctrine, lower tribunals are generally obliged to adhere to the decision of appellate tribunals

---

[3] Although it does not specifically reference them, Staff appears to rely on the second criterion in 10 C.F.R. § 2.786(g) and the criteria in section 2.786(b)(4)(ii) and (iv) as a basis for review.

[4] *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 262 (1988), *citing* ALAB-861, 25 NRC 129, 135 (1987) (same case), *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1757 (1982), *and Pennsylvania Power and Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 552 (1981).

in subsequent proceedings in the same case, even if the appellate body has decided an issue at an interlocutory phase of the proceeding.[5] The doctrine applies, however, only to questions actually decided or decided by necessary implication. *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 950 (3d Cir. 1985).

In ALAB-931, 31 NRC 350 (1990), the Appeal Board found that USR Industries' sale of Safety Light Corporation in 1982 was a transfer of control within the meaning of section 184 of the Atomic Energy Act and that the failure to notify the NRC of the proposed transfer and the failure to have obtained consent were a sufficient foundation for the inclusion of USR Industries in the enforcement orders. 31 NRC at 368. Although this finding may be challenged in a petition for review of the Licensing Board's initial decision at the conclusion of proceedings before the Board, the Appeal Board's finding in ALAB-931 constitutes the "law of the case" at this point which must be followed by the Licensing Board. The Appeal Board left open, however, the question whether certain other matters needed to be resolved which might bear on jurisdiction over USR Industries and its subsidiaries. *See id.* at 367 n.53 & 370 n.60. With respect to these other matters, there appears to be no "law of the case" and, thus, further inquiry may be appropriate.

We see no need, however, to undertake a closer examination of either issue raised by the Staff at this time. We think it more appropriate to reserve our review, if necessary, to a more fully developed record and focused decision on the merits. To the extent that Staff or any other party believes that it has been aggrieved by the Licensing Board's initial decision related to these or other matters, the Commission will consider appropriate petitions for review in accordance with section 2.786(b).

---

[5] *See Lyons v. Fisher*, 888 F.2d 1071, 1074 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 2209 (1990); *National Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers*, 430 F.2d 957, 960 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971). Licensing Boards are certainly bound to follow the directives of higher level tribunals in the Commission's adjudicatory system. *See South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1150 (1981), *review declined*, CLI-82-10, 15 NRC 1377 (1982); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-88-6, 27 NRC 245, 251-52 (1988).

Accordingly, Staff's petition for review of the Licensing Board's orders of September 10 and December 13, 1991, is *denied*.

IT IS SO ORDERED.

For the Commission[6]

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 10th day of April 1992.

[6]Chairman Selin and Commissioner Remick were not available for the affirmation of this order; if they had been present, they would have approved it.

Atomic Safety and Licensing Boards Issuances

LICENSING BOARDS

ATOMIC SAFETY AND LICENSING BOARD PANEL

B. Paul Cotter,* *Chief Administrative Judge*
Robert M. Lazo,* *Deputy Chief Administrative Judge (Executive)*
Frederick J. Shon,* *Deputy Chief Administrative Judge (Technical)*

Members

Dr. George C. Anderson
Charles Bechhoefer*
Peter B. Bloch*
G. Paul Bollwerk III*
Glenn O. Bright
Dr. A. Dixon Callihan
James H. Carpenter*
Dr. Richard F. Cole*
Dr. Thomas E. Elleman
Dr. George A. Ferguson
Dr. Harry Foreman
Dr. Richard F. Foster
John H. Frye III*
James P. Gleason
Dr. Cadet H. Hand, Jr.
Dr. Jerry Harbour*
Dr. D[illegible] L. Hetrick
Ernest E. Hill
Dr. Frank F. Hooper
Elizabeth B. Johnson
Dr. Walter H. Jordan
Dr. Charles N. Kelber*
Dr. Jerry R. Kline*
Dr. Peter S. Lam*
Dr. James C. Lamb III
Dr. Emmeth A. Luebke
Dr. Kenneth A. McCollom
Morton B. Margulies*
Marshall E. Miller
Thomas S. Moore*
Dr. Peter A. Morris
Dr. Richard R. Parizek
Dr. Harry Rein
Lester S. Rubenstein
Dr. David R. Schink
Ivan W. Smith*
Dr. George Tidey
Sheldon J. Wolfe

*Permanent panel members

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chair
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 030-29626-OM
(ASLBP No. 92-653-02-OM)
(Byproduct Material License
No. 24-24826-01)
(EA 91-136)
(License Suspension)

PIPING SPECIALISTS, INC.

April 17, 1992

The Board issues subpoenas at the request of a party and expresses its appreciation for the appearance of the witnesses. It also requires prefiled written direct testimony in this enforcement case but permits parties to avoid filing written statements to the extent that they have made reasonable efforts to obtain the prefiled testimony or have special reasons for not wanting to obtain it from a particular witness.

RULES OF PRACTICE: ENFORCEMENT CASE; PREFILED DIRECT TESTIMONY

The Board requires prefiled written direct testimony in this enforcement case but permits parties to avoid filing written statements to the extent that they have made reasonable efforts to obtain the prefiled testimony or have special reasons for not wanting to obtain it from a particular witness.

MEMORANDUM AND ORDER

(Subpoenas: Issuance, Explanation and Related Matters)

MEMORANDUM

We are issuing the four subpoenas requested by the Staff of the Nuclear Regulatory Commission (Staff) on April 13, 14, and 16, 1992. Because a party has requested these subpoenas, we are assured that the testimony of the subpoenaed witnesses is relevant to a full and fair hearing of this case and we have ordered them to appear, according to long-established legal tradition and to the regulations of the Nuclear Regulatory Commission (10 C.F.R. § 2.720(a)). We appreciate the appearance of the witnesses.

The subpoenas require each of the witnesses to appear at the beginning of our proceeding. However, all four will not be first to testify. Hence, we authorize the party that requested the subpoenas (in this instance, the Staff), to arrange a reasonable time for each of the witnesses to report to the hearing. This time should be set in light of negotiations between the parties concerning the scheduling of witnesses, in light of reasonable needs for the Staff to speak with the witnesses or prepare written direct testimony prior to eliciting their sworn testimony, and in light of the need for the proceeding to progress without interruption.

We note that the Staff, in a Motion of April 13, 1992,[1] has requested permission to present oral testimony in lieu of the written direct testimony ordered by the Board on April 7, 1992. This request shall be granted only to the extent that the parties have made reasonable efforts to obtain the prefiled testimony or have special reasons for not wanting to obtain it from a particular witness.

We are aware that the Administrative Procedure Act, 5 U.S.C. § 556(d), contains the following sentence: "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be provided for a full and true disclosure of the facts." Under our ruling, a witness may swear to the accuracy of prepared written direct testimony and must be present for cross-examination. Consequently, the party will have an opportunity to present testimony "in oral or documentary form," and we will have an opportunity to examine the demeanor of the witness. The procedure we have adopted will save time and will avail us of all the evidence.

---

[1] NRC Staff Motion for Leave to Present Oral Testimony of Subpoenaed Witnesses (Motion).

We understand the short time period available at this time for preparing written testimony. Hence, we are requiring only that the parties make reasonable efforts to prepare in advance all or part of the testimony of each witness. We also would understand a party's difficulty, and would grant an exemption from the requirement for written direct testimony, with respect to hostile or unfriendly witnesses or those with respect to which the party has special reasons for requesting a complete or partial exemption from the requirement for written direct testimony.

As the Staff correctly notes, at page 1 of its Motion, the Commission's regulations do not require the submission of written testimony in enforcement proceedings. 10 C.F.R. § 2.743(b)(3). However, we consider our Order of April 7 to be authorized by 10 C.F.R. § 2.718(d) and (e); *see also* 10 C.F.R. § 2.721(d).

ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is this 17th day of April 1992, ORDERED, that:

1. The Board shall issue the subpoenas requested for Mr. Barry Mitchell, Mr. Aaron L. Reil, Mr. James A. Hosak, and Ms. Rene Husberg.

2. The Board authorizes the Staff of the Nuclear Regulatory Commission to accommodate the convenience of the witnesses, consistent with the needs of this proceeding, with respect to the time at which parties are required to appear at the hearing.

3. The parties shall make reasonable efforts to prepare written direct testimony. Exemptions from this requirement may be granted for specific witnesses upon motion.

4. This Memorandum and Order shall be served together with the subpoenas.

THE ATOMIC SAFETY AND
LICENSING BOARD

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Peter B. Bloch, Chair
ADMINISTRATIVE JUDGE

Bethesda, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Richard F. Foster
Frederick J. Shon

In the Matter of

Docket No. 040-08989-ML
(ASLBP No. 91-638-01-ML)
(Byproduct Material Waste
Disposal License)

ENVIROCARE OF UTAH, INC.

April 30, 1992

In a proceeding involving the licensing of a facility for the disposal of section 11e(2) uranium and thorium byproduct material, the Licensing Board determines that the only petitioner for intervention lacks standing and, accordingly, that its petition for intervention and request for a hearing should be denied and the proceeding terminated.

ATOMIC ENERGY ACT: STANDING TO INTERVENE

Section 189a(1) of the Atomic Energy Act, and implementing NRC regulations, provides an opportunity for hearing to "interested" persons and, accordingly, requires persons to possess standing in order to participate as a matter of right in a hearing.

RULES OF PRACTICE: STANDING TO INTERVENE

Commission regulations specify that a petitioner for intervention must set forth its interest in the proceeding and the "possible effect of any order that may be entered in the proceeding" on its interest.

RULES OF PRACTICE: STANDING TO INTERVENE

In determining standing, the Commission applies contemporaneous judicial concepts of standing. Under those standards, in order to establish standing, a petitioner must demonstrate both that it has suffered or will likely suffer injury from the action under review and that the injury falls within the "zone of interests" at least arguably sought to be protected by the statute being enforced.

RULES OF PRACTICE: STANDING (INJURY IN FACT)

To demonstrate injury in fact, courts require a showing that the petitioner has suffered or will suffer a "distinct and palpable" harm, that the harm fairly can be traced to the challenged action and that the injury is likely to be redressed by a favorable decision.

RULES OF PRACTICE: STANDING (INJURY IN FACT)

Where purported harm or injury has not yet occurred, it must at least be shown to be likely. The petitioner must have a "real stake" in the outcome of the proceeding, although not necessarily a substantial stake.

RULES OF PRACTICE: STANDING (PLEADING REQUIREMENTS)

In ruling on standing questions, a Licensing Board must accept as true all material factual allegations of a petition, except to the extent it deems them to be overly speculative. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *United Transportation Union v. Interstate Commerce Commission*, 991 F.2d 908, 911-12 (D.C. Cir. 1989). In evaluating injury in fact, a board is limited to the types of injury in fact actually asserted by the petitioner.

RULES OF PRACTICE: STANDING (INJURY IN FACT)

A generalized grievance shared in substantially equal measure by all or a large class of citizens will not result in the distinct and palpable harm sufficient to support standing. Interest "as a corporate citizen," as alleged in this proceeding, is such a generalized grievance.

RULES OF PRACTICE: STANDING (INJURY IN FACT)

An alleged injury that is neither caused by the licensing of a facility nor could be alleviated by license conditions imposed on the facility cannot be recognized as a basis for injury in fact.

RULES OF PRACTICE: STANDING (INJURY IN FACT)

Perpetual joint and several liability for onsite incidents involving byproduct waste, irrespective of fault, as imposed by the Superfund statute, can constitute injury in fact for a waste disposer to intervene in a proceeding involving licensing of a waste disposal facility, as long as the disposer has shown sufficient interest in considering use of the facility in question.

RULES OF PRACTICE: STANDING (INJURY IN FACT)

It is not a valid basis for denying injury in fact from the licensing of a facility that the potential user of the facility could alternatively establish its own facility, particularly where the potential user claims no expertise in the establishing or operating of such a facility.

RULES OF PRACTICE: STANDING (ZONE OF INTEREST)

Although historically economic injury has been held not to constitute a zone of interest sought to be protected by the Atomic Energy Act, the amendment of section 84a(1) to include consideration of the economic costs of the disposal of byproduct material expanded the zone to include certain types of such injury.

RULES OF PRACTICE: STANDING (DISCRETIONARY)

A petitioner that lacks standing of right may nonetheless be granted standing as a matter of discretion, based on a weighing of six specified factors. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-17 (1976).

RULES OF PRACTICE: STANDING (DISCRETIONARY)

Intervention on a discretionary basis has not been granted in a proceeding where no other intervenor had established standing of right. Before intervention founded on discretionary standing were granted in such a case, there should be cause to believe that "some discernible public interest will be served by the

hearing." *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977).

RULES OF PRACTICE: CONTENTION REQUIREMENT FOR INTERVENTION

In order to be admitted as a party, a petitioner must not only demonstrate its standing but also must proffer at least one viable contention. 10 C.F.R. § 2.714(b)(1).

PREHEARING CONFERENCE ORDER
(Terminating Proceeding)

Pending before us is a novel — indeed unique — application of the law of interest or standing to participate in an NRC licensing proceeding. Because we conclude that Kerr-McGee Chemical Corporation (Kerr-McGee or Petitioner) does not possess standing of right and, in the particular circumstances of this case, should not be afforded standing as a matter of discretion, we are denying its petition for leave to intervene and request for a hearing and terminating the proceeding.

I. PROCEDURAL BACKGROUND

This proceeding involves the application by Envirocare of Utah, Inc. (Applicant) for a license to accept and dispose of uranium and thorium byproduct material (as defined in section 11e(2) of the Atomic Energy Act, as amended, 42 U.S.C. § 2014(e)(2)) received from other persons, at a site near Clive, Utah, approximately 85 miles west of Salt Lake City. In response to a Notice of Opportunity for Hearing, published on January 25, 1991,[1] a timely request for a hearing and petition for intervention, dated February 25, 1991, was filed by Kerr-McGee. This Licensing Board was created to consider that request and to preside at a hearing, if necessary.[2]

By filings dated March 25, 1991, and April 5, 1991, the Applicant and NRC Staff, respectively, filed responses in opposition to Kerr-McGee's request and petition. On April 15, 1991, Kerr-McGee filed a reply memorandum in support

---

[1] 56 Fed. Reg. 2959.

[2] Establishment of Atomic Safety and Licensing Board, dated March 14, 1991, 56 Fed. Reg. 11,796 (Mar. 20, 1991). The Board was reconstituted on January 27, 1992, 57 Fed. Reg. 4502 (Feb. 5, 1992).

of its hearing request, and on April 30, 1991, the Applicant filed a supplemental answer to Kerr-McGee's request.

We initially scheduled a prehearing conference for June 19, 1991, but to accommodate settlement negotiations among the parties and Petitioner, we postponed and rescheduled that conference on a number of occasions. We also granted Kerr-McGee several extensions of time to file proposed contentions, based in part on modifications to the application for the proposed facility. Kerr-McGee's contentions were filed on December 9, 1991, together with its responses to questions posed by us on May 2, 1991. The Applicant filed its responses to Kerr-McGee's contentions and to our questions on January 24, 1992. The Staff filed its responses to the contentions and our questions on February 3, 1992 (corrected on February 5, 1992).

On Tuesday, March 10, 1992, we conducted a prehearing conference in Salt Lake City, Utah.[3] Participating in the conference were representatives of the Applicant, Kerr-McGee, and the NRC Staff (Staff). Information provided prior to and during the conference provides the basis for our conclusion that Kerr-McGee lacks standing to participate in this proceeding, that at least one of its proposed contentions satisfies the Commission's standards for admissible contentions, and that one particular contention (absent adjudicatory consideration) warrants additional Staff attention.

II. LEGAL ANALYSIS

A. Standing

In order to be admitted as a party to an NRC proceeding, a petitioner for intervention must demonstrate both that it has standing to participate in a proceeding and that it has proffered at least one valid contention. 10 C.F.R. § 2.714(a) and (b). The standing question formed the basis for the opposition of the Applicant and Staff to the intervention of Kerr-McGee.[4]

1. General

As pointed out by the Commission in a recent determination on standing, the requirement stems from section 189a(1) of the Atomic Energy Act, 42 U.S.C. § 2239(a)(1), which provides that the Commission shall "grant a hearing upon the request of any person *whose interest may be affected* by [a] proceeding . . ."

---

[3] The conference was announced through a Notice of Prehearing Conference, dated February 7, 1992, published at 57 Fed. Reg. 5495 (Feb. 14, 1992).

[4] Both the Applicant and Staff conceded that at least one of Kerr-McGee's proffered contentions conforms to the Commission's contention requirements. *See* pp. 184, 185-86, *infra*.

(emphasis supplied). As a result, Commission regulations specify that a petitioner for intervention (such as Kerr-McGee) must set forth that interest and the "possible effect of any order that may be entered in the proceeding on the petitioner's interest." 10 C.F.R. § 2.714(a) and (d). *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47 (1992).

The standing questions in this proceeding arise from Kerr-McGee's status as a potential customer of this facility. Kerr-McGee possesses a large quantity of mill tailings (estimated by Kerr-McGee as amounting to some 376,400 cubic meters), defined by the Atomic Energy Act as section 11e(2) byproduct material, at its site in West Chicago, Illinois, a now-inoperative thorium milling facility. Kerr-McGee has long been seeking a way of disposing of this material — either on its own site or at an offsite location.[5] The proposed Envirocare facility is one possible disposal site. At the prehearing conference, however, Kerr-McGee stated that its disposal options had narrowed and that, reflecting environmental concerns expressed by the State of Illinois, it had agreed with Illinois not only that the material would not be disposed of on site but also that it would be shipped to a site out of the State of Illinois.[6]

It has long been held that, in determining standing, the Commission applies contemporaneous judicial concepts of standing. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). Under those standards, in order to establish standing, a petitioner must demonstrate both that it has suffered or will likely suffer injury from the action under review — i.e., that there has been or is likely to be "injury in fact" — and that the injury falls within the "zone of interests" at least arguably sought to be protected by the statute being enforced — here, the Atomic Energy Act or the National Environmental Policy Act (NEPA). *Id.*, CLI-85-2, 21 NRC 282, 316 (1985); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); *see Air Courier Conf. v. Postal Workers*, ___ U.S. ___, 112 L. Ed. 2d 1125, 1134 (1991).

The Applicant and Staff each claim that Kerr-McGee satisfies neither aspect of this standing test. We turn to these claims *seriatim*.

---

[5] *See, e.g., Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-944, 33 NRC 81 (1991).

[6] Tr. 9-10, 17, 19, 23, 75. Written material submitted by Kerr-McGee following the prehearing conference raised a question whether the material would necessarily be disposed of outside the State of Illinois; but, in response to our [illegible]dum dated March 17, 1992, Kerr-McGee emphasized that "there are no disposal facilities . . . available in Illinois and no facility is contemplated for such materials" (Response dated March [illegible], 1992, at 2).

2. Injury in Fact

(a) General

To demonstrate injury in fact, courts require a showing that the petitioner has suffered or will suffer a "distinct and palpable" harm, that the harm fairly can be traced to the challenged action and that the injury is likely to be redressed by a favorable decision. *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988), *citing Warth v. Seldin*, 422 U.S. 490, 501 (1975) and *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

Where (as here) the purported harm or injury has not yet occurred, it must at least be shown to be likely. The petitioner must demonstrate that it has a "real stake" in the outcome of the proceeding, although not necessarily a substantial stake. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-77-10, 9 NRC 439, 447-48 (1979), *aff'd*, ALAB-549, 9 NRC 644 (1979). In ruling on standing questions, we must accept as true all material factual allegations of the petition, except to the extent we deem them to be overly speculative. *Warth, supra*, 422 U.S. at 501; *United Transportation Union v. Interstate Commerce Commission*, 891 F.2d 908, 911-12 (D.C. Cir. 1989).

(b) Kerr-McGee's Claims

Kerr-McGee has propounded the following claims of injury in fact stemming from the licensing of this facility, to which we will apply the foregoing standards:[7]

1. Kerr-McGee's interest in assuring that the review of the application by the Commission fully addresses the health, safety, and environmental implications of the application, inasmuch as failure to do so "might subject Kerr-McGee to potential liability for claims arising under state tort law and federal and state environmental statutes."[8] Kerr-McGee focused this interest in terms of its potential liability under the Superfund laws.[9]
2. Kerr-McGee's financial interest, premised upon the increased cost (including environmental costs both to Kerr-McGee and to persons near the shipment routes) of shipping material to the Envirocare site rather than leaving it on site.[10] Kerr-McGee subsequently withdrew

---

[7] In evaluating Kerr-McGee's claims of injury, we are of course limited to the types of injury in fact actually asserted by Kerr-McGee. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-6, 35 NRC 114 (1992).

[8] Request for Hearing, dated February 25, 1991, at 6; Reply Memorandum of Kerr-McGee, dated April 15, 1991, at 4.

[9] Tr. 11-12, 119-20.

[10] Request for Hearing, *supra* note 8, at 6; Tr. 12.

this claim of injury in view of its agreement with Illinois to ship the material off site and out of state.

3. Kerr-McGee's asserted injury caused by environmental damage or accidents arising from the transport of wastes to the Envirocare facility.[11]
4. Kerr-McGee's interest "as a corporate citizen" in the "entire range of public health and safety issues."[12]

(c) Board Rulings on Injury in Fact

(i) Dealing with these claims in inverse order, we find the fourth ("corporate citizen interest") is clearly not a valid basis for standing. It represents a type of "generalized grievance" shared in substantially equal measure by all or a large class of citizens — such as assertions of broad public interest in regulatory matters, or the administrative process, or the development of economical energy resources, or economic interest as a ratepayer — that will not result in the distinct and palpable harm sufficient to support standing. *Three Mile Island*, CLI-83-25, *supra*, 18 NRC at 332-33; *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418 (1977); *Dellums*, *supra*, 863 F.2d at 971; *Warth*, *supra*, 422 U.S. at 501. That the class of corporate citizens is smaller than the totality of all citizens does not rescue it from the generality of the "large class" that lacks the particularity necessary to establish an interest in the proceeding.

(ii) The third claim (based on environmental damage or accidents stemming from transportation of wastes to the site) is invalid because it contains an insufficiently particularized relationship to the Envirocare site. Under its agreement with the State of Illinois, Kerr-McGee clearly will have to transport its wastes someplace. From the material before us, it appears that Kerr-McGee will risk essentially the same damages if it ships the wastes to any location, and it is clear that it will have to do so. Kerr-McGee has pointed to nothing that makes shipment to the Envirocare site different from shipment to any other site. And the Applicant has stated that shipment would be by rail or truck using conventional containers.[13]

That being so, there are no particularized reasons why the transportation claims — notwithstanding their foundation in environmental or public health and safety claims — should be recognized as a basis for standing in this particular proceeding. The injury, if any, would neither be caused by the licensing of this

---

[11] Reply Memorandum of Kerr-McGee, dated April 15, 1991, at 4.
[12] Tr. 12, 112.
[13] Tr. 31-32, 40, 60.

facility nor alleviated by any conditions that we could impose on the facility. *See Simon, supra*, 426 U.S. at 38.

(iii) As noted above, the second basis (costs of shipping off site, as compared to onsite storage) has been withdrawn in light of Kerr-McGee's agreement to so dispose of its wastes.

(iv) The first basis listed represents the only potentially viable basis for standing of right proffered by Kerr-McGee. Namely, Kerr-McGee asserts perpetual liability for onsite incidents should it store wastes at Envirocare. Kerr-McGee relies on the Superfund statute to support this claim of potential damage. We review this claim in some detail.

Kerr-McGee asserts — and no other party appears to dispute — that some of the waste material on the West Chicago site is subject to Superfund liability. Such liability arises from section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a), which reads in pertinent part:

> § 9607. *Liability*
>
> (a) Covered persons, scope
>
> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —
>
> . . .
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, . . .
>
> . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

There are relatively few defenses against liability under the foregoing provision. They are all set forth in section 107(b) of CERCLA, 42 U.S.C. § 9607(b), which reads:

> (b) Defenses
>
> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damage resulting therefrom were caused solely by —

(1) an act of God;
(2) an act of war;
(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant (except . . .), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
(4) any combination of the foregoing paragraphs.

Kerr-McGee asserts that the Superfund liability remains with it notwithstanding the transfer of the waste material to a disposal site such as Envirocare and notwithstanding that the damage giving rise to the liability occurs while the material is in the disposal facility's control and possession (and through no fault of Kerr-McGee, its employees or agents). Kerr-McGee also claims that it could be jointly and severally liable under the Superfund statute not only for damages from its own waste but also for damages from the wastes of others stored at the facility that may become commingled with its own waste. Therefore, Kerr-McGee reasons, it has an obligation to assure that the waste is handled and stored in as appropriate a manner as possible, at a facility designed to assure that its waste is properly stored to prevent damages from arising and, in addition, will not become commingled with the wastes of other disposers.[14]

Kerr-McGee claims that its intervention into this proceeding is an appropriate way to effectuate its interest in achieving this goal and, accordingly, that its interest will be affected by the results of this proceeding. Kerr-McGee particularly emphasizes its interest in assuring that its wastes are kept separate and apart from wastes provided by other customers of the facility, to avoid joint and several liability and to assure that any eventual Superfund liability on its part is limited to that arising from its own wastes.

In response, the Applicant and Staff each assert that, notwithstanding the Superfund liability, Kerr-McGee does not have an interest in the Envirocare proceeding, because it may never seek to store its wastes at the Envirocare site. They deem Kerr-McGee's interest described above as being too speculative to serve as a basis for standing to participate in the proceeding.

The Applicant and Staff acknowledge that there currently is no licensed disposal site that would be authorized to accept Kerr-McGee's West Chicago wastes. They also acknowledge that applications are currently pending for such authority at two separate facilities, the Envirocare facility and one other

[14] No party has claimed that Superfund liability would not extend to materials stored at an NRC-regulated site such as Envirocare, and we thus do not explore the ramifications or legal validity of such a claim.

similar proposed facility located near Spofford, Texas, to be operated by Texcor Industries, Inc.[15] (The Texas facility license is currently under review by the State of Texas.)

But the Staff, at least, also claims that Kerr-McGee has other storage alternatives, even if it has agreed that it will not store the wastes on its own West Chicago site or within the State of Illinois. The Staff lists three general categories of such alternatives.

The first is any site that Kerr-McGee itself may develop to dispose of the West Chicago tailings. In this category the Staff includes onsite storage (both in-place and relocated), but even absent the availability of such option, the Staff maintains that Kerr-McGee could obtain a suitable site and develop it itself.[16] It adds that there are potentially a large number of sites that could meet the siting criteria of 10 C.F.R. Part 40, Appendix A.

In our view, it is not appropriate to deny injury in fact (and hence standing) on the ground that a petitioner could go out and develop its own site and thus may never use the site in question. In the first place, although Kerr-McGee has had much experience in handling thorium wastes, it disclaims any expertise in the disposal of wastes — as we understand it, the establishing or operating of a long-term waste storage facility.[17]

Beyond that, such a response is equivalent to the declaration, in an antitrust context, that monopoly control over a scarce resource is not objectionable inasmuch as a purchaser can always go out and establish its own source of supply of the resource — a claim that has been routinely rejected. *See, e.g. Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927). Moreover, under the Staff's reasoning, a petitioner would never have an interest in a facility to be operated in the future, inasmuch as the petitioner's interest might well change before the facility in question becomes operational.

The Staff's second category of so-called available sites is any existing site under the Uranium Mill Tailings Radiation Control Act (UMTRCA), Title II, that has enough room in its tailings impoundment to hold the West Chicago tailings. The Staff points out that many such sites would be physically capable of accepting the West Chicago tailings, and it lists 23 mills capable of taking section 11e(2) byproduct material from other sites.[18] It acknowledges, however,

---

[15] Applicant's Response to Board Questions of May 2, 1991, dated January 24, 1992, at 3; NRC Staff's Response to the Licensing Board's Questions in its Order of May 2, 1991, dated February 3, 1992 (corrected on February 5, 1992), at 4.

[16] NRC Staff's Response to the Licensing Board's Questions in its Order of May 2, 1991, dated February 3, 1992 (corrected, February 5, 1992), at 2.

[17] Tr. 75.

[18] NRC Staff's Response to the Licensing Board's Questions in its Order of May 2, 1991, corrected version dated February 5, 1992, Exhibit A.

that it has not inquired about how much unused capacity remains available at any such site, whether any site has sufficient excess capacity to accommodate the West Chicago tailings, or whether the owners would be willing to accept West Chicago wastes. The Staff adds that any site owner subject to NRC regulation would have to seek a license amendment to permit its site to receive the West Chicago wastes, and any site owner subject to Agreement State control would have to obtain necessary regulatory approval from such State.

We acknowledge that the existence of identified sites of this type might easily undercut Kerr-McGee's claim of injury from the licensing of Envirocare. But we are rejecting this second category of potential sites for essentially the same reason we rejected the first — the lack of identified site whose owner is expressly willing and able to handle Kerr-McGee's wastes. None of the sites would currently be available to take the West Chicago wastes, and no site owner has sought to make its site available. Indeed, the record includes no suggestion that any owner would wish to do so. Absent such a showing, the theoretical acceptability and potential availability of such sites does not elevate them to the status of available alternatives — particularly given Kerr-McGee's expressed need for disposing of the wastes as soon as possible.

Finally, the Staff's third category of potentially available sites are commercial disposal facilities licensed to receive section 11e(2) byproduct material. The Staff acknowledges that no such facility is currently licensed, and it indicates knowledge of only two that are seeking regulatory approval for that purpose — the Envirocare facility (involved in this proceeding) and the Texcor Industries facility in Texas, mentioned earlier. The Staff indicates that it has had informal conversations with others who might seek to establish such facilities.

In our view, based on the representations of both Kerr-McGee and other parties, only the Envirocare and Texcor facilities constitute viable options for the near-term disposal of the West Chicago wastes. As Kerr-McGee points out, "[t]here are only two potential sites out [] there . . . . [t]he available options are Envirocare and Texcor."[19] The record additionally reflects that authorities and public opinion in the State of Illinois view the Envirocare site as the prime option for waste disposal[20] and, for purposes of standing, we must give credit to these statements (which are reiterated by Kerr-McGee).

As the Staff points out,[21] Kerr-McGee's interest in the Envirocare facility would be stronger if it had taken steps to arrange for potential disposal at that site — a step it has apparently not taken. We disagree, however, with the Staff's conclusion that, absent any such arrangement, Kerr-McGee's interest in

---

[19] Tr. 73, 84.
[20] Request for Hearing, dated February 25, 1991, at 4-5 and various attachments.
[21] Tr. 51.

the Envirocare facility would necessarily be too hypothetical and speculative to constitute a valid interest.

In our view, there are currently only two potential facilities for the near-term disposal of Kerr-McGee's wastes that we must consider in evaluating Kerr-McGee's standing to participate in this proceeding — Envirocare and Texcor. If Kerr-McGee had expressed an intent to use either Envirocare or Texcor or both, or perhaps the first licensed, we would have no difficulty in concluding that Kerr-McGee has an interest in assuring that either or both of these facilities meet its special need for acceptable long-term isolation and separation of its wastes. Such assurance is needed to preclude Kerr-McGee from becoming liable for damages caused by improper handling and storage of its own wastes and generally and severally liable under CERCLA for damages caused by wastes generated by others that become co-mingled with its own wastes.

Kerr-McGee, however, has not even expressed the intent that would provide it standing to protect against CERCLA liability. The farthest that it has gone is its statement that it "consider[s] Envirocare as an alternative site for the materials."[22] It also stated that "we have no preference as between Texcor and Envirocare or anyone else."[23] Something more is required, to provide the concrete interest that must be demonstrated under the Commission's Rules of Practice. Otherwise, the Applicant might be required to make extensive changes to its facility to accommodate the CERCLA liability of a single potential customer that has not expressed any intent to use the facility.

Absent such an expression of intent, we conclude that Kerr-McGee has failed to demonstrate its interest in this proceeding. It has not met its burden in establishing injury in fact. Kerr-McGee thus lacks standing of right to participate in this proceeding.

3. *Zone of Interest*

Given our conclusion on injury in fact, we need not rule on the second aspect of standing, i.e., whether the asserted injury of Kerr-McGee falls "arguably within the zones of interest" sought to be protected by the statute being enforced — here, the Atomic Energy Act or NEPA. *See Pebble Springs*, CLI-76-27, *supra*, 4 NRC at 614; *see also Air Courier Conf., supra*, 112 L. Ed. 2d at 1134; *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). Because an appeal of our determination might well be taken, however, we believe it to be useful to express our opinion on whether the only basis for standing that we have found could have merit arguably falls within the zones of interest of the foregoing statutes — namely, potential CERCLA

---

[22] Tr. 10.

[23] Tr. 75 (corrected).

liability of Kerr-McGee from improper handling and storage of its wastes and from the co-mingling of its wastes with those of others.

The Applicant and Staff have cited a number of cases holding that economic matters of various sorts are not within the zones of interests sought to be protected by the Atomic Energy Act or NEPA. In particular, either or both rely on, *inter alia*, *Pebble Springs*, CLI-76-27, *supra*, 4 NRC at 614; *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98 (1976); and *Long Island Lighting Co.* (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 638-39 (1975). On such basis, they assert that Kerr-McGee's interests are likewise not within a qualifying zone of interest and, on that ground as well, Kerr-McGee has failed to establish standing.

We have reviewed those and other cases of the same sort — e.g., *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47 (1992), *appeal pending sub nom. Environmental and Resources Conservation Organization v. NRC*, No. 92-70202 (9th Cir., filed Apr. 2, 1992) (economic interest of plant employees in employment at plant that was shutting down for management-determined reasons not within protected zone of interest). We agree that they do hold that, at the time of their issuance, the particular economic interest being asserted did indeed fall outside the zones of interest sought to be protected by the governing statutes. But, as Kerr-McGee observes, the economic interest it seeks to assert (vis-a-vis its CERCLA liability) depends upon an amendment to the Atomic Energy Act that was not in effect at the time of (or, with respect to the *Rancho Seco* decision, did not apply to) the foregoing decisions.[24]

The amendment in question was enacted in 1983.[25] It modified section 84a(1) of the Atomic Energy Act to include the language underscored below:

> a. The Commission shall insure that the management of any byproduct material, as defined in section 11.e(2), is carried out in such manner as —
>
> > (1) the Commission deems appropriate to protect the public health and safety and the environment from radiological and nonradiological hazards associated with the processing and with the possession and transfer of such material *taking into account the risk to the public health, safety, and the environment, with due consideration of the economic costs and such other factors as the Commission determines to be appropriate* . . . [emphasis supplied]

Kerr-McGee asserts that this language added economic considerations to the Atomic Energy Act, at least in the area of section 11e(2) waste disposal, enlarging the ambit of the zones of interest sought to be enforced by the Act to

---

[24] Tr. 111, 113-14, 115.

[25] Pub. L. No. 97-415 (96 Stat. 2067) (1983).

include claims of the adequacy of the facility satisfactorily to isolate the wastes provided by different disposers.[26] Although the Applicant and Staff acknowledge some change to the zones of interest comprehended by the Act, both claim that the NRC fulfilled its entire obligation in regard to the economic aspects of waste disposal by its issuance (in 1985) of revised implementing regulations in 10 C.F.R. Part 40, Appendix A. The Staff stresses the portion of that revision that allows reduction in a 1000-year isolation design standard to 200 years under certain circumstances.[27] They each cite *Quivira Mining Co. v. U.S. NRC*, 866 F.2d 1246 (10th Cir. 1989) (hereinafter, *Quivira*).

We agree (and Kerr-McGee does not here dispute) that *Quivira* held that NRC satisfactorily recognized economic considerations and performed the requisite cost-benefit rationalization in its issuance of the 1985 version of Appendix A to Part 40. Beyond that, however, Kerr-McGee cites the Court's acknowledgment that, in approving the 1985 criteria, it recognized that "NRC has pledged to take into account 'the economics of improvements in relation to benefits to the public health and safety' *in making site specific licensing decisions* [emphasis added], *see* 1985 Criteria, Introduction" and, as a result, concluded that "this commitment is consistent with the statutory mandate to determine that the costs of regulation bear a 'reasonable relationship' to benefits."[28] Further, and significantly, the Court commented that those challenging the regulations (including Kerr-McGee) "may have cause in the future to challenge, in the context of individual licensing procedures, whether the NRC's application of [the Introduction of Appendix A to Part 40] achieves the statutory command of flexibility."[29]

We agree with Kerr-McGee that this material persuasively establishes that issues such as Kerr-McGee wishes to raise (concerning the adequacy of material storage and isolation in light of CERCLA liability) are at least "arguably" (the only standard that must be met) within the zone of interests sought to be protected by section 84a(1) of the Atomic Energy Act. Thus, adequate storage and isolation under the criteria of the Appendix to Part 40 may not be sufficient in view of CERCLA liability. But, on the other hand, the added cost (if any) of constructing the facility and managing its operations to take CERCLA liability into account may exceed the bounds of reasonableness that the Atomic Energy Act now directs the Commission to consider. The zones of interests covered by section 84a(1) of the Atomic Energy Act are thus at least "arguably" broad enough to encompass such claims. The second aspect of standing has thus been satisfied by Kerr-McGee.

---

[26] Tr. 115, 119-20.
[27] Tr. 135 (Staff).
[28] 866 F.2d at 1254. Cited by Kerr-McGee at Tr. 136-37.
[29] 866 F.2d at 1259 (citation omitted).

4. Discretionary Standing

Although we have found that Kerr-McGee has failed to set forth at least a reasonable basis for us to conclude that it has standing of right in this proceeding, we also recognize that the Commission has authorized participation on the basis of discretionary standing under prescribed circumstances. *See Pebble Springs*, CLI-76-27, *supra*, 4 NRC at 614-17. We therefore have also considered Kerr-McGee's claim that it should be granted standing as a matter of discretion. In determining whether to allow participation on the basis of discretionary standing, the Commission has directed us to look at the following factors:

(a) Weighing in favor of allowing intervention —
  (1) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
  (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
  (3) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.

(b) Weighing against allowing intervention —
  (4) The availability of other means whereby petitioner's interest will be protected.
  (5) The extent to which petitioner's interest will be represented by existing parties.
  (6) The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

Weighing the varying factors, we believe that the first — the most important[30] — weighs slightly in favor of Kerr-McGee's intervention, on topics relating to the capability of the facility (and its management) to store wastes properly to avoid CERCLA liability and to keep isolated one entity's wastes from the wastes of others, although Kerr-McGee itself disclaims any expertise in disposal of waste.[31] The second factor — Kerr-McGee's interest in the proceeding — is, however, negative; as we have stated earlier, Kerr-McGee has demonstrated a general interest in the safe handling and storage of wastes but no particular interest in the use of this facility. We have reviewed the third factor in conjunction with our consideration of standing of right and conclude that it tends to favor discretionary intervention, inasmuch as any license conditions designed to enhance the ability of the Applicant to avoid CERCLA liability for

---

[30] *Pebble Springs*, CLI-76-27, *supra*, 4 NRC at 617; *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-363, 4 NRC 631, 633 (1976); *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1145 (1977); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977).

[31] Tr. 75.

improper storage and to isolate the material of various disposers would enhance the option of Kerr-McGee to utilize the Envirocare facility for its wastes.

As for the contrary factors, Kerr-McGee could perhaps attain its stated desire — a facility properly designed and operated to minimize Kerr McGee's potential CERCLA liability — through informal conversations with the Applicant and Staff, as suggested by the Staff.[32] Although Kerr-McGee would have no right to have its views considered, much less acted upon, the Staff and Applicant at the prehearing conference appeared amenable to such an approach and willing to take responsible suggestions seriously. We rank this factor as neutral, neither favoring nor disfavoring intervention. The fifth factor favors intervention, inasmuch as there is no other party who could represent or protect Kerr-McGee's interest.

Finally, and significantly, intervention of Kerr-McGee clearly will produce some delay in the proceeding — adjudication in a situation where there otherwise would be none will of necessity produce that result. Kerr-McGee denies any intent to delay the proceeding through its participation and offers to proceed expeditiously and abide by expedited discovery and hearing schedules.[33] Were a hearing to be authorized, we would also take steps to minimize that necessary result by limiting Kerr-McGee's intervention to issues clearly related to its interest in avoiding CERCLA liability. Nonetheless, delay would occur, and we would thus weigh this factor negatively.

One further factor needs to be considered. Based on our inquiries to the parties as well as our own research, we are unaware of any proceeding where discretionary intervention was the only intervention granted.[34] We also are unaware of any bar to doing so. Indeed, the Appeal Board long ago suggested that no such bar exists, commenting that "before a hearing is triggered at the instance of one who has not alleged any cognizable personal interest in the operation of this facility, there should be cause to believe that some discernible public interest will be served by the hearing." *Watts Bar*, ALAB-413, *supra*, 5 NRC at 1422. There do not appear to be any established standards for determining whether a discernible public interest would be served by a hearing.

Here, we believe that a discernible public interest would not be served by the hearing that Kerr-McGee has requested. The issues it has raised are not being ignored by the Staff — indeed, as pointed out by the Staff and Applicant,[35] many of the proposed contentions are derived from or suggested by questions previously asked the Applicant by the Staff.[36] In addition, we are urging the Staff

---

[32] Tr. 63, 68-69.
[33] Tr. 13, 154, 155.
[34] Tr. 14, 16, 153.
[35] Tr. 69, 156-57, 162.
[36] In particular, proposed contentions 1, 2, 3, 4, 5, 7, 8, 9, 12, 13, 14, 15, 16, 18, 19, and 20.

(later in this opinion) to devote particular attention to one issue that was initially highlighted by Kerr-McGee and which is currently under review by the Staff — namely, Contention 6, concerning the capability of management adequately to manage the proposed facility (*see* p. 186, *infra*).

Thus, the primary reason why we are declining to grant intervention on a discretionary basis is the same reason we refused to grant standing as a matter of right — the absence of any commitment or even expressed intent by Kerr-McGee actively to consider use of the facility (whether separately from or in conjunction with the Texcor facility) for all or a portion of its wastes. Another reason is our failure to perceive any "discernible public interest" that will be served by a hearing in a situation where, as here, there are no other intervenors. Accordingly, as a matter of discretion, and particularly absent an expression of intent such as we have described, we conclude that Kerr-McGee has failed to establish adequate grounds to merit convening a hearing to provide it an adjudicatory opportunity to participate in resolving issues bearing upon the CERCLA liability of waste disposers (including itself).

B. Contentions

In order to be admitted as a party to a proceeding, a petitioner must not only demonstrate its standing but also that it has proffered at least one viable contention. 10 C.F.R. § 2.714(b)(1). Given our finding of lack of standing, we normally would not discuss the adequacy of contentions. Because of potential review, however, we believe it desirable to express our view on whether Kerr-McGee has proffered at least one valid contention.

In its December 9, 1991, filing, Kerr-McGee submitted twenty proposed contentions. In their responses to those contentions, the Applicant and Staff, respectively, have acknowledged that many of the contentions are consistent with the NRC rules governing contentions, and they offered no objection to their admission, assuming standing were to be found. We discussed the contentions with the parties at the prehearing conference.[37]

In its response to Kerr-McGee's contentions, the Applicant suggests that, if we were to find that Kerr-McGee has standing, we limit its participation to those issues as to which it has demonstrated a proper interest, based on authority in 10 C.F.R. § 2.714(g).[38] That section authorizes us, upon determining that a petitioner's interest is limited to one or more of the issues involved in the proceeding, to limit its participation to those issues. In addition, in conjunction with discretionary intervention, the Commission explicitly empowered boards

---

[37] Tr. 178-219.

[38] Applicant's Answer to Kerr-McGee's Contentions, dated January 24, 1992, at 14; Tr. 36.

to limit the participation of intervenors "to the issues they have specified as of particular concern to them." *Pebble Springs*, CLI-76-27, *supra*, 4 NRC at 617.

Given the limited subject that we have determined even warrants participation of Kerr-McGee, and given our determination that Kerr-McGee can contribute in some degree to the development of the record insofar as it bears on that subject, we find the Applicant's suggestion to be well founded. If a hearing were authorized, we would limit Kerr-McGee's participation to contentions having a bearing upon the ability of the facility and its management properly to handle and store wastes to avoid CERCLA liability and to assure isolation of one organization's wastes from the wastes of others.

As submitted, the proposed contentions fall into several discrete categories:

1. Above-Grade Disposal — Contention 1.
2. Siting — Contentions 2, 3.
3. Transportation Issues — Contentions 4, 5.
4. Applicant's Qualifications — Contention 6.
5. Seismic Stability — Contention 7.
6. Hydrological Performance — Contentions 8, 9.
7. Maintenance — Contention 10.
8. Intrusion — Contention 11.
9. Waste Characteristics — Contention 12.
10. Embankment Liner — Contention 13.
11. Radon Barrier — Contention 14.
12. Water Erosion — Contention 15.
13. Endangered Species — Contention 16.
14. Waste Dust — Contention 17.
15. Monitoring — Contention 18.
16. Cost-Benefit Analysis — Contention 19.
17. Surety Arrangements — Contention 20.

Kerr-McGee has stated that its contentions (filed on December 9, 1991) are not based on the latest version of the Applicant's proposal, that filed on December 16, 1991, but that if we determined that it had standing, it would discuss its contentions with the parties, drop any that had become moot, and revise the others in accordance with the latest proposal.[39] If a hearing were to be held, we would adopt that course of action. However, inasmuch as we wish to provide guidance as to how we would rule on contentions, we turn to the contentions that are before us.

Under the criteria we have adopted, Contention 1 would appear to raise issues of the suitability of above-grade disposition to achieving the protection and isolation that Kerr-McGee believes is necessary. Neither the Applicant

[39] Tr. 198, 218-19. Any revised contentions that raise new issues would be subject to the late-filing criteria of 10 C.F.R. § 2.714(a)(1).

nor Staff opposes this contention. We would accept it if a hearing were to be authorized. Thus, the contention requirement for a hearing would be satisfied.

As for the others, we leave most of them to a time when, by virtue of an appeal from our decision, we may be directed to hold a hearing. Only one — number 6 — warrants our comments at this time. That contention challenged the adequacy of the Applicant's management to achieve proper disposal and isolation of wastes from the wastes of others. Kerr-McGee cites four separate examples of management practice at the existing Envirocare facility.

The Staff does not oppose this contention, and the Applicant objects on the merits. It claims that Kerr-McGee is merely using isolated instances in Envirocare's 4-year management of NORM wastes and is unfairly considering them out of context. We note, however, that Kerr-McGee is using a traditional way of raising management issues and that it may be the only way to raise potential systemic management deficiencies. Assuming this contention were never to be litigated, we strongly urge the Staff (as it apparently intends) to perform additional investigation into the alleged circumstances and to determine whether the cited circumstances reflect management deficiencies that ought to be remedied prior to licensing.[40]

III. ORDER

On the basis of the foregoing, it is, this 30th day of April 1992, ORDERED:

1. The request for a hearing and petition for leave to intervene of Kerr-McGee Chemical Corp. is hereby *denied*.

2. This proceeding is hereby *terminated*.

3. Objections to this Order may be filed by a party or petitioner within five (5) days of its service, except that the Staff may file such objections within ten (10) days after service. *Cf.* 10 C.F.R. § 2.752(c).

4. This Order is subject to appeal to the Commission in accordance with the provisions of 10 C.F.R. § 2.714a. Any appeal must be filed within ten (10) days of service of this Order and must include a Notice of Appeal and supporting

[40] Indeed, the Staff has indicated that, as of February, 1992, although "unable to form an opinion at this time as to the significance of these incidents, it will consider this matter as appropriate in the course of its ongoing review of Envirocare's license application." NRC Staff's Response to Kerr-McGee's Contentions, corrected version dated February 5, 1992, at 14 n.19.

brief. Any other party may file a brief in support of or in opposition to the appeal within ten (10) days after service of the appeal.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Foster
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Bethesda, Maryland
April 30, 1992