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UNITED STATES NUCLEAR REGULATORY COMMISSION STAFF PRACTICE AND PROCEDURE DIGEST

Commission, Appeal Board and Licensing Board Decisions July 1972 - September 1991

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U.S. Nuclear Legulatory Commission
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UNITED STATES NUCLEAR REGULATORY COMMISSION STAFF PRACTICE AND PROCEDURE DIGEST

(The July, 1992 Update includes Commission, Appeal Board, and Licensing Board Decisions issued from July 1, 1972 through September 30, 1991.)

NOTE TO USERS

On June 27, 1991, the Commission completed final rulemaking which involved major changes in the structure and procedures of the Commission's adjudicatory hearing system. In light of its decision to abolish the Atomic Safety and Licensing Appeal Panel, the Commission issued a final rule which provides for direct discretionary appellate review by the Commission of all appeals (and other appellate and related matters) from initial decisions of presiding officers in all formal and informal adjudicatory proceedings. 56 Fed. Req. 29403 (June 27, 1991).

Effective July 29, 1991, a petition for review of an initial adjudicatory decision must be filed with the Commission, which will exercise its discretion whether to take review of the initial decision.

All matters pending before the Appeal Boards on June 27, 1991 were decided by the Appeal Boards under the regulations in effect prior to October 24, 1990.

Initial adjudicatory decisions issued prior to the July 29, 1991 effective date of the final rule were reviewed by the Commission, acting in place of the Appeal Boards, under the regulations in effect prior to October 24, 1990.

In the notice of proposed rulemaking, the Commission stated that it "does not intend to abrogate the existing body of appeal board case law and begin writing on a clean slate." 55 Fed. Reg. 42947 (October 24, 1990). Existing appeal board precedent, to the extent it is consistent with any future changes in the Rules of Practice, "may still be cited and relied upon, and will be modified only on a case-by-case basis as issues arise...." Id.

NRC STAFF PRACTICE AND PROCEDURE DIGEST

UPDATE, JULY 1992

INSTRUCTIONS FOR REPLACEMENT OF PAGES

| Section | Remove Pages | Insert New Pages* |
|--|--------------------------|-----------------------------------|
| Preliminary Pages | 1, 11, 111 | 1, 11, 111 |
| TABLE OF CONTENTS | 1-4, 7-8, 11-13 | Table of Contents 1-4, 7-8, 11-13 |
| APPLICATIONS 1.0 | 1-14 | 1-14 |
| Prehearing Matters Table of Contents | 1, 11, 111 | 1, 11, 111 |
| PREHEARING MATTERS 2.0 | 3-146 | 3-148 |
| EARINGS 3.0 | 19-42 | 19-42 |
| Post Hearing Matters Table of Contents | 1 | i |
| POST HEARING MATTERS 4.0 | 7-27 | 7-27 |
| General Matters Table of Contents | i - iv | i - iv |
| GENERAL MATTERS 6.0 | 21-74, 81-82, 111-123 | 21-74, 81-82, 111-123 |
| Indexes | | |
| FACILITY | ALL | ALL |
| CITATION | ALL | ALL |
| CFR | ALL | ALL |
| STATUTES | ALL | ALL |
| CASE LAW | ALL | ALL |
| OTHER LEGAL CITATIONS | 1, 2, 3 | ALL |

^{*}Where a replacement page is back-to-back with an unchanged page, both have been included for insertion.

PREFACE

This Revision 3 of the sixth edition of the NRC Staff Practice and Procedure Digest contains a digest of a number of Commission, Atomic Safety and Licensing Appeal Board, and Atomic Safety and Licensing Board decisions issued during the period from July 1, 1972 to September 30, 1991 interpreting the NRC's Rules of Practice in 10 CFR Part 2. This Revision 3 replaces in part earlier editions and revisions and includes appropriate changes reflecting the amendments to the Rules o Practice effective through September 30, 1991.

The Practice and Procedure Digest was originally prepared by attorneys in the NRC's Office of the Executive Legal Director (now, Office of the General Counsel) as an internal research tool. Because of its proven usefulness to those attorneys, it was decided that it might also prove useful to members of the public. Accordingly, the decision was made to publish the Digest and subsequent editions thereof. This edition of the Digest was prepared by attorneys from Aspen Systems Corporation pursuant to Contract number 18-91-336.

Persons using this Digest are placed on notice that it may not be used as an authoritative citation in support of any position before the Commission or any of its adjudicatory tribunals. Persons using this Digest are also placed on notice that it is intended for use only as an initial research tool, that it may, and likely does, contain errors, including errors in analysis and interpretation of decisions, and that the user should not rely on the Digest analyses and interpretations but must read, analyze and rely on the user's own analysis of the actual Commission, Appeal Board and Licensing Board decisions cited. Further, neither the United States, the Nuclear Regulatory Commission, Aspen Systems Corporation, nor any of their employees makes any expressed or implied warranty or assumes liability or responsibility for the accuracy, completeness or usefulness of any material presented in the Digest.

The Digest is roughly structured in accordance with the chronological sequence of the nuclear facility licensing process as set forth in Appendix A to 10 CFR Part 2. Those decisions which did not fit into that structure are dealt with in a section on "general matters." Where appropriate, particular decisions are indexed under more than one heading. Some topical headings contain no decision citations or discussion. It is anticipated that future updates to the Digest will utilize these headings.

This edition of the Digest will be updated in the future. The updates will be prepared in the form of replacement pages.

We hope that the Digest will prove to be as useful to the members of the public as it has been to the members of the Office of the General Counsel. We would appreciate from the users of the Digest any comments or suggestions which would serve to improve its usefulness.

Office of the General Counsel
U.S. Nuclear Regulatory Commission

TABLE OF CONTENTS

NOTE

References are to Chapter Title and page number.

| Chapter | Abbreviation |
|---------------------------------|--------------|
| Applications for License/Permit | An |
| Prehearing Matters | Pre |
| Hearings | Н |
| Post Hearing Matters | PH |
| Appeals | APP |
| General Matters | GM |

| 1.0 | APPLICATION FOR LICENSE/PERMIT | An | 1 | |
|--------------------------------|--|----------------------|---|---|
| 1.1 | Applicants | An | 1 | |
| 1.2 | Renewal Applications | An | 1 | |
| 1.3 | Applications for Early Site Review | An | 1 | |
| 1.4.1 1.4.2 | Form of Application for Construction Permit/Operating License Form of Application for Initial License/Permit Form of Renewal Application for Licens / Permit | An An An | 2 | |
| 1.5 1.5.1 1.5.2 | Contents or Application Incomplete Applications Material False Statements in Applications | An An An | 2 | |
| 1.6 | Docketing of License/Permit Application | An | 5 | |
| 1.7 1.7.1 1.7.2 1.7.3 | Notice of License/Permit Application Publication of Notice in Federal Register Amended Notice After Addition of New Owners Notice on License Renewal | An An An An | 5 | |
| 1.8 | Staff Review of License/Permit Application | An | 6 | |
| 1.9 | Withdrawal of Application for License/Permit | An | 9 | |
| 1.10 | Abandonment of Application for License/Permit | An | 1 | 4 |
| 2.0 | PREHEARING MATTERS (See 3.3) | Pre | e | 1 |
| 2.1 | Scheduling of Hearings (SEE 3.3.1 to 3.3.5.2) | Pri | е | 1 |
| 2.2 | Necessity of Hearing | Pr | е | 1 |
| | | | | |

OCTOBER 1989

| 2.3 | Location of Hearing Public Interest Requirements Affecting Hearing Location (Reserved) | Pre Pre | |
|---|---|---|--|
| 2.3.2 | Convenience of Litigants Affecting Hearing Location (SEE 3.3.5.2) | Pre | 4 |
| 2.4 | Issues for Hearing (SEE 3.4 to 3.4.6) | Pre | 4 |
| 2.5 2.5.1 2.5.2 2.5.3 2.5.4 | Notice of Hearing Contents of Notice of Hearing Adequacy of Notice of Hearing Publication of Notice of Hearing in Federal Register Requirement to Renotice | Pre Pre Pre Pre | 5 6 |
| 2.6 2.6.1 2.6.2 2.6.3 2.6.3.1 2.6.3.2 2.6.3.3 | Prehearing Conferences Transcripts of Prehearing Conferences Special Prehearing Conferences Prehearing Conference Order Effect of Prehearing Conference Order Objections to Prehearing Conference Order Appeal from Prehearing Conference Order | Pre Pre Pre Pre Pre Pre | 7 8 8 8 8 |
| 2.7 | Conference Calls | Pre | 9 |
| 2.8 2.8.1 2.8.1.1 2.8.1.2 2.8.1.3 | Prehearing Motions Prehearing Motions Challenging ASLB Composition Contents of Motion Challenging ASLB Composition Evidence of Bias in Challenges to ASLB Composition Waiver of Challenges to ASLB Composition | Pre | |
| 2.9 2.9.1 2.9.2 2.9.3 2.9.3.1 2.9.3.2 2.9.3.3 2.9.3.3.1 2.9.3.3.2 2.9.3.3.4 2.9.3.3.5 2.9.3.5 2.9.3.7 | Intervention General Policy on Intervention Intervenor's Need for Counsel Petitions to Intervene Pleading Requirements Defects in Pleadings Time Limits/Late Petitions Time for Filing Intervention Petitions Sufficiency of Notice of Time Limits on Intervention Consideration of Untimely Petitions to Intervene Appeals from Rulings on Late Intervention Mootness of Petitions to Intervene Amendment of Petition Expanding Scope of Intervention Withdrawal of Petition to Intervene Intervention in Antitrust Proceedings Intervention in High-Level Waste Licensing Proceedings | Pre | 11 11 12 12 13 17 17 20 21 21 22 22 22 22 22 22 23 38 38 40 40 41 |

| 2.9.4.1 2.9.4.1.1 2.9.4.1.2 2.9.4.1.3 2.9.4.1.4 2.9.4.2 | Interest and Standing for Intervention Judicial Standing to Intervene "Injury-in-Fact" and "Zone of Interest" Tests for Standing to Intervene Standing of Organizations to Intervene Standing to Intervene in Export Licensing Cases Standing to Intervene in Specific Factual Situations Discretionary Intervention | Pre Pre Pre Pre Pre Pre | 43 44 53 58 60 |
|--|--|--|--|
| 2.9.5 2.9.5.1 2.9.5.2 2.9.5.3 2.9.5.4 2.9.5.5 2.9.5.6 2.9.5.7 2.9.5.8 2.9.5.9 2.9.5.10 2.9.5.11 2.9.5.12 2.9.5.13 | Contentions of Intervenors Pleading Requirements for Contentions Requirement of Oath from Intervenors Requirement of Contentions for Purposes of Admitting Petitioner as a Party Material Used in Support of Contentions Timeliness of Submission of Contentions Contentions Challenging Regulations Contentions Involving Generic Issur Contentions Challenging Absent or Incomplete Documents Contentions re Adequacy of Security Plan Defective Contentions Discovery to Frame Contentions Stipulations on Contentions (Reserved) Appeals of Rulings on Contentions | Pre Pre Pre Pre Pre Pre Pre Pre Pre Pre | 71 77 77 79 80 92 93 96 96 97 98 98 |
| 2.9.6 2.9.7 2.9.7.1 | Conditions on Grants of Intervention Appeals of Rulings on Intervention Standards for Reversal of Rulings on Intervention | Pre Pre Pre | 99 |
| 2.9.9 2.9.9.1 2.9.9.2 2.9.9.2.1 2.9.9.2.2 2.9.9.3 2.9.9.4 2.9.9.5 | Reinstatement of Intervenor After Withdrawal Rights of Intervenors at Hearing Burden of Proof Presentation of Evidence Affirmative Presentation by Intervenor/Participants Consolidation of Intervenor Presentations Cross-Examination by Intervenors Intervenor's Right to File Proposed Findings Attendance at/Participation in Prehearing Conferences/Hearings Pleadings and Documents of Intervenors | Pre Pre Pre Pre Pre Pre Pre | 102 104 104 105 106 106 |
| 2.9.10 2.9.10.1 2.9.10.2 | Cost of Intervention Financial Assistance to Intervenors Intervenors' Witnesses | Pre Pre Pre | 108 |
| 2.9.11 2.9.12 | Appeals by Intervenors Intervention in Remanded Proceedings | Pre Pre | |
| | | | |

| 2.10 2.10.1 2.10.1.1 2.10.1.2 2.10.2 | Nonparty Participation - Limited Appearance and Interested States Limited Appearances in MRC Adjudicatory Proceedings Requirements for Limited Appearance Scope/Limitations of Limited Appearances Participation by Nonparty Interested States | Pre 111 Pre 111 Pre 111 Pre 111 Pre 112 |
|--|---|--|
| 2.11 2.11.1 2.11.2 2.11.2.1 2.11.2.2 2.11.2.3 2.11.2.4 2.11.2.5 2.11.2.6 2.11.2.7 2.11.2.8 | Discovery Time for Discovery Discovery Rules Construction of Discovery Rules Scope of Discovery Requests for Discovery During Hearing Privileged Matter Protective Orders Work Product Updating Discovery Responses Interrogatories | Pre 116 Pre 119 Pre 122 Pre 122 Pre 125 Pre 125 Pre 134 Pre 135 Pre 136 Pre 136 |
| 2.11.3 2.11.4 2.11.5 2.11.5.1 2.11.5.2 | Discovery Against the Staff Responses to Discovery Requests Compelling Discovery Compelling Discovery From ACRS and ACRS Consultants Sanctions for Failure to Comply with Discovery Orders | Pre 137 Pre 139 Pre 141 Pre 143 Pre 144 |
| 2.11.6 2.11.7 2.11.7.1 2.11.7.2 | Appeals of Discovery Rulings Discovery in High-Level Waste Licensing Proceedings Pre-License Application Licensing Board Licensing Support System | Pre 147 Pre 148 Pre 148 Pre 148 |
| 3.0 | HEARINGS | H 1 |
| 3.1 3.1.1 | <u>Licensing Board</u> General Role of Licensing Board | H 1 H 1 |
| 3.1.2 3.1.2.1 3.1.2.1.1 | Powers/Duties of Licensing Board Scope of Jurisdiction of Licensing Board Authority in Construction Permit Proceedings Distinguished | H 3 H 4 |
| 3.1.2.2 3.1.2.3 3.1.2.4 3.1.2.5 3.1.2.6 3.1.2.7 | From Authority in Operating License Proceedings Scope of Authority to Rule on Petitions and Motions Authority of Licensing Board to Raise Sua Sponte Issues Expedited Proceedings; Timing of Rulings Licensing Board's Relationship with the NRC Staff Licensing Board's Relationship with Other Agencies Conduct of Hearing by Licensing Board | H 12 H 14 H 16 H 20 H 22 H 26 H 27 |
| 3.1.3 3.1.4 3.1.4.1 3.1.4.2 | Quorum Requirements for Licensing Board Hearing Disqualification of a Licensing Board Member Motion to Disqualify Adjudicatory Board Member Grounds for Disqualification of Adjudicatory Board Member Improperly Influencing an Adjudicatory Board Decision | H 32 H 33 H 33 H 35 H 39 |

| 3.15 | Interlocutory Review via Directed Certification | Н 106 |
|--|---|--|
| 3.16 3.16.1 | <u>Licensing Board Findings</u> Independent Calculations by Licensing Board | H 108 H .11 |
| 3.17 | Res Judicata and Collateral Estoppel | Н 112 |
| 3.18 3.18.1 3.18.2 | Termination of Proceedings Procedures for Termination Post-Termination Authority of Commission | H 118 H 118 H 118 |
| 4.0 | POST HEARING MOTTERS | PH 1 |
| 4.1 | Settlements and Stipulations | PH 1 |
| 4.2 4.2.1 4.2.2 | Proposed Findings Intervenor's Right to File Proposed Findings Failure to File Proposed Findings | PH 1 PH 2 PH 2 |
| 4.3 4.3.1 | Initia: Decisions Recorsideration of Initial Decision | PH 3 PH 6 |
| 4.4 4.4.1 4.4.1.1 4.4.1.2 4.4.2 4.4.3 | Reopening Hearing Motions to Reopen Hearing Time for Filing Motion to Reopen Hearing Contents of Motion to Reopen Hearing (Reserved) Grounds for Reopening Hearing (SEE ALSO 3.13.3) Reopening Construction Permit Hearings to Address New Generic Issues Discovery to Obtain Information to Support Peopening of Hearing | PH 7 PH 9 PH 12 PH 14 PH 14 PH 21 |
| 4.5 | Motions to Reconsider | PH 22 |
| 4.6 | Sua Sponte Review by the Appeal Board | PH 23 |
| 4.7 | Motions for Post-Judgment Relief | PH 27 |
| 5.0 | APPEALS | App 1 |
| 5.1 | Right to Appeal | App 1 |
| 5.2 | Who Can Appeal | App 2 |
| 5.3 | How to Appeal | App 4 |
| 5.4 | Time for Filing Appeals | App 4 |

| 5.5 5.5.1 5.5.2 5.5.3 | Matters Considered on Appeal Issues Raised for the First Time on Appeal Effect on Appeal of Failure to File Proposed Findings Matters Considered on Appeal of Ruling Allowing Late | App App App | 9 |
|--|---|---|--|
| 5.5.4 | Intervention Consolidation of Appeals on Generic Issues | App App | |
| 5.6 5.6.1 5.6.2 5.6.3 | Appeal Board Action Role of Appeal Board Parties' Opportunity to be Heard on Appeal Standards for Reversing Licensing Board on Findings of | App App App | 12 17 |
| 5.6.4 5.6.5 5.6.6 5.6.6.1 | Fact Grounds for Immediate Suspension of Construction Permit by Appeal Board Immediate Effectiveness of Appeal Board Decision Effect of Appeal Board Affirmance as Precedent Precedential Effect of Unpublished Opinions of Appeal Boards | App App App App | 20 21 21 |
| 5.6.7 | Disqualification of Appeal Board Member | App | 22 |
| 5.7 5.7.1 5.7.2 | Stays Pending Appeal Requirements for a Stay Pending Appeal Stays Pending Remand After Judicial Review | App App App | 25 |
| 5.8 5.8.1 5.8.2 5.8.3 5.8.3.1 5.8.3.2 | Specific Appealable Matters Rulings on Intervention Scheduling Orders Discovery Rulings Rulings on Discovery Against Nonparties Rulings Curtailing Discovery | App App App App App | 34 36 37 37 |
| 5.8.4 5.8.4.1 | Refusal to Compel Joinder of Parties Order Consolidating Parties | | 38 38 |
| 5.8.5 | Order Denying Summary Disposition (SEE ALSO 3.5) | Арр | 38 |
| 5.8.6 5.8.7 5.8.8 5.8.9 5.8.10 5.8.11 5.8.12 5.8.13 5.8.14 5.8.15 | Procedural Irregularities Matters of Recurring Importance Advisory Decisions on Trial Rulings Order on Pre-LWA Activities Partial Initial Decisions Other Licensing Actions Rulings on Civil Penalties Evidentiary Rulings Director's Decision on Enforcement Petition Findings of Fact | App App App App App App App | 39 39 39 39 39 40 40 41 41 41 |
| 5.9 5.9.1 | Perfecting Appeals General Requirements for Appeals from Initial Decision | | 41 |

| 11 | | |
|----|--|--|
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |

| 6.5.3.1 6.5.3.2 6.5.4 6.5.4.1 | Staff Review of Application Staff-Applicant Correspondence Notice of Relevant Significant Developments Duty to Inform Adjudicatory Board of Significant | GM GM GM | 23 23 |
|--|---|----------------------|----------------------------------|
| | Developments | GM | |
| 6.6 | Early Site Review Procedures | GM | 26 |
| 6.6.1 | Scope of Early Site Review | GM | 27 |
| 6.7 6.7.1 6.7.2 | Endangered Species Act Required Findings re Endangered Species Act Degree of Proof Needed re Endangered Species Act | GM GM GM | |
| 5.8 | Financial Qualifications | GM | 28 |
| 6.9 6.9.1 6.9.2 6.9.2.1 | Generic Issues Consideration of Generic Issues in Licensing Proceedings Effect of Unresolved Generic Issues Effect of Unresolved Generic Issues in Construction | | 31 31 34 |
| 6.9.2.2 | Permit Proceedings Effect of Unresolved Generic Issues in Operating License Proceedings | | 34 |
| 6.10 6.10.1 6.10.1.1 6.10.1.2 | | GM GM | 35 36 38 39 |
| 6.11 | Masters in NRC Proceedings | GM | 39 |
| 6.12 | Material False Statements in Applications (SEE 1.5.2) | GM | 40 |
| 6.13 | Materials Licenses | GM | 40 |
| 6.14 6.14.1 6.14.2 6.14.2.1 6.14.3 | Motions in NRC Proceedings Form of Motion Responses to Motions Time for Filing Responses to Motions Licensing Board Actions on Motions | GM GM GM | 43 44 44 44 |
| 6.15 6.15.1 6.15.1.1 6.15.1.2 6.15.2 6.15.3 6.15.3.1 | NEPA Considerations Environmental Impact Statements (EIS) Need to Prepare an EIS Scope of EIS Role of EIS Circumstances Requiring Redrafting of Final Environmental Statement (FES) Effect of Failure to Comment on Draft Environmental Statement (DES) | GM GM GM GM | 45 48 49 53 54 55 |

| 6.15.3.2 6.15.4 6.15.4.1 6.15.4.2 | Stays Pending Remand for Inadequate EIS Alternatives Obviously Superior Standard for Site Selection Standards for Conducting Cost-Reposit Analysis | GM | 58 59 62 |
|--|--|--|--|
| 6.15.5 6.15.6 6.15.6.1 6.15.6.1.1 6.15.6.1.2 6.15.7 6.15.8 6.15.8.1 6.15.8.2 6.15.8.3 6.15.8.4 6.15.8.4 6.15.8.5 | Standards for Conducting Cost-Benefit Analysis Related to Alternatives Need for Facility Cost-Benefit Analysis Under NEPA Consideration of Specific Costs Under NEPA Cost of Withdrawing Farmland from Production (SEE 3.7.3.5.1) Socioeconomic Costs as Affected by Increased Employment and Taxes from Proposed Facility Consideration of Class 9 Accidents in an Environmental Impact Statement Power of NRC Under NEPA Powers in General (Under NEPA) Transmission Line Routing Pre-LWA Activities/Offsite Activities Relationship to EPA with Regard to Cooling Systems NRC Power Under NEPA with Regard to FWPCA | GM GM GM GM GM GM GM GM GM | 63 64 65 67 68 68 70 72 74 74 75 76 |
| 6.15.9 6.16 6.16.1 6.16.1.1 6.16.1.2 6.16.2 6.16.3 | NRC Staff Staff Role in Licensing Proceedings Staff Demands on Applicant or Licensee Staff Witnesses Post Hearing Resolution of Outstanding Matters by the Staff Status of Staff Regulatory Guides Status of Staff Position and Working Papers | GM GM GM GM | 77 77 82 83 83 |
| 6.16.4 6.16.5 | Status of Standard Review Plan Conduct of NRC Employees (Reserved) | GM | 99 89 |
| 6.17 6.17.1 | Orders of Licensing and Appeal Boards Compliance with Board Orders | | 89 89 |
| 6.18 | Precedent and Adherence to Past Agency Practice | GM | 90 |
| 6.19 6.19.1 6.19.2 6.19.2.1 | Pre-Permit Activities Pre-LWA Activity Limited Work Authorization LWA Status Pending Remand Proceedings | GM | 91 93 94 95 |
| 6.20 6.20.1 6.20.2 6.20.3 6.20.4 6.20.5 | Regulations Compliance with Regulations Commission Policy Statements Regulatory Guides Challenges to Regulations Agency's Interpretation of its Own Regulations | GM GM GM | 95 96 96 96 98 102 |

| 6.21 6.21.1 | Rulemaking Distinguished from General Policy | GM | 102 |
|--|--|--|---|
| 6.21.2 | Statements Generic Issues and Rulemaking | | 103 103 |
| 6.22 | Research Reactors | GM | 104 |
| 6.23.1 6.23.2 6.23.3 6.23.3.1 6.23.3.2 | Disclosure of Information to the Public Freedom of Information Act Disclosure Privacy Act Disclosure (Reserved) Disclosure of Proprietary Information Protecting Information Where Disclosure is Sought in an Adjudicatory Proceeding Security Plan Information Under 10 CFR § 2.790(d) | GM GM GM | 104 105 107 107 |
| 6.24 6.24.1 6.24.1.2 6.24.1.3 6.24.2 6.24.3 6.24.4 6.24.5 6.24.6 6.24.7 6.24.8 | Enforcement Proceedings (Formerly Show Cause Proceedings) Petition for Enforcement Order Grounds for Enforcement Order Burden of Proof for Enforcement Order Issues in Enforcement Proceedings Standards for Issuing in Enforcement Order Review of Decision on Request for Enforcement Order Notice/Hearing on Enforcement Order to Licensee/Permittee Burden of Proof in Enforcement Proceedings Consolidation of Petitioners in Enforcement Proceedings Necessity of Hearing in Enforcement Proceedings Intervention in Enforcement Proceedings | GM GM GM GM GM GM GM GM | 110 114 114 115 115 116 118 119 119 |
| 6.25 | Summary Disposition Procedures (SEE 3.5) | GM | 120 |
| 6.26 | Suspension, Revocation or Modification of License | GM | 120 |
| 6.27 | Technical Specifications | GM | 121 |
| 6.28 | Termination of Facility Licenses | GM | 122 |
| 6.29 6.29.1 6.29.2 | Procedures in Other Types of Hearings Military or Foreign Affairs Functions Export Licensing (SEE ALSO 3.4.6) | GM | 122 122 122 |
| 6.29.2.1 6.29.2.2 6.29.3 | Jurisdiction of Commission re Export Licensing Export License Criteria High-Level Waste Licensing | GM | 122 123 123 |

PROCEDURAL CONSIDERATIONS

1.0 APPLICATION FOR LICENSE/PERMIT

1.1 Applicants

All co-owners of a nuclear power plant must be co-applicants for NRC licenses for the facility. To hold otherwise could place a cloud on significant areas of the NRC's regulatory authority and is not consistent with the safety considerations with which Congress was primarily concerned in the Atomic Energy Act. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 200-201 (1978). The Appeal Board's decision in Marble Hill thus overrules the Licensing Board's holding to the contrary in Omaha Public Power District (Fort Calhoun Station, Unit 2), LBP-77-5, 5 NRC 437 (1977).

1.2 Renewal Applications

Applications for a renewal of a license may be filed with the NRC. 10 CFR § 2.109 provides that where an application for renewal is filed at least 30 days prior to the expiration of an existing license authorizing activities of a continuing nature, the existing license will not be deemed to expire until the renewal application has been finally determined.

1.3 Applications for Early Site Review

The Commission's regulations in 10 CFR Part 2 have been amended to provide for an adjudicatory early site review. See 10 CFR §§ 2.101(a-1), 2.600 to 2.606. These early site review procedures, which differ in both form and effect from those of Subpart A of 10 CFR Part 52 and Appendix Q to 10 CFR Part 52 (formerly, 10 CFR Part 50), are designed to result in the issuance of a partial initial decision with regard to site suitability matters chosen by the applicant.

An applicant who seeks early site review is not required to own the proposed power plant site. The real test for deciding on early site review is whether or not the applicant can produce the information required by regulation and necessary for an effective hearing.

Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1136 (1981).

The Commission's early site review regulations do not require that the applicant have a "firm plan" to construct a plant at the site, but rather are meant to provide an opportunity to resolve siting issues in advance of any substantial commitment of resources. 10 CFR § 2.101(a-1), §§ 2.600 et seq. Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 975-976 (1981).

OCTOBER 1989 APPLICATIONS 1

Three years after the Licensing Board sanctioned a limited work authorization (LWA) and before applicant had proceeded with any construction activity, applicant indicated it wanted to amend its construction permit application to focus only on site suitability issues. The Appeal Board adopted applicant's suggestion to "vacate without prejudice" the decisions of the Licensing Board sanctioning the LWA. The Appeal Board remanded the cause for proceedings deemed appropriate by the Licensing Board upon formal receipt of an early site approval application. Delmarva Power & Light Company (Summit Power Station, Units 1 and 2), ALAB-516, 9 NRC 5, 6 (1979).

i.4 Form of Application for Construction Permit/Operating License

1.4.1 Form of Application for Initial License/Permit

Regulations permit the filing of an application in three parts: Antitrust Information; SAR; and ER (10 CFR § 2.101). The application is initially treated as a "tendered application" pending a preliminary Staff review for completeness. 10 CFR § 2.101(a)(2).

1.4.2 Form of Renewal Application for License/Permit

(RESERVED)

1.5 Contents of Application

1.5.1 Incomplete Applications

The determination as to whether an application is sufficiently complete for docketing is for the Staff, rather than an adjudicatory board, to make. New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 280 (1978).

A materials licensee may submit evidentiary material to supplement its license application where intervenors seek to invalidate the license because of alleged deficiencies and omissions in the license application. Curators of the University of Missouri, LBP-90-45. '2 NRC 449, 454-55 (1990). See Curators of the University of Missouri, LBP-91-31, 34 NRC 29, 109-110 (1991), clarified, LBP-91-34, 34 NRC 159 (1991).

1.5.2 Material False Statements in Applications

Under Section 186 of the Atomic Energy Act of 1954 (42 U.S.C. § 2236), a license or permit may be revoked for material false statements in the application.

Liability of an applicant or licensee for a material false statement in violation of Section 186a of the Atomic Energy Act does not depend on whether the applicant or licensee knew of the falsity. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 910 (1982), citing, Virginia

Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480 (1976), aff'd sub nom. Virginia Electric and Power Co. v. Nuclear Regulatory Commission, 571 F.2d 1289 (4th Cir. 1978).

Intent to deceive is irrelevant in determining whether there has been a material false statement under Section 186a of the Atomic Energy Act; a deliberate effort to mislead the NRC, however, is relevant to the matter of sanctions, once a material false statement has been found. Midland, supra, 16 NRC at 915; The Regents of the University of California (UCLA Research Reactor), LBP-84-22, 19 NRC 1383, 1387 (1984).

In <u>Virginia Electric & Power Co.</u> (North Anna Power Station, Units 1 & 2), ALAB-324, 3 NRC 347 (1976), the Appeal Board held that:

- (1) A statement may be "false" within the meaning of Section 186 even if it is made without knowledge of its falsity i.e., scienter is not a necessary element of a false statement under Section 186.
- (2) Information is material under Section 186 if it would have a natural tendency or capability to influence the decision of the person or body to whom it is to be submitted i.e., the information is material if a reasonable Staff member would consider it in reaching a conclusion. The information need not be relied upon in fact.

Under Section 186a of the Atomic Energy Act, the test for materiality is whether the information is capable of influencing the decisionmaker, not whether the decisionmaker would, in fact, have relied on it. Determinations of materiality require careful, common sense judgments of the context in which information appears and the stage of the licensing process involved. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 910 (1982), citing, Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480 (1976), aff'd sub nom. Virginia Electric and Power Co. v. Nuclear Regulatory Commission, 571 F.2d 1289 (4th Cir. 1978); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1358 (1984); The Regents of the University of California (UCLA Research Reactor), LBP-84-22, 19 NRC 1383, 1408-05 (1984).

The mere existence of a question or discussion about the possible materiality of information does not necessarily make the information material. <u>Midland</u>, <u>supra</u>, 16 NRC at 914.

In <u>Virginia Electric & Power Co.</u> (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480 (1976), the Commission affirmed the Appeal Board's rulings supra and, in

addition, held that silence (omissions) as to material facts regarding issues of major importance to licensing decisions is included in the Section 186 phrase "material false statement" since such an interpretation will effectuate the health and safety purposes of the Act. Thus, the sanctions of Section 186 apply not only to affirmative statements but to omissions of material facts important to health and safety.

A "material false statement" under Section 186a of the Atomic Energy Act encompasses omissions as well as affirmative statements. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-6S1, 16 NRC 897, 911 (1982), citing, Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 489 (1976), aff'd sub nom. Virginia Electric and Power Co. v. Nuclear Regulatory Commission, 571 F.2d 1289 (4th Cir. 1978); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1357 (1984). The Commission has indicated, however, that it is reconsidering its views on what constitutes a material false statement in this regard. See 49 Fed. Reg. 8583, 8584 (1984).

Information concerning a licensee's or applicant's intent to deceive may call into question its "character," a matter the Commission is authorized to consider under Section 182 of the Atomic Energy Act, 42 U.S.C. ?232a, or its ability and willingness to comply with & ency regulations, as Section 103b, 42 U.S.C. § 2133b, requires. Midland, supra, 16 NRC at 915 n.25.

False statements, if proved, could signify lack of management character sufficient to preclude an award of an operating license, at least as long as responsible individuals retained any responsibilities for the project. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1297 (1984), citing, Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-84-13, 19 NRC 659, 674-75 (1984), and Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-83-2, 17 NRC 69, 70 (1983).

A deliberate false statement or withholding of material information would warrant the imposition of a severe sanction. Not only are material false statements and omissions punishable under Sections 234 and 186 of the Atomic Energy Act, but deliberate planning for such statements or concerns on the part of applicants or licensees would be evidence of bad character that could warrant adverse licensing action even where those plans are not carried to fruition. When parties and their attorneys engage in conduct which skirts close to the line of improper conduct, they are reming a grave risk of serious sanction if they cross that the Consumers Power

<u>Co.</u> (Midland Plant, Units 1 and 2), CLI-83-2, 17 NRC 69, 70 (1983).

1.6 Docketing of License/Permit Application

If the application is found to be complete, a docket number will be assigned and the applicant and other appropriate officials notified. $10 \ CFR \ \S \ 2.101(a)(3)$.

1.7 Notice of License/Permit Application

1.7.1 Publication of Notice in Federal Register

The Federal Register Act (44 U.S.C. § 1508) provides that a publication of a notice in the <u>Federal Register</u> constitutes notice to all persons residing in the United States. <u>Consolidated Edison Co.</u> (Indian Point Station, Unit No. 2), LBP-82-1, 15 NRC 37, 40 (1982).

In Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 & 2), ALAB-445, 6 NRC 865 (1977), it was held that, while 10 CFR § 2.104(a) requires that notice of hearing initiating a construction permit proceeding be published in the Federal Register at least 30 days prior to commencement of hearing, it does not require this such notice establish the time, place and date for all phases of the evidentiary hearings. However, in an unpublished opinion issued on December 12, 1977, the Federal District Court for the Northern District of Mississippi held that the interpretation of the notice requirements by the Appeal Board in Yellow Creek was erroneous and that at least 30 days prior public notice of the time, place and date of hearing must be provided.

One may be charged with notice of matters published in the Federal Register. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7 (1980). (Note - The Appeal Board expressly declined to reach the question of whether the Federal Register notice bound the petitioners to its terms. Id. at 10).

There appears to be no requirement that the rights of interested local governmental bodies to be made parties to a proceeding be spelled out in the notice of opportunity for hearing. Thus, a notice of opportunity for hearing is not defective simply because it fails to state the right of an interested governmental body to participate in a proceeding. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 585 (1978).

The notice to parties wishing to intervene in hearings before the Commission published in the <u>Federal Register</u> is notice to all the world. <u>Public Service Co. of New Hampshire</u> (Seabrook Station, Units 1 and 2), LBP-S2-76, 16 NRC 1029, 1085 (1982).

1.7.2 Amended Notice After Addition of New Owners

(RESERVED)

1.7.3 Notice on License Renewal

(RESERVED)

1.8 Staff Review of License/Permit Application

An ASLB has ruled that the Staff has a right to continue to meet privately with parties even though a hearing has been noticed, and that, while an ASLB has supervisory authority over Staff actions that are part of the hearing process, it has no such authority with regard to the Staff's review process. Northeast Nuclear Energy Co. (Montague Nuclear Power Station, Units 1 & 2), LBP-75-19, 1 NRC 436 (1975).

Note that 10 CFR § 2.102 explicitly provides that the Staff may request any one party to a proceeding to confer informally with the Staff during the Staff's review of an application.

In the absence of a demonstration that meetings were deliberately being scheduled with a view to limiting the ability of intervenors' representatives to attend, the imposition of hard and fast rules would needlessly impair the Staff's ability to obtain information. The Staff should regard the intervenor's opportunity to attend as one of the factors to be taken into account in making its decisions on the location of such meetings. Fairness demands that all parties be informed of the scheduling of such meetings at the same time. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2) and Power Authority of the State of N.Y. (Indian Point, Unit 3), CLI-82-41, 16 NRC 1721, 1722-23 (1982).

Adjudicatory boards lack the power to direct the Staff in the performance of its independent responsibilities and, under the Commission's regulatory scheme, boards cannot direct the Staff to suspend review of an application, preparation of an environmental impact statement or work, studies or analyses being conducted or planned as part of the Staff's evaluation of an application. New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 278-79 (1978).

The Staff produces, among other documents, the Safety Evaluation Report (SER) and the Draft and Final Environmental Statements (DES and FES). The studies and analyses which result in these reports are made independently by the Staff, and Licensing Boards have no rule or authority in their preparation. The Board does not have any supervisory authority over that part of the application review process that has been entrusted to the Staff.

Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 48-49 (1983), citing, New

England Power Co. (NEP Units 1 and 2:, LBP-78-9, 7 NRC 271 (1978). See Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 134, 206-07 (1978).

It is up to the Staff to decide its priorities in the review of applications. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233, 238 (1980), modified, CLI-80-12, 11 NRC 514, 517 (1980). However, where a Licensing Board finds that the Staff cannot demonstrate a reasonable cause for its delay in submitting environmental statements, the Board may issue a ruling noting the unjustified failure to meet a publication schedule and then proceed to hear other matters or suspend proceedings until the Staff files the necessary documents. The Board, sua sponte or on motion of one of the parties, may refer the ruling to the Appeal Board. If the Appeal Board affirms, it would certify the matter to the Commission. Offshore Power Systems (Floating Nuclear Power Plants), ALAE-489, 8 NRC 194, 207 (1978).

One aspect of the NRC role in regulating nuclear power plants is to provide criteria forming the engineering baseline against which licensee system designs, including component specifications, are judged for adequacy. It has not been the Staff's practice to certify that any particular components are qualified for nuclear service, but, rather, it independently reviews designs and analyses, qualification documentation and quality assurance programs of licensees to determine adequacy. This review approach is consistent with the NRC's responsibilities under the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974 (42 U.S.C. 5801 et seq.). Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 426 (1978).

Pursuant to 10 CFR § 50.47(a)(1), the NRC must find, prior to the issuance of a license for the full-power operation of a nuclear power reactor, that the state of onsite and offsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-82-68, 16 NRC 741, 745 (1982); Consolidated Edison Co. of New York (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, Unit 3), CLI-83-16, 17 NRC 1006, 1008 (1983); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2). ALAB-730, 17 NRC 1057, 1063-64 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1094 n.22 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 651 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 506 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22, 29 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear

Power Plant, Units 1 and 2), CLI-86-22, 24 NRC 685, 693-94 (1986), aff'd sub nom. on other grounds, Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-857, 25 NRC 7, 12 (1987). The NRC is not required to make a new finding on the adequacy of emergency preparedness plans for the issuance of a renewed nuclear power reactor operating license. 10 CFR § 50.47(a)(1), 55 Fed. Req. 64943, 64966-67 (Dec. 13, 1991). In accordance with Section 50.47(a)(2), the Commission is to base its finding on a review of FEMA's "findings and determinations as to whether State and local emergency plans are adequate and capable of being implemented", and on a review of the NRC Staff assessment of applicant's onsite emergency plans. Zimmer, supra, 16 NRC at 745-46; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1094 n.22 (1983); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1063-64 (1983); <u>Union Electric Co.</u> (Callaway Plant, Unit 1), ALAB-754, 18 NRC 1333, 1334-1335 (1983), <u>affirming</u>, LBP-83-71, 18 NRC 1105 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 652 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-22, 24 NRC 685, 693 (1986), aff'd sub nom. on other grounds, Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987). However, 10 CFR § 50.47(a)(2) does not mandate that a Board's finding on the adequacy of an emergency plan must be based on a review of FEMA findings and determinations. Since 10 CFR § 50.47(a)(2) also provides that any other information available to FEMA may be considered in assessing the adequacy of an emergency plan, a Board may rely on such evidence, properly admitted into the hearing record, when FEMA findings and determinations are not available. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515, 531-32 (1988). In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on a question of the adequacy of an emergency plan. Zimmer, supra, 16 NRC at 746; Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 378 (1983), citing, 10 CFR § 50.47(a)(2); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 655 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-49, 22 NRC 899, 910 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-86-11, 23 NRC 294, 365 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-835, 23 NRC 479, 499 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 239 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-32, 28 NRC 667, 714 (1988), aff'd in part and rev'd in part on other grounds, ALAB-924, 30 NRC 331 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 397, 624 (1989), rev'd in part on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd on other grounds, ALAB-947, 33 NRC 299 (1991). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 139 n.38

APPLICATIONS 8

(1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC 331, 360 (1989). The presumptive validity of FEMA findings does not depend upon the presentation of testimony by FEMA witnesses. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 437 (1989), rev'd in part on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd on other grounds, ALAB-947, 33 NRC 299 (1991).

A Staff review of an application is an aid to the Commission in determining if a hearing is needed in the public interest. Without the Staff's expert judgment the Commission probably cannot reach an informed judgment on the need for a hearing in the public interest. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-5&1, 11 NRC 233, 235 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

In an operating license proceeding (with the exception of certain NEPA issues), the applicant's license application is in issue, not the adequacy of the Staff's review of the application. An intervenor is thus free to challenge directly an unresolved generic safety issue by filing a proper contention, but it may not proceed on the basis of allegations that the Staff has somehow failed in its performance.

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983), review denied.

CLI-83-32, 18 NRC 1309 (1983). See Curators of the University of Missouri, LBP-91-31, 34 NRC 29, 108-109 (1991), clarified, LBP-91-34, 34 NRC 159 (1991).

1.9 Withdrawai of Application for License/Permit

An applicant may withdraw its application without prejudice unless there is legal harm to the intervenors or the public. <u>Duke Power Co.</u> (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1134 (1982), <u>citing</u>, <u>LeCompte v. Mr. Chip. Inc.</u>, 528 F.2d 601, 604 (5th Cir. 1976).

The filing of an application to construct a nuclear power plant is wholly voluntary. The decision to withdraw an application is a business judgment. The law on withdrawal does not require a determination of whether the decision is sound. Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 51 (1983).

The right to a voluntary dismissal without prejudice is not absolute. Perkins, supra, 16 NRC at 1135, citing, LeCompte, supra, 528 F.2d at 304.

Where the defendant has prevailed or is about to prevail, an unconditional withdrawal cannot be approved. Perkins, supra, 16 NRC at 1135, citing, 9 Wright and Miller Federal Practice and Procedure, Civil, Section 2364 (1971).

10 CFR § 2.107(a) provides, in part, that:

(t)he Commission...may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

See Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-88-15, 27 NRC 576, 581 (1988).

The terms prescribed at the time of withdrawal must bear a rational relationship to the conduct and legal harm at which they are aimed. The record must support any findings concerning the conduct and harm in question. Perkins, supra, 16 NRC at 1134, citing, LeCompte v. Mr. Chip. Inc., 528 F.2d 601, 604 (5th Cir. 1976); 5 Moore's Federal Practice 41.05(1) at 41-58.

The Board may attach reasonable conditions on a withdrawal without prejudice to protect intervenors and the public from legal harm. Perkins, supra, 16 NRC at 1134, citing, teCompte v. Mr. Chip. Inc., supra, 528 F.2d at 604.

Board has no jurisdiction to impose conditions on A Licens the with awal of an application for an operating license where the applicant has filed a motion to terminate the operating license proceeding prior to the Board's issuance of a notice of hearing on the application. Public Service Co. of Indiana, and Wabash Valley Power Association (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-86-37, 24 NRC 719, 724 (1986), citing, 10 CFR § 2.107(a). See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-36, 34 NRC 193, 195 (1991). A notice of hearing is only issued after a Board considers any requests for hearing and intervention petitions which may have been submitted, and makes a determination that a hearing is warranted. Thus, the notice of receipt of an application for an operating license, notice of proposed action, and notice of opportunity for hearing are not functionally the notice of hearing referred to in 10 CFR § 2.107(a). Marble Hill, supra, 24 NRC at 723-24.

Intervenors have standing to seek a dismissal with prejudice or to seek conditions on a dismissal without prejudice to the exact extent that they may be exposed to legal harm by a dismissal. Perkins, supra, 16 NRC at 1137.

The possibility of another hearing, standing alone, does not justify either a dismissal with prejudice or conditions on a withdrawal without prejudice. That kind of harm, the possibility of future litigation with its expenses and uncertainties, is the consequence of any dismissal without prejudice. It does not provide a basis for departing from the usual rule that a dismissal should be without prejudice. <u>Duke Power Co.</u> (Perkins Nuclear Station, Units 1, 2, and

3), LBP-82-81, 16 NRC 1128, 1135 (1982), citing, Jones v. SEC, 296 U.S. 1, 19 (1936); 5 Moore's Federal Practice 41.05(1) at 41-72 to 41-73 (2nd ed. 1981); Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 50 (1983).

In the circumstances of a mandatory licensing proceeding, the fact that the motion for withdrawal comes after most of the hearings should not operate to bar a withdrawal without prejudice where the applicant has prevailed or where there has been a nonsuit as to particular issues. Perkins, supra, 16 NRC at 1136.

While Section 2.107 is phrased primarily in terms of requests for withdrawal of an application by an applicant, the Commission itself has entertained such requests made by other parties to a construction permit proceeding. Consumers Power Company (Quanicassee Plant, Units 1 & 2), CLI-74-29, 8 AEC 10 (1974), and has indicated that such a request is normally to be directed to, and ruled upon by, the Atomic Safety and Licensing Board presiding in the proceeding. Consumers Power Company (Quanicassee Plant, Units 1 & 2), CLI-74-37, 8 AEC 627, n.1 (1974). Thus, it appears that a Licensing Board has the authority, under 10 CFR § 2.107, to consider a motion to compel withdrawal of an application filed by a party other than the applicant.

With regard to design changes affecting an application, where there is a fairly substantial change in design not reflected in the application, the remedy is not summary judgment against the applicant, nor is withdrawal and subsequent refiling of the application necessarily required. Rather, an amendment of the application is appropriate. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-74-36, 7 AEC 877 (1974).

Following a request to withdraw an application the Board may dismiss the case "without prejudice," signifying that no disposition on the merits was made; or "with prejudice," suggesting otherwise. (10 CFR § 2.107(a), 10 CFR § 2.721(d)). A dismissal with prejudice requires some showing of harm to either a party or the public interest in general and requires careful consideration of the circumstances, giving due requires to the legitimate interests of all parties. It is well settled that the prospect of a second lawsuit or another application does not provide the requisite quantum of legal harm to warrant dismissal with prejudice. Puerto Rico Electric Power Authority (North Coast Nuclear Flant, Unit 1), ALAB-662, 14 NRC 1125, 1132, 1135 (1981); Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 973, 978-979 (1981); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1134 (1982), citing, Fed.R. Civ.P. 41(a)(1), (2); LeCompte v. Mr. Chip Inc., 528 F.2d 601, 603 (5th Cir. 1976), citing, 5 Moore's Federal Practice, 41.05 (2d ed. 1981).

The Commission has the authority to condition the withdrawal of a license application on such terms as it thinks just (10 CFR \S 2.107(a)). However, dismissal with prejudice is a severe sanction

which should be reserved for those unusual situations which involve substantial prejudice to the opposing party or to the public interest in general. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1132-1133 (1981); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-84-33, 20 NRC 765, 767-768 (1984).

General allegations of harm to property values, unsupported by affidavits or unrebutted pleadings, do not provide a basis for dismissal of an application with prejudice. Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), LBP-84-43, 20 NRC 1333, 1337 (1984), citing, Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133-34 (1981), Philadelphia Electric Co. (Fulton Generating Station, 'Inits 1 and 2), ALAB-657, 14 NRC 967, 979 (1981).

Allegations of psychological harm from the perdency of the application, even if supported by the facts, do not warrant the dismissal of an application with prejudice. Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), LBP-84-43, 20 NRC 1333, 1337-1338 (1984), citing, Metropolitan Edison Co. v. People Against Nuclear Energy, 103 S. Ct. 1556 (1983).

A Licensing Board has substantial leeway in defining the circumstances in which an application may be withdrawn (10 CFR § 2.107(a)), but the Board may not abuse this discretion by acting in an arbitrary fashion. The withdrawal terms set by the Board must bear a rational relationship to the conduct and legal harm at which they are aimed. Fulton, supra, 14 NRC at 974; Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 49 (1983).

A Board may authorize the revocation of a Limited Work Authorization and the withdrawal of an application without prejudice after determining the adequacy of the applicant's site redress plan and clarifying the responsibilities of the applicant and Staff in the event that an alternate use for the site is found before redress is completed. United States Dept. of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), LBP-85-7, 21 NRC 507 (1985).

Where a motion for leave to withdraw a license application without prejudice has been filed with both an Appeal Board and a Licensing Board, it is for the Licensing Board, if portions of the proceeding remain before it, to pass upon the motion in the first instance. As to whether withdrawal should be granted without prejudice, the Board is to apply the guidance provided in Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967 (1981) and Puerto.org/Philadelphia Electric Co. (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125 (1981). Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-668, 15 NRC 450, 451 (1982).

The applicant for a license bears the cost of Staff work performed for its benefit, whether or not it withdraws its application prior to fruition. <a href="https://doi.org/10.1001/nc

Ordinarily parties are to bear their own litigation expense. <u>Duke Power Co.</u> (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1139 (1982), <u>citing</u>, <u>Alyeska Pipeline Serv. v. Wilderness Soc.</u>, 421 U.S. 240; 44 L.Ed.2d 141; 95 S. Ct. 1612 (1975).

A claim for litigation costs under the "private attorney general" theory must have a statutory basis. Perkins, supra, 16 NRC at 1139, citing, Alyeska Pipeline, supra, 421 U.S. at 269.

Recovery of litigation costs by the prevailing party as an award for winning a presumably completed law suit, must be distinguished from the practice of reimbursing litigation costs as a condition on a dismissal without prejudice. The latter is not an award for winning anything, but it is intended as compensation to defendants who have been put to the trouble and expense to prepare a defense only to have the plaintiff change his mind, withdraw the complaint, but remain free to bring the action again. Perkins, supra, 16 NRC at 1140.

The absence of specific authority does not prevent the Commission's Boards from exercising reasonable authority necessary to carry out their responsibilities, and a money condition is not necessarily barred from consideration. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1140 (1982). Payment of attorney's fees is not necessarily prohibited, as a matter of law, as a condition of withdrawal without prejudice of a construction permit application. Ferkins, supra, 16 NRC at 1141. Another Licensing Board has noted, however, that the Commission is a body of limited powers. Its enabling legislation has no provisions empowering it to require the payment of a party's costs and expenses, nor do the regulations promulgated by the Commission provide for such payments. It has no equitable power it can exercise, as courts have. Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-33-2, 17 NRC 45, 54 (1983).

If intervenors prevail on a need-for-power issue, there is no entitlement to attorney's fees because as the prevailing party, they received what they paid for and are barred from recovery. On the other hand, if intervenors lose on the need-for-power issue, they may not recover their attorney's fees because they will suffer no legal harm in any filing of a new application. Perkins, supra, 16 NRC at 1142.

Where an applicant abandons its construction of a nuclear facility and requests that the construction permit proceeding be terminated prior to resolution of issues raised on appeal from the initial decision authorizing construction, fundamental fairness dictates that termination of the proceedings be accompanied by a vacation of the initial decision on the ground of mootness. Rochester Gas and Electric Corporation (Sterling Power Project, Nuclear Unit 1), ALAB-596, 11 NRC 867, 869 (1980); United States Department of Energy (Clinch River Breeder Reactor Plant), ALAB-755, 18 NRC 1337, 1338-1339 (1983), vacating, LBP-83-8, 17 NRC 158 (1983).

The antitrust ir ormation required to be filed under 10 CFR § 50.33a is part of the ermit application; therefore, any applicant who wishes to withdraw after filing antitrust information, must comply with the Commission's rule governing withdrawal of license applications (10 CFR § 2.107(a)), even if a hearing on the application had not yet been scheduled. To instead file a Notice of Prematurity and Advice of Withdrawal is an impermissible unilateral withdrawal, and the filing will be treated as a formal request for withdrawal under 10 CFR § 2.107(a). Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), CLI-82-5, 15 NRC 404, 405 (1982).

1.10 Abandonment of Application for License/Permit

When the applicant has abandoned any intention to build a facility, it is within the Licensing Board's power to dismiss the construction permit application. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153, 154 (1980).

JULY 1992 APPLICATIONS 14

PREHEARING MATTERS

| 2.0 | PREHEARING MATTERS (SEE 3.3) | Pre 1 |
|---|---|--|
| 2.1 | Scheduling of Hearings (SEE 3.3.1 to 3.3.5.2) | Pre 1 |
| 2.2 | Necessity of Hearing | Pre 1 |
| 2.3 | Location of Hearing Public Interest Requirements Affecting Hearing Location (Reserved) | Pre 4 Pre 4 |
| 2.3.2 | Convenience of Litigants Affecting Hearing Location (SEE 3.3.5.2) | Pre 4 |
| 2.4 | Issues for Hearing (SEE 3.4 to 3.4.6) | Pre 4 |
| 2.5 2.5.1 2.5.2 2.5.3 2.5.4 | Notice of Hearing Contents of Notice of Hearing Adequacy of Notice of Hearing Publication of Notice of Hearing in Federal Register Requirement to Renotice | Pre 4 Pre 5 Pre 5 Pre 6 Pre 6 |
| 2.6 2.6.1 2.6.2 2.6.3 2.3.3.1 2.6.3.2 2.6.3.3 | Prehearing Conferences Transcripts of Prehearing Conferences Special Prehearing Conferences Prehearing Conference Order Effect of Prehearing Conference Order Objections to Prehearing Conference Order Appeal from Prehearing Conforence Order | Pre 7 Pre 8 Pre 8 Pre 8 Pre 8 Pre 9 |
| 2.7 | Conference Calls | Pre 9 |
| 2.8 2.8.1 2.8.1.1 1.8.1.2 2.8.1.3 | Prehearing Motions Prehearing Motions Challenging ASLB Composition Contents of Mction (Fallenging ASLB Composition Evidence of Bias in challenges to ASLB Composition Waiver of Challenges to ASLB Composition | Pre 9 Pre 9 Pre 10 Pre 11 |
| 2.9 2.9.1 2.9.2 2.9.3 2.9.3.1 2.9 3.2 2.9 3.3 | Intervention General Policy on Intervention Intervenor's Food for Councel Petitions to Intervene Pleading Requirements Defects in Pleadings Time Limits/Late Petitions | Pre 11 Pre 12 Pre 13 Pre 13 Pre 17 Pre 20 Pre 21 |

PREHEARING MATTERS

| 2.9.3.3.1 2.9.3.3.2 2.9.3.3.4 2.9.3.3.5 2.9.3.4 2.9.3.5 2.9.3.6 2.9.3.7 | Time for Filing Intervention Petitions Sufficiency of Notice of Time Limits on Intervention Consideration of Untimely Petitions to Intervene Appeals from Rulings on Late Intervention Mootness of Petitions to Intervene Amendment of Petition Expanding Scope of Intervention Withdrawal of Petition to Intervene Intervention in Antitrust Proceedings Intervention in High-Level Waste Licensing Proceedings | Pre Pre Pre Pre Pre Pre Pre | 22 22 36 38 30 38 40 |
|---|---|---|--|
| 2.9.4 2.9.4.1 2.9.4.1.1 2.9.4.1.2 2.9.4.1.3 2.9.4.1.4 2.9.4.2 | Interest and Standing for Intervention Judicial Standing to Intervene "Injury-in-Fact" and "Zone of Interest" Tests for Standing to Intervene Standing of Organizations to Intervene Standing to Intervene in Export Licensing Cases Standing to Intervene in Specific Factual Situations Discretionary Intervention | Pre Pre Pre Pre Pre Pre | 43 44 53 58 60 |
| 2.9.5 2.9.5.1 2.9.5.2 2.9.5.3 2.9.5.4 2.9.5.5 2.9.5.6 2.9.5.7 2.9.5.8 2.9.5.9 2.9.5.9 2.9.5.10 2.9.5.11 2.9.5.12 2.9.5.13 | Contentions of Intervenors Pleading Requirements for Contentions Requirement of Oath from Intervenors Requirement of Contentions for Purposes of Admitting Petitioner as a Party Material Used in Support of Contentions Timeliness of Submission of Contentions Contentions Challenging Regulations Contentions Involving Generic Issues Contentions Challenging Absent or Incomplete Documents Contentions re Adequacy of Security Plan Defective Contentions Discovery to Frame Contentions Stipulations on Contentions (Reserved) Appeals of Rulings on Contentions | Pre Pre Pre Pre Pre Pre Pre Pre Pre | 71 77 79 80 92 93 96 96 97 98 98 |
| 2.9.6 2.9.7 2.9.7.1 | Conditions on Grants of Intervention Appeals of Rulings on Intervention Standards for Reversal of Rulings on Intervention | Pre Pre Pre | 99 |
| 2.9.8 2.9.9 2.9.9.1 2.9.9.2 2.9.9.2.1 2.9.9.2.2 2.9.9.3 2.9.9.4 | Reinstatement of Intervenor After Withdrawal Rights of Intervenors at Hearing Burden of Proof Presentation of Evidence Affirmative Presentation by Intervenor/Participants Consolidation of Intervenor Presentations Cross-Examination by Intervenors Intervenor's Right to File Proposed Findings | Pre Pre Pre Pre Pre Pre | 104 104 104 105 |

PREHEARING MATTERS

| 2.9.9.5 | Attendance at/Participation in Prehearing Conferences/Hearings Pleadings and Documents of Intervanors | Pre Pre | |
|--|--|--|---|
| 2.9.10 2.9.10.1 2.9.10.2 | Cost of Intervention Financial Assistance to Intervenors Intervenors' Witnesses | Pre Pre Pre | 108 |
| 2.9.11 | Appeals by Intervenors Intervention in Remanded Proceedings | Pre Pre | |
| 2.10.1 2.10.1.1 2.10.1.1 2.10.1.2 2.10.2 | Nonparty Participation - Limited Appearance and Interested States Limited Appearances in NRC Adjudicatory Proceedings Requirements for Limited Appearance Scope/Limitations of Limited Appearances Participation by Nonparty Interested States | Pre Pre Pre Pre | 111 111 111 |
| 2.11 2.11.1 2.11.2 2.11.2.1 2.11.2.2 2.11.2.3 2.11.2.4 2.11.2.5 2.11.2.6 2.11.2.7 2.11.2.8 | Discovery Time for Discovery Discovery Rules Construction of Discovery Rules Scope of Discovery Requests for Discovery During Hearing Privileged Matter Protective Orders Work Product Updating Discovery Responses Interrogatories | Pre Pre Pre Pre Pre Pre Pre Pre | 116 119 122 122 125 125 134 135 136 |
| 2.11.3 2.11.4 2.11.5 2.11.5.1 2.11.5.2 | Discovery Against the Staff Responses to Discovery Requests Compelling Discovery Compelling Discovery From ACRS and ACRS Consultants Sanctions for Failure to Comply with Discovery Orders | Pre Pre Pre Pre | 139 141 143 |
| 2.11.6 2.11.7 2.11.7.1 2.11.7.2 | Appeals of Discovery Rulings Discovery in High-Level Waste Licensing Proceedings Pre-License Application Licensing Board Licensing Support System | Pre Pre Pre Pre | 148 148 |
| | | | |

There is no statutory entitlement to a formal hearing under the Atomic Energy Act or NRC regulations with regard to materials licensing actions. Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-21, 16 NRC 401, 402 (1982); Rockwell International Corp. (Energy Systems Group Special Nuclear Materials License No. SNM-21), CLI-83-15, 17 NRC 1001, 1002 (1983). Rather, to mandate that a hearing be convened, prospective intervenors must fulfill the requirements for intervention. The presiding officer's review of the postcards and letters from individuals living near the Rockwell International nuclear facilities found only vague and generalized allusions to danger or injury from radiation. Therefore, standing was not established and there was no authority to hold a hearing. Rockwell International Corp. (Energy Systems Group Special Nuclear Materials License No. SNM-21), LBP-83-65, 18 NRC 774, 777-78 (1983).

Before entering into or amending an agreement to transfer to a state its regulatory control over Atomic Energy Act § 11e(2) byproduct material, the NRC must provide notice and an opportunity for a public hearing where the state's proposed regulatory standards for the byproduct material differ from the Commission's standards for such material. Atomic Energy Act § 274o. A formal adjudicatory hearing is not required. Notice and comment procedures are sufficient for determining whether the proposed state standards, evaluated generally and not as applied to specific sites, are equivalent to, or more stringent than, the corresponding Commission standards. State of Illinois, CLI-90-9, 32 NRC 210, 215-16 (1990), reconsid. denied, CLI-90-11, 32 NRC 333 (1990).

The NRC will conduct a formal hearing, if requested, on an application to renew a nuclear power reactor operating license. 10 CFR § 54.27, 56 Fed. Reg. 64943, 64960-61 (Dec. 13, 1991). The hearing will be limited to consideration of issues concerning (1) age-related degradation unique to license renewal and (2) compliance with National Environmental Policy Act requirements. 10 CFR § 54.2S(a), (b). The Commission may, at its discretion, admit an issue for resolution in the formal renewal hearing if the intervenor can demonstrate that the issue raises a concern relating to adequate protection which would occur only during the renewal period. 10 CFR §§ 54.29(c), 2.758(b)(2).

There is no legal requirement for a notice-and-comment rulemaking proceeding concerning the Commission's statutory concurrence in the Department of Energy's General Guidelines for Recommendation of Sites for Nuclear Waste Repositories, pursuant to Section 112(a) of the Nuclear Waste Policy Act of 1982. NRC Concurrence in High-Level Waste Repository Safety Guidelines Under Nuclear Waste Policy Act of 1982, CLI-83-25, 18 NRC 1139, 1140 (1983).

A Confirmatory Action Letter whereby the applicants voluntarily ceased low-power testing and agreed to obtain NRC Staff approval prior to resuming operations is not a suspension within the meaning of Section 189(a) of the Atomic Energy Act, and does not give the

intervenors the right to a hearing. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271, 275-76 (1989), aff'd, ALAB-940, 32 NRC 225 (1990). In the Seabrook operating license proceeding, supra, the intervenors sought to litigate contentions involving the low-power testing even though the record had already closed. On appeal, the intervenors argued that the Licensing Board violated their right to a hearing on all issues material to the granting of a full-power operating license, Atomic Energy Act § 189a, by requiring that the intervenors' contentions meet the standards for reopening the record, 10 CFR § 2.734(a). The Appeal Board affirmed the Licensing Board decision, noting that: (1) although the intervenors labeled their contentions "low-power testing contentions", they actually raised issues which involved generic operational questions about plant readiness for full-power operation which could have been raised when the hearing began, Seabrook, supra, 32 NRC at 233-34, 240-41; and (2) while low-power testing is material to the operation of a licensed facility, it is not material to the initial issuance or grant of a full-power license, Seabrook, supra, 32 NRC at 234-37.

2.3 Location of Hearing

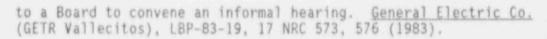
- 2.3.1 Public Interest Requirements Affecting Hearing Location (RESERVED)
- 2.3.2 Convenience of Litigants Affecting Hearing Location (SEE 3.3.5.2)
- 2.4 Issues for Hearing

(SEE 3.4 to 3.4.6)

2.5 Notice of Hearing

10 CFR 2.105(a)(4), in effect in 1982, required that the Commission issue a notice of proposed action - also called a notice of opportunity for hearing - only with respect to an application for a facility license, an application for a license to receive radioactive waste for commercial disposal, an application to amend such licenses where significant hazards considerations are involved, or an application for "any other license or amendment as to which the Commission determines that an opportunity for public hearing should be afforded." A materials license amendment does not fall into any of these categories. Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 245 (1982), aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983).

10 CFR § 2.105 requires that formal procedures under Part 2, Subpart G, he adhered to following a notice of proposed action issued under § 2.105. The Rules of Practice do not provide latitude



2.5.1 Contents of Notice of Hearing

Operating license proceedings start with the notice of proposed action (10 CFR § 2.105) and are separate from prior proceedings. Thus, a Licensing Board in a construction permit hearing may not order that certain issues be tried at the OL proceeding. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), CLI-80-12, 11 NRC 514, 517 (1980).

A Licensing Board does not have the power to explore matters beyond those which are embraced by the notice of hearing for the particular proceeding. This is a holding of general applicability. Portland General Electric Company (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-290 n.6 (1979); Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-171 (1976). See also Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-61b, 12 NRC 419, 426 (1980); Northern Indiana Public Station, Nuclear 1), ALAB-1, 12 NRC 558, 565 (1980); Tulsa Gamma Ray, Inc., LBP-90-42, 32 NRC 387, 388 (1990).

A notice of hearing must correspond to the agency's statutory authority over a given matter; it cannot confer or broaden that jurisdiction to matters expressly proscribed by law. Florida Power and Light Co. (St. Lucie Plant, Unit No. 2), ALAB-661, 14 NRC 1117, 1123 (1981).

2.5.2 Adequacy of Notice of Hearing

One receiving filings in a proceeding is charged with reading and knowing matters therein which might affect his rights.

Houston Lighting & Power Co. (Allers Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 13 (1980).

Where an original notice of hearing is too narrowly drawn, a requirement in a subsequent notice that those who now seek to intervene state that they did not intervene before because of limitations in the original notice was not improper. Houston Lichting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 10 (1980).

The notice of hearing in an enforcement proceeding must provide adequate notice of (1) the alleged violations and (2) the specific regulatory provisions upon which the Staff seeks to impose a civil penalty. <u>Tulsa Gamma Ray</u>, <u>Inc.</u>, LBP-90-43, 32 NRC 390, 391-92 (1990), <u>citing</u>, 5 U.S.C. § 554(b)(3).

2.5.3 Publication of Notice of Hearing in Federal Register

In Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 & 2). ALAB-445, 6 NRC 865 (1977), it was held that, while 10 CFR § 2.104(a) requires that notice of hearing initiating a construction permit proceeding be published in the Federal Register at least 30 days prior to commencement of hearing, it does not require that such notice establish time, place and date for all phases of the evidentiary hearings. However, in an unpublished opinion issued on December 12, 1977, the Federal District Court for the Northern District of Mississippi held that the interpretation of the notice requirements by the Appeal Board in Yellow Creek was erroneous and that at least 30 days prior public notice of the time, place and date of hearing must be provided.

The Licensing Board rejected Petitioner's argument that "mere notice in the Federal Register ... is inadequate notice"
The Federal Register Act expressly provides that such publication constitutes notice to "all persons residing within the States of the Union" (44 U.S.C. 1508). See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). See also Long Island Lighting Company (Jamesport Nuclear Power Station, Uni's 1 and 2), ALAB-292, 2 NRC 631 (1975); Florida Power and Light Company (Turkey Point Nuclear Generating Units 3 and 4), LBP-79-21, 10 NRC 183, 191-192 (1979).

In an operating license amendment proceeding, the Licensing Board ruled that the law required the NRC to publish once in the Federal Register notice of its intention to act on the application for amendment to the operating license. Turkey Point, supra, LBP-79-21, 10 NRC at 192.

Publication in the <u>Federal Register</u> of conditions on intervention is notice as to all of those conditions, and one cannot excuse a failure to meet those conditions by a claimed lack of knowledge. <u>Houston Lighting & Power Co.</u> (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 10 (1980).

2.5.4 Requirement to Renotice

Where a full-term operating license proceeding had been delayed by a lengthy NRC Staff review and the original notice of the opportunity for a hearing had been issued ten years earlier, a Licensing Board found it necessary to renotice the opportunity for a hearing. Rochester Gas and Electric Corp. (R.E. Ginna Nuclear Plant, Unit 1). LBP-83-73, 18 NRC 1231, 1233 (1983), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-539, 9 NRC 422 (1979) wherein the Appeal Board opined that a hearing notice issued "perhaps 5 to 10 years" earlier is "manifestly stale". The

renotice cannot limit the scope of contentions to those involving design changes or those based on new information. The new notice must allow the raising of any issues which have not been previously heard and decided. See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 386-387 (1979).

2.6 Prehearing Conferences

Prehearing conference matters are governed generally by 10 CFR §§ 2.751a, 2.752.

There are several types of prehearing conferences, each of which serves a different purpose. For a discussion of the types of prehearing conferences and of the purposes of such conferences, see Wisconsin Electric Power Company (Point Beach Nuclear Plant, Units 1 & 2), LBP-78-23, 8 NRC 71, 76 (1978).

The purposes of a general prehearing conference, in general, are set out in 10 CFR § 2.752(a). Such a prehearing conference should be held within 60 days after completion of discovery. 10 CFR § 2.752(a). "Special" prehearing conferences, provided for by 10 CFR § 2.751a and applicable only to contested proceedings, may be utilized to consider the sufficiency of petitions to intervene and of issues raised by intervenors. <u>Duquesne Light Co.</u> (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 245 (1973).

Where a party has an objection to the scheduling of the prehearing phase of a proceeding, he must lodge such objection promptly. Late requests for changes in scheduling will not be countenanced absent extraordinary unexpected circumstances. Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Generating Station, Units 1, 2 & 3). ALAB-377, 5 NRC 430 (1977).

A party seeking to be excused from participation in a prehearing conference should present its justification in a request filed before the date of the conference. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187, 191 (1978).

2.6.1 Transcripts of Prehearing Conferences

Prehearing conferences may be stenographically reported. 10 CFR §§ 2.751a(c), 2.752(b).

A Licensing Board must make a good faith effort to determine whether the facts support a party's motion to correct the transcript of a prehearing conference. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-839, 24 NRC 45, 51 (1986).

2.6.2 Special Prehearing Conferences

Special prehearing conferences are covered by 10 CFR § 2.751a. Such prehearing conferences:

- (a) are required in contested proceedings only. 10 CFR § 2.751a, n.1a;
- (b) will usually be held within 90 days of the issuance of notice of hearing or such other time as the Commission or presiding officer may deem appropriate. 10 CFR § 2.751a(a);
- (c) will be utilized to rule on petitions to intervene unless this has already been done by a previous Licensing Board appointed for that purpose. Cf., Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 245 (1973);
- (d) may be utilized to exclude certain issues raised by petitions to intervene, the adequacy of which was not ruled upon when the petition was allowed. <u>Duquesne Light</u> <u>Co.</u>, ALAB-109, <u>supra</u>;
- (e) may be used to establish a schedule for further actions in the proceeding, to direct further informal conferences, and to establish other courses of action, as set forth in 10 CFR § 2.751a(a) and (b), to expedite the proceeding.

2.6.3 Prehearing Conference Order

2.6.3.1 Effect of Prehearing Conference Order

A prehearing conference order may describe action taken at the conference, schedule further actions, describe stipulations agreed to, identify key issues, provide for discovery and the like. The order should finalize the issues to be considered, 1C CFR Part 2, Appendix A, para. II(c), and will control the subsequent course of proceedings unless modified for cause. 10 CFR §§ 2.751a(d), 2.752(c).

2.6.3.2 Objections to Prehearing Conference Order

Objections to the prehearing conference order may be filed by parties other than the Staff within 5 days after service of the order and by the Staff within 10 days after service. 10 CFR §§ 2.751a(d), 2.752(c). Parties may not file replies to such objections unless the Board so directs. <u>Id.</u>

2.6.3.3 Appeal from Prehearing Conference Order

Since a prehearing conference order is interlocutory in nature, it is not generally appealable except with regard to matters for which interlocutory appeal is provided. In this vein that portion of a prehearing conference order which grants or wholly denies a petition for leave to intervene is appealable under 10 CFR § 2.714a. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-130, 6 AEC 423, 424 (1973).

The action of a Licensing Board in provisionally ordering a hearing and in preliminarily ruling on petitions for leave to intervene is not appealable under 10 CFR § 2.714a in a situation where the Board cannot rule on contentions and the need for an evidentiary hearing until after the special prehearing conference required under 10 CFR § 2.751a and where the petitioner denied intervention may qualify on refiling. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-78-27, 8 NRC 275, 280 (1978).

2.7 Conference Calls

Both prior to the start of a hearing and sometimes during recesses thereof, it may become necessary for the Board to communicate quickly with the parties. In this vein, the practice has grown up of using telephone conference calls. The Appeal Board has indicated that such calls should not be utilized unless all parties participate except in the case of the most dire necessity. Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-313, 3 NRC 94, 96 (1976). If any rulings are made, the Licensing Board must make and enter a written order reflecting the ruling directly thereafter. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-334, 3 NRC 809, 814-815 (1976).

Where a party informs an adjudicatory board that it is not interested in a matter to be discussed in a conference call between the board and the other litigants, that party cannot later complain that it was not consulted or included in the conference call. <u>Public Service Co. of Indiana</u> (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 269 n.63 (1978).

2.8 Prehearing Motions

2.8.1 Prehearing Motions Challenging ASLB Composition

Disqualification of adjudicatory board members is covered generally by 10 CFR § 2.704.

In <u>Consumers Power Company</u> (Midland Plant, Units 1 & 2), ALAB-101, 6 AEC 60 (1973), the Appeal Board listed the circumstances under which a board member is subject to

disqualification. Those circumstances include situations in which:

- the board member has a direct, personal, substantial pecuniary interest in the results of the case;
- (2) the board member has a personal bias against a participant;
- (3) the board member has served in a prosecutory or investigative role with regard to the same facts as are in issue;
- (4) the board member has prejudged factual -- as distinguished from legal or policy -- issues;
- (5) the board member has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues

A litigant may move for disqualification of any board member who, by word or deed, has manifested a conflict of interest or a bias covered by the above listing.

2.8.1.1 Contents of Motion Challenging ASLB Composition

In <u>Duquesne Light Co.</u> (Beaver Valley Power Station, Units 1 & 2), ALAB-172, 7 AEC 42 (1974), the Appeal Board summarized the requirements for disqualification motions as follows:

- motions must be accompanied by affidavits establishing a basis for the charge;
- (2) motions must be filed in a timely manner, <u>citing</u>, <u>Consumers Power Co.</u>, ALAB-101, <u>supra</u>; <u>Commonwealth Edison</u> <u>Co.</u> (LaSalle County Nuclear Power Station, Units 1 & 2), CLI-73-8, 6 AEC 169 n.1 (1973);
- (3) motions for disqualification, as with all other motions, must be served on all parties or their attorneys, <u>citing</u>, 10 CFR §§ 2.701(b), 2.730(a).

The requirement of an affidavit must be met even if the basis for the motion is founded on matters of public record.

Detroit Edison Cr. (Greenwood Energy Center, Units 2 & 3),

ALAB-225, 8 AEC 379 (1974).

2.8.1.2 Evidence of Bias in Challenges to ASLB Composition

Although no specific guidelines can be set as to the type or quantum of evidence sufficient to support a disqualification motion, it is clear that the mere fact that a Board issued a large number of unfavorable or even erroneous

rulings with respect to a given party is not evidence of bias. To establish bias, something more must be shown than that the presiding officials decided matters incorrectly; to be wrong is not necessarily to be partisan. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 246 (1974).

Nor is an alleged institutional bias sufficient for disqualification. Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 & 2), ALAB-164, 6 AEC 1143 (1973).

2.8.1.3 Waiver of Challenges to ASLB Composition

If a party has reason to believe that there are grounds for disqualification, he must raise the question at the earliest possible moment. Failure to move for disqualification as soon as the information giving rise to such a claim comes to light amounts to a waiver of the objection. Commonwea?th Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 385 (1974); Northern Indiana Public Service Co., ALAB-224, supra; Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-101, 6 AEC 60, 64 (1973); Public Service Electric & Gas Co. (Atlantic Nuclear Generating Station, Units 1 & 2), LBP-78-5, 7 NRC 147, 149 (1978).

2.9 Intervention

2.9.1 General Policy on Intervention

The general attitude of the Appeal Panel is that public participation through intervention is a positive factor in the licensing process and that intervenors perform a valuable function and are to be complimented and encouraged. See, e.g., Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2). ALAB-256, 1 NRC 10, 18 n.9 (1975); Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Generating Station, Unit 2), ALAB-243, 8 AEC 850, 853 (1974); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-229, 8 AEC 425 (1974); Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-183, 7 AEC 222 (1974).

The statutory mandate does not confer the automatic right of intervention upon anyone. The Commission may condition the exercise of that right upon the meeting of reasonable procedural requirements. <u>Duke Power Co.</u> (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 469 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

A petitioner for intervention is entitled to party status if he (1) establishes standing and (2) pleads at least one valid contention. Carolina Power and Light Co. and North Carolina

Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2070 (1982).

2.9.2 Intervenor's Need for Counsel

The NRC's Rules of Practice permit non-attorneys to appear and represent their organizations in agency proceedings.

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). Furthermore, lay representatives are not held to as high a standard as lawyers. But the right of participation accorded pro se representatives carries with it the corresponding responsibilities to comply with and be bound by the same agency procedures as all other parties, even where a party is hampered by limited resources. Three Mile Island, supra, 19 NRC at 1247, citing, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981).

There is no requirement that an intervenor be represented by counsel in NRC proceedings. Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813 (1975); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 498 (1985). As a rule, pro se petitioners will be held to less rigid standards for pleading, although a totally deficient petition will be rejected. Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Units 1 & 2), ALAB-136, 6 AEC 487 (1973). While there is no requirement that an intervenor be represented by counsel in NRC proceedings, there are some indications that the regulations do not contemplate representation of a party by a non-lawyer and that any party who does not appear pro se must be represented by a lawyer. See 10 CFR § 2.713(a), (b); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-474, NRC 746, 748 (1978); <u>Duke Power Co.</u> (Cherokee Nuclear Station, Units 1, 2 & 3), ALAB-440, 6 NRC 642, 643 n.3 (1977); <u>Virginia</u> Electric & Power Company (North Anna Power Station, Units 1 & 2), Licensing Board Order of October 8, 1976 (unpublished). As the <u>Three Mile Island</u> and <u>Cherokee</u> cases cited amply demonstrate, however, any requirement that only lawyers appear in a representative capacity is usually waived, either explicitly or implicitly, as a matter of course.

Insofar as organicions are concerned, 10 CFR § 2.713(*) clearly limits representation to either an attorney or a member, and it can logically be read as precluding representation by an attorney and a member at the same time. But it does not appear to bar representation by a member throughout a proceeding if, at some earlier time during the proceeding, an attorney has made an appearance for the organization. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Station), LBP-79-17, 9 NRC 723, 724 (1979).

Following the withdrawal of its lead counsel on the eve of its hearing, an intervenor has an affirmative duty to request a postponement. A Board is not required to order a postponement sua sponte. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 498 (1985).

2.9.3 Petitions to Intervene

Intervention is covered generally in 10 CFR §§ 2.714, 2.714a.

In the first instance, the decision as to whether to grant or deny a petition to intervene or a request for a hearing lies with the Licensing Board. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Units 1 & 2), CLI-73-16, 6 AEC 391 (1973).

There is nothing in 10 CFR § 2.714 or the case law interpreting that rule which permits Licensing Boards to exclude certain groups because of their opinions on nuclear power, either generally or as related to specific plants, nor is there a Commission rule prescribing the conduct of any party (other than licensees or others subject to its regulatory jurisdictions) outside adjudicatory proceedings. Consolidated Edison Co. of New York (Indian Point, Unit 2); Power Authority of the State of New York (Indian Point, Unit 3), CLI-82-15, 16 NRC 27, 31, 32 (1982).

The testimony of experts sponsored by petitioner may make a valuable contribution to the record, but the merits of that testimony need not be decided in order to admit a petitioner as a party. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2029 (1982).

In past operating license cases, petitions to intervene were sometimes considered and ruled upon by an ASLB especially appointed for that purpose, and a separate ASLB conducted separate proceedings if intervention were permitted. Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175, 1177-78 (1977). In construction permit cases, a single ASLB usually performed both tasks. See Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-130, 6 AEC 423, 424 n.2 (1973).

In ruling on a petition to intervene, the Licensing Board must consider, <u>inter alia</u>, the nature of petitioner's right under the Atomic Energy Act to be made a party to the proceeding, the nature and extent of petitioner's property, financial or other interest in the proceeding, and the possible effect of any Order which may be entered in the

proceeding on the petitioner's interests. 10 CFR § 2.714(d): Washington Public Power Supply System (WPPSS Nuclear Projects No. 3 and No. 5), LBP-77-16, 5 NRC 650 (1977). These standards also apply to a petition to intervene in a materials licensing proceeding. Sequoyah Fuels Corporation, LBP-91-5, 33 NRC 163, 164, 166 (1991), citing, 10 CFR § 2.1205(g).

An intervention petition must, under 10 CFR § 2.714(a)(2), set forth with particularity certain factors regarding the petitioner's interest in the proceeding and address the criteria set forth in 10 CFR § 2.714(d). Florida Power and Light Co. (Turkey Point Plant, Units 3 and 4), CLI-81-31, 14 NRC 959, 960 (1981); Consumers Power Co. (Big Rock Point Plant), CLI-81-32, 14 NRC 962, 963 (1981).

A petition for leave to intervene must set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, and the specific aspect of the subject matter of the proceeding as to which petitioner wishes to intervene. 10 CFR § 2.714(a)(2); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 88, 89, 90 (1990); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138, 140 (1991). The burden is on the petitioner to satisfy these requirements. 10 CFR § 2.732, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 (1983); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), LBP-87-2, 25 NRC 32, 34 (1987). A petition to intervene in a materials licensing proceeding must satisfy similar requirements. <u>Combustion Engineering</u>. <u>Inc.</u> (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 143, 145-146, 147-148 (1989), citing, 10 CFR § 2.1205(d).

Petitioners for intervention are required by Commission regulations to set forth in their petitions their interest in the proceeding, how that interest might be affected by the result of the proceeding, the reasons why they should be permitted to intervene, and the specific aspects of the subject matter as to which intervention is sought. Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1431 (1982), citing, 10 CFR § 2.714(a)(2). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987).

The ASLB must make specific determinations as to whether the petition is proper and meets the requirements for intervention and must articulate in reasonable detail the basis for its determination. <u>Duquesne Light Co.</u> (Beaver Valley Power Station, Unit 1), ALAB-105, 6 AEC 181 (1973); Northern States Power Co. (Prairie Island Nuclear Generating

Plant, Units 1 & 2), ALAB-104, 6 AEC 179 (1973). See Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 722 (1989) (rulings on intervention petitions should be in writing), aff'd, CLI-90-5, 31 NRC 337, 341 (1990).

Assuming that the requisite persona? interest of the intervenor is shown, if the ASLB determines that there is present at least one contention which meets applicable requirements, intervention will be permitted. The ASLB has no duty to consider additional contentions for the purpose of determining whether intervention should be permitted. Mississippi Power & Light Co., ALAB-130, supra, 6 AEC at 424; Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 (1973); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 245 (1973).

Although 10 CFR § 2.714 has been amended with regard to the time for filing contentions, the "one good contention" rule remains. 10 CFR § 2.714(b). Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 985 (1982), citing, Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 571 (1980).

10 CFR § 2.714 now permits the amendment of petitions to intervene and contentions up to 15 days prior to the first prehearing conference. The presiding board may, of course, set a different time period pursuant to 10 CFR § 2.711.

General Electric Co. (GETR Vallecitos), LBP-83-19, 17 NRC 573, 578 (1983). A petitioner has an unlimited right to amend its intervention petition until 15 days prior to the first prehearing conference. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 91, 93 (1990), citing, 10 CFR § 2.714(a)(3).

A petitioner must advance at least one admissible contention in order to be permitted to intervene in a proceeding.

Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43Å, 15 NRC 1423, 1432 (1982), citing, 10 CFR § 2.714(a)(2), Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424 (1973); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987).

<u>Pro se</u> petitioners will be held to less rigid standards of clarity and precision with regard to the petition to intervene. Nevertheless, a totally deficient petition will be rejected. <u>Public Service Electric & Gas Co.</u> (Salem Nuclear Generating Station, Units 1 & 2), ALAB-136, 6 AEC 487, 489 (1973).

In NRC proceedings in which a hearing is not mandatory but depends upon the filing of a successful intervention

petition, an "intervention" Licensing Board has authority only to pass upon the intervention petition. If the petition is granted, thus giving rise to a full hearing, a second Licensing Board, which may or may not be composed of the same members as the first Board, is established to conduct the hearing. Wisconsin Electric Power Company (Point Beach Nuclear Plant, Units 1 & 2), LBP-78-23, 8 NRC 71, 73 (1978). See also Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-36-A, 14 NRC 364, 366 (1981), citing, Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175 (1977).

Section 189a of the Atomic Energy Act does not provide an unqualified right to a hearing. The Commission is authorized to establish reasonable regulations on procedural matters like the filing of petitions to intervene and on the proffering of contentions. <u>Duke Power Co.</u> (Cat a Nuclear Station, Units 1 and 2), LLI-83-19, 17 NRC 1041, 1645 (1983), citing, BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974); <u>Easton Utilities Commission v. AEC</u>, 424 F.2d 847 (D.C. Cir. 1970).

The identity of specific individual members of a petitioner organization whose interests are being represented by that organization is not viewed as an integral and material portion of the petition to intervene. Any change in membership, therefore, does not require an amendment of the petition.

Washington Public Power Supply System (WPPSS Nuclear Project 1), LBP-83-59, 18 NRC 667, 669 (1983).

While it is true that a petitioning organization must disclose the name and address of at least one member with standing to intervene so as to afford the other litigants the means to verify that standing exists, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-400 (1979), there is no requirement that the identification of such a member or members be made in the petition to intervene or in an attached affidavit. Washington Public Power Supply System (WPPSS Nuclear Project 1), LEP-83-59, 18 NRC 667, 669 (1983).

The provision in original 10 CFR § 2.714(a), that a petition to intervene be accompanied by a supporting affidavit setting forth the facts pertaining to the petitioner's interest, was abolished effective May 26, 1978. 43 Fed. Reg. 17,798 (1978). Washington Public Power Supply System (WPPSS Nuclear Project 1), LBP-83-59, 18 NRC 667, 669 (1983).

Once a member has been identified sufficiently to afford verification by the other parties and the petition to intervene has been granted, it is presumed that the organizational petitioner continues to represent individual members with standing to intervene who authorize the intervention. It is doubtful that the death or relocation

outside the geographical zone of interest of the only named members upon whom standing was based would defeat this presumption and require a further showing of standing. Washington Public Power Supply System (WPPSS Nuclear Project 1), LBP-83-59, 18 NRC 667, 669 (1983).

2.9.3.1 Pleading Requirements

Under 10 CFR § 2.714, a petition to intervene must:

- (1) be in writing;
- (2) identify the specific aspect or aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene;
- (3) set forth with particularity the interest of the petitioner in the matter, the manner in which that interest may be affected by the proceeding, and the reasons why the petitioner should be permitted to intervene with particular reference to the petitioner's right to be made a party under the Atomic Energy Act, the nature and extent of petitioner's property, financial or other interest in the proceeding, and the possible effect of any order entered in the proceeding on petitioner's interest.

In addition, prior to the first prehearing conference, the petitioner must file a supplement to his petition to intervene which sets forth the contentions the petitioner seeks to have litigated and the basis for each contention set forth with reasonable specificity. 10 CFR § 2.714(b). Illinois Power Co. (Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735, 1737 (1981). Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1654 (1982). Where a contention is made up of a general allegation which, standing alone, would not be admissible under 10 CFR § 2.714(b), plus one or more alleged bases for the contention set forth with reasonable specificity, the matters in controversy raised by each such contention are limited in scope to the specific alleged basis or bases set forth in the contention. Clinton, supra, 14 NRC at 1737.

Under 10 CFR § 2.714 and 10 CFR § 2.714(b) an intervention petition must not only set forth with particularity the interest of the petitioner and how that interest may be affected by the proceeding, but must also include the bases for each contention, sufficiently detailed and specific to demonstrate that the issues raised are admissible and that further inquiry is warranted. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-82-4, 15 NRC 199, 206 (1982). See also Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-85-9, 23 NPC 273, 277 (1986).

In general these elements have been construed as requiring the petitioner to show:

- (a) that he has a personal interest in the matter (e.g., residence in proximity to the reactor - see Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188 (1973);
- (b) how that interest may be adversely affected;
- (c) the specific contentions as to which the petitioner desires to participate.

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-73-10, 6 AEC 173 (1973); Florida Power and Light Co. (Turkey Point Plant, Units 3 and 4), CLI-81-31, 14 NRC 959, 960 (1981), citing, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980); Consumers Power Co. (Big Rock Point Plant), CLI-81-32, 14 NRC 962, 963 (1981).

In <u>BPI v. AEC</u>, 502 F.2d 424 (D.C. Cir. 1974), the Court of Appeals for the District of Columbia Circuit upheld various aspects of 10 CFR § 2.714, including the requirement that contentions be specified, and the requirement that the basis for contentions be set forth.

Section 189a of the Atomic Energy Act does not provide a non-discretionary right to a hearing on all issues arguably related to an acknowledged enforcement problem without regard to the scope of the enforcement action actually proposed or taken. In order to be granted leave to intervene, one must demonstrate an interest affected by the action, as required by 10 CFR § 2.714. Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 6 NRC 44, 45 (1982), citing, BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974).

Petitions drawn by counsel experienced in NRC practice must exhibit a high degree of specificity. In contrast, Licensing Boards are to be lenient in this respect for petitions drawn. pro se or by counsel new to the field or to the bar. Kansas Gas & Electric Co. (Wolf Creek Generating Station), ALAB-279, 1 NRC 559, 576-577 (1975). For a more recent case acknowledging that a pro se petitioner for intervention should not be held to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere in the petition to intervene, see Wisconsin Public Service Corporation (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 82 (1978).

Although a totally deficient pleading may not be justified on the basis that it was prepared without the assistance of counsel, a pro se petitioner is not "to be held to those standards of clarity and precision to which a lawyer might reasonably be expected to adhere." Public Service Electric and Gas Company (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973), cited in Houston Lighting and Power Co. (Aliens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546 (1980); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 578 (1982).

A petitioner is not permitted to incorporate massive documents by reference as the basis for, or a statement of, his contentions. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 & 2), LBP-76-10, 3 NRC 209, 216 (1976).

A petition to intervene which seeks to raise antitrust contentions must comply with the requirements of 10 CFR § 2.714 and must also set forth with particularity:

- (1) facis which describe a situation inconsistent with the antitrust laws or their underlying policies;
- (2) facts which describe the existence of a meaningful nexus between the activities under the nuclear license and the aforementioned anticompetitive "situation";
- (3) the specific relief sought, including whether, how and to what extent any license conditions imposed by the attorney general fail to provide the requested relief.

Wolf Creek, ALAB-279, supra; see also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 32 (1981).

Petitions to intervene must initially specify the "aspect or aspects" of the subject matter of the proceeding as to which the petitioner wishes to intervene. An "aspect" is broader than a "contention" but narrower than a general reference to the NRC's operating statutes. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-78-27, 8 NRC 275, 278 (1978). A Board lacks jurisdiction to consider an intervention petition in which the aspect of the proposed intervention is not within the scope of the proceeding. Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 277 (1986). Until the petitioner files a list of contentions, the publication in the Federal Register of a notice of opportunity for a hearing on proposed operating license amendments may serve to sufficiently specify the aspects as to which the petitioner wishes to intervene. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-4, 33 NRC 153, 159 (1991).

Under 10 CFR § 2.714 it is no longer necessary for petitioners for intervention to advance at least one viable

contention when initially filing a petition to intervene. The petition may later be supplemented to include contentions. There is no single date when the petition must be supplemented. Pursuant to 10 CFR § 2.714(b), the supplement may be submitted without leave of the presiding officer 15 days prior to the special prehearing conference or, if none is held, the first prehearing conference. Wisconsin Electric Power Company (Point Beach Nuclear Plant, Units 1 & 2), LBP-78-23, 8 NRC 71, 74 (1978).

Where an original notice of hearing is overly narrowly drawn, a requirement that those who subsequently seek to intervene state that they did not intervene before because of limitations in the original notice was not an abuse of discretion. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 10 (1980).

The perition of an organization to intervene must show that the person signing it has been authorized by the organization to do so. <u>Detroit Edison Company</u> (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 77 (1979).

2.6.3.2 Defects in Pleadings

Although the requirements of 10 CFR § 2.714 must ultimately be met, the Appeal Panel has made it clear that every benefit of the doubt should be given to the potential intervenor in order to obviate dismissal of an intervention petition because of inarticulate draftsmanship or procedural or pleading defects. As such, petitioners will usually be permitted to amend petitions containing curable defects. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-146, 6 AEC 631 (1973). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 40 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 195 (1991). A Licensing Board itself has no duty to recast contentions offered by a petitioner to make them acceptable under the regulations. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 406 (1974); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1660 (1982). Refusal to do so cannot constitute error. Saabrook, supra, citing, Zion, supra.

Intervention petitions and requests for hearing cannot properly raise antitrust issues and health and safety issues in the same proceedings. <u>Duke Power Co.</u> (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 32 (1981).

2.9.3.3 Time Limits/Late Petitions

The Commission's regulations at 10 CFR § 2.714(a)(1) provide that nontimely filings of petitions to participate as a party will not be entertained absent a determination that the petition should be granted based upon a balancing of five factors. (Sec. 2.9.3.3.3 for five factors). Out of the five factors enumerated in 10 CFR § 2.714(a), the factors involving the availability of other means to protect petitioner's interest and the ability of other parties to represent petitioner's interest are entitled to less weight than the other three. (Sec. 2.9.3.3.3). Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), LBP-82-1 6 NRC 1376, 1381, 1384 (1982); Kansas Gas and Electric Co. Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 7 (1984), citing, Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767 (1982).

Regarding a Petition to intervene, some weight may be attached to the fact that lateness, though not justified, is not extreme. It is permissible to consider the fact that a petition was filed only two months late if the start of the proceeding will not be substantially delayed. Puget Sound Power and Light Co. (Skaqit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 985 (1982), citing, Duke Power Co. (Amendment to Materials License SNM - 1773 - Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 (1979).

If the lateness of a Petition to intervene is not egregious, and will not cause substantial delay to the narties, those considerations will outweigh the fact that the balance of the five factors required under 10 CFR § 2.714(a)(1) tips slightly against the petitioner. Skagit/Hanford, supra, 16 NRC at 985.

The exclusion from a proceeding of persons or organizations who have slept on their rights does not offend any public policy favoring broad Litize. involvement in nuclear licensing adjudications. Assuming that such a policy finds footing in Section 189a of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a), it must be viewed in conjunction with the equally important policy favoring the observance of established time limits. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 396 n.37 (1983).

2.9.3.3.1 Time for Filing Intervention Petitions

Petitions to intervene or requests for hearing must be filed not later than the time specified in the notice for hearing or as provided by the Commission, the presiding officer or the Licensing Board designated to rule on petitions and/or requests for hearing, or as provided in 10 CFR § 2.102(d)(3) (with regard to antitrust matters); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 116 (1983).

A Licrosing Board did not abuse its discretion in shortening the time to file contentions where there were many intervenors. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 13 (1980).

2.9.3.3.2 Sufficiency of Notice of Time Limits on Intervention

Although the Appeal Board has stated that it would leave open the question as to whether <u>Federal Register</u> notice without more is adequate to put a potential intervenor on notice for filing intervention petitions, <u>Pennsylvania Power and Light Co.</u> (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-148, 6 AEC 642, 643 n.2 (1973), the Board tacitly assumed that such notice was sufficient in <u>Tennessee Valley Authority</u> (Browns Ferry Nuclear Plant, Units 1 & 2), ALAB-341, 4 NRC 95 (1976) (claims by petitioner that there was a "press blackout" and that he was unaware of Commission rules requiring timely intervention will not excuse untimely petition for leave to intervene).

2.9.3.3.3 Consideration of Untimely Petitions to Intervene

Section 10 CFR 2.714(a) provides that nontimely petitions to intervene or requests for hearing will not be considered absent a determination that the petition or request should be granted based upon a balancing of the following factors:

- (1) good cause, if any, for failure to file on time;
- (2) the availability of other means for protecting the petitioner's interests;
- (3) the extent to which petitioner's participation might reasonably assist in developing a sound record;
- (4) the extent to which the petitioner's interest will be represented by existing parties; and
- (5) the extent to which petitioner's participation will broaden the issues or delay the proceeding.

Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 984 (1982); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-82-96, 16 NRC 1408, 1429 (1982); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 n.3 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 390 n.3

(1983), citing, 10 CFR § 2.714(a)(1); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1170 n.3 (1983); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 883 (1984); General Electric Co. (GEL? Vallecitos), LBP-84-54, 20 NRC 1637, 1643-1644 (1984); Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98 n.3 (1985), affirmed, ALAB-816, 22 NRC 461 (1985); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 278 n.6 (1986); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2' CLI-88-12, 28 NRC 605, 608-609 (1988), reconsid. denied on or grounds CLI-89-6, 29 NRC 348 (1989), aff'd sub nom., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir. 1990); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 76 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991).

This consideration must be weighed against the petitioner's strong interest in the proceeding under 10 CFR § 2.714(d). Skagit/Hanford, supra, 16 NRC at 984.

In ruling on a petition for leave to intervene that is untimely, the Commission must consider, in addition to the factors set forth in 10 CFR § 2.714(a)(1), the following factors set forth in 10 CFR § 2.714(d): (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 n.3 (1983).

The burden of proof is on the petitioner. Thus, a person who files an untimely intervention petition must affirmatively address the five lateness factors in his petition, regardless of whether any other parties in the proceeding raise the tardiness issue. Even if the other parties waive the tardiness of the petition, a Board, on its own initiative, will review the petition and weigh the five lateness factors. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 n.22 (1985).

A late petitioner who fails to address the five lateness factors in his petition does not have a right to a second opportunity to make a substantial showing on the lateness factors. However, a Board, as a matter of discretion, may give a late petitioner such an opportunity. Pilgrim, supra, 22 NRC at 468.

A late petitioner's obligation to affirmatively address the five lateness factors is not affected by the extent of the

tardiness. However, the length of the delay, whether measured in days or years, may influence a Board's assessment of the lateness factors. <u>Pilgrim</u>, <u>supra</u>, ALAB-816, 22 NRC at 468 n.27.

Amendments to Section 2.714 make it clear that a showing of good cause for the untimeliness of a petition is only one factor to be considered and balanced. Prior to these amendments, the "good cause" factor was given special treatment, although a showing of good cause would not relieve a Licensing Board of its obligation to consider the other factors. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460 (1977); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 22 (1977); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-384, 5 NRC 612 (1977); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-82-4, 15 NRC 199 (1982); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2026 (1982). In addition, it has been held that even if a petitioner fails to establish good cause for the untimely petition, the other factors must be examined, Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631 (1975), although the burder of justifying intervention on the basis of the other factors is considered to be greater when the petitioner fails to show good cause. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975); USERDA (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976); Virginia Electric & Power Co. (North Anna Station, Units 1 & 2), ALAB-289, 1 NRC 395, 398 (1975); Philadelphia Electric Co. (Limerick Generating Station, Finit 1), LBP-86-9, 23 NRC 273, 279 (1986).

Absent a showing of good cause for a very late filing, an intervention petitioner must make a "compelling showing" on the other four factors stated in 13 CFR § 2.714(a) governing late intervention. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 894 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2. 261 (D.C. Cir. 1982). See also Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1764 (1982), citing, Grand Gulf, supra, 16 NRC at 1730; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983); General Electric Co. (GETR Vallecitos), LBP-84-54, 20 NRC 1637, 1645 (1984).

A satisfactory explanation for failure to file on time does not automatically warrant the acceptance of a late-filed intervention petition. The additional four factors specified under 10 CFR § 2.714(a) must also be considered. However, where a late filing of an intervention petition has been satisfactorily explained, a much smaller demonstration with regard to the other factors of 10 CFR § 2.714(a) is necessary than would otherwise be the case. Wisconsin Public Service Corporation (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 83 (1978).

The five factors listed in 10 JF & 2.714(a) are to be considered in determining whether allow late intervention. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 509 (1982); Cincinnati Gas and Electric Co. (Zimmer Nuclear Power Station, Unit 1), LBP-82-54, 16 NRC 210, 213-214 (1982); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-89-6, 29 NRC 348, 353 (1989). Newly acquired standing by moving to the vicinity of a plant is not alone enough to justify belated intervention. Nor does being articulate show a contribution can be made in developing the record. Other parties having the same interest weigh against allowing late intervention. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 241 (1980).

The first factor of those specified in 10 CFR § 2.714(a) is whether there exists "good cause, if any, for the failure to file on time." Cincinnat: Gas and Electric Company (William H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 862 (1980). In considering the "good cause" factor, the Appeal Board pointed out that a strong excuse for lateness will attenuate the showing necessary on the other factors of 10 CFR § 2.714. It added that the 1978 amendment of the language of § 2.714, far from altering this substantive principle, regarding excuse for lateness, merely codified it. Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-523, 9 NRC 58, 63 (1979). See also Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-420, 6 NRC 8, 22 (1977), affirmed, CLI-78-12, 7 NRC 939 (1978).

The burden of showing good cause is on the late petitioner. <u>Detroit Edison Co.</u> (Enrico Fermi Atomic Power Plant, Unit 2), LBP-82-96, 16 NRC 1408, 1432 (1982).

The Appeal Board has held that whether there is "good cause" for a late filing depends entirely upon the substantiality of the reasons assigned for not having filed at an earlier date. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 887 n.5 (1981).

Although a concrete definition as to what constitutes "good cause" has not been established, certain excuses for delay have been held to be insufficient to justify late filing. For example, in Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2), LBP-74-63, 8 AEC 330 (1974), aff'd, ALAB-238, 8 AEC 656 (1974), it was held that neither the fact that the corporate citizens' group seeking to intervene was not chartered prior to the cutoff date for filing, nor the fact that the applicant changed its application by dropping one of the two units it intended to build, gave good cause for late filing. Similarly, claims by a petitioner that there was a "press blackor." and that he was unaware of the Commission's rules requiring timely intervention will not excuse an untimely petition for leave to intervene. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 & 2), ALAB-341, 4 NRC 95 (1976), nor will failure to read the Federal Register. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 423 (1981), citing, New England Power and Light Co. (NEP Units 1 and 2), LBP-78-18, 7 NRC 932, 933-934 (1978); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 79 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991). The showing of good cause is required even though a petitioner seeks to substitute itself for another party. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 796 (1977).

Licensing Boards and Appeal Boards have both considered various excuses to determine whether they constitute "good cause." Newly-acquired organizational existence does not constitute good cause for delay in seeking intervention. Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979), cited in Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570 (1980) and South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 423 (1981); and Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 887 (1984); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 80-81 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991). Nor does preoccupation with other matters afford a basis for excusing a nontimely petition to intervene. Poor judgment or imprudence is not good cause for late filing. Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 and 2), LBP-79-16, 9 NRC 711, 714 (1979). The Appeal Board did not accept as an excuse for late intervention the claim that petitioner, a college organization, could not meet an August petition deadline because most of its members were away from school during the summer and hence unaware of developments in the case. Such a consideration does not relieve an organization from making the necessary arrangements to insure that its interest is protected in its members' absence. On the other hand, new regulatory developments and the availability of new information may constitute good cause for delay in seeking intervention. Duke Power Company (Amendment to Materials License SNM-1773 -- Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 148-149 (1979). See also Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 572-573 (1980).

The Licensing Board will not accept a petitioner's claim of excuse for late intervention where the petitioner failed to uncover and apply publicly available information in a timely manner. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), L8P-84-17, 19 NRC 878, 886 (1984), citing, Long Island Sahting Co. (Shoreham Nuclear Power Station, Unit 1), L8P-83-42, 18 NRC 112, 117, aff'd, ALAB-743, 18 NRC 387 (1983); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), L8P-90-5, 31 NRC 73, 79 (1990). aff'd, ALAB-950, 33 NRC 492, 495-96 (1991).

Newly arising information has long been recognized as providing "good cause" for acceptance of a late contention. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982), citing, Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), CLI-72-75, 5 AEC 13, 14 (1972); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 574 (1980), appeal dismissed, ALAB-595, 11 NRC 860 (1980).

Before admitting a contention based on new information, factors must be balanced such as the intervenor's ability to contribute to the record on the contention and the likelihood and effects of delay should the contention be admitted. However, in balancing those factors, the same weight given to each of them is not required. Consumers Power Co. /Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

Confusing and misleading letters from the Staff to a prospective pro se petitioner for intervention, and failure of the Staff to respond in a timely fashion to certain communications from such a petitioner, constitute a strong showing of good cause for an untimely petition. Wisconsin Public Service Corporation (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 81-82 (1978). And where petitioner relied to its detriment on Staff's representations that no action would be immediately taken on licensee's application for renewal, elementary fairness requires that the action of the Staff could be asserted as an estoppel on the issue of timeliness of petition to intervene, and the petition must be considered

even after the license har been issued. Armed Forces adiobiology Research Institute (Cobalt-60 Storage Facility), LBP-82-24, 15 NRC 652, 658 (1982), rev'd on other grounds, ALAB-682, 16 NRC 150 (1982).

A petitioner's claim that it was lulled into inaction because it relied upon the State, with later withdrew, to represent its interests does not constitute good cause for an untimely petition. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 796 (1977). See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 609 (1988), reconsid. divided on other grounds. CLI-89-6, 29 NRC 348 (1989), aff'd sub nom., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th C'- 1990). A petitioner who has relied upon a State participating pursuant to 10 CFR § 2.715(c) to represent her interests in a proceeding cannot rely on her dissatisfaction with the State's performance as a valid excuse for a late-filed intervention petition where no claim is made that the State undertook to represent her interests specifically, as opposed to the public interest generally. Duke Power Company (Cherokee Nuclear Station, Urits 1, 2 & 3), ALAB-440, 6 NRC 642 (1977). See also South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 423 (1981); Comerche Peak, supra, 28 NRC at 610 (a petitioner's previous reliance on another party to assert its interests does not by itself constitute good cause), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd sub nom. Citizens for Fair Utility R ulation v. NRC, 898 F.2d 51, 55 (5th Cir. 1990); Florida rower and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 80 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991). Nor will an explanation that full-time domestic and other responsibilities was the reason for filing an intervention petition almost three years late suffice. Cherokee, supra.

Just as a petitioner may not rely upon interests being represented by another party and then justify an untimely petition to intervene on the others' withdrawal, so a petitioner may not rely on the pendency of another proceeding to protect its interests and then justify a late petition on that reliance when the other petition fails to represent those interests. A claim that petitioner believed that its concerns would be addressed in another proceeding will not be considered good cause. Consolidated Edison Co. (Indian Point Station, Unit No. 2), LBP-82-1. 15 NRC 37, 39-40 (1982); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2027 (1982). It must be established that petitioners were furnished

erroneous information on matters of basic fact and that it was reliance upon that information that prompted their own inaction. Palo Verde, supra, 16 NRC at 2027-2028.

Employees of an applicant or licensee are not exempt from the Commission's procedural rules. Thus, an employee's mere assertions of fears of retaliation from the employer do not establish good cause for late intervention. To encourage employees to raise potentially significant safety concerns or information, Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851(a), prohibits employer retaliation against any employ e who commences or participates in any manner in an NRC proce ng. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 77-79 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991).

Where no good excuse is tendered for the tardiness, the petitioner's demonstration on the other factors must be particularly strong. Duke Power Company (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977) and cases there cited. See also Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 887 (1984); Consumers Power Co. (Midiand Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982), citing, Nuclear Fuel Services, Inc. and New York State Atomic and Space Development Authority (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). Absent a showing of good cause for late filing, an intervention petitioner must make a "compelling showing" on the other four factors stated in 10 CFR § 2.714(a) governing late intervention. Mississippi Power <u>& Light Co.</u> (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 694 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C. Cir. 1982); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 610 (1988), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd sub nom., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51, 55 (5th Cir. 1990).

In determining how compelling a showing a petitioner must make on the other four factors, a Licensing Board need not attach the same significance to a delay of months as to a delay involving a number of years. The significance of the tardiness, whether measured in months or years, will generally depend on the posture of the proceeding at the time the petition surfaces. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173 (1983), citing, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 398-399 (1983).

With regard to the second factor - other means to protect petitioner's interest - the question is not whether other parties will adequately protect the interest of the petitioner, but whether there are other available means whereby the petitioner can itself protect its interest. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631 (1975).

The second factor in 10 CFR § 2.714(a) points away from allowing lace intervention if the interest which the petitioner asserts can be protected by some means other than litigation. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-82-96, 16 NRC 1408, 1433 (1982).

The suggestion that an organization could adequately protect its interest by submitting a limited appearance statement gives insufficient regard to the value of participational rights enjoyed by parties - including the entitlement to present evidence and to engage in cross-examination. Similarly, assertions that the organization might adequately protect its interest by making witnesses available to a successful petitioner or by transmitting information in its possession to appropriate State and local officials are without merit. Duke Power Company (Amendment to Materials License SNM-1773 -- Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 n.7 (1979).

Until the parties to a proceeding that oppose a late intervention petition suggest another forum that appears to promise a full hearing on the claims petitioner seeks to raise, a petitioner need not identify and particularize other remedies as inadequate. <u>Detroit Edison Co.</u> (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767 n.6 (1982).

A petition under 10 CFR § 2.206 for a show cause proceeding is not an adequate alternative means of protecting a late petitioner's interests. The Section 2.206 remedy cannot substitute for the petitioner's participation in an adjudicatory proceeding concerned with the grant or denial abinitio of an application for an operating license. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1175-1176 (1983). See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 81 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991).

Participation of the NRC Staff in a licensing proceeding is not equivalent to participation by a private intervenor. WPPSS, id. By analogy, the availability of nonadjudicatory Staff review outside the hearing process generally does not constitute adequate protection of a private party's rights

when considering factor two under 10 CFR § 2.714(a). Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 384 n.108 (1985). But see Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-828, 23 NRC 13, 21-22 (1986).

As to the third factor with regard to "assistance in developing the record," a late petitioner placing heavy reliance on this factor and claiming that it has substantial technical expertise in this regard should present a bill of particulars in support of such a claim. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-476, 7 NRC 759, 764 (1978). At the same time, it... not necessary that a petitioner have some specialized education, relevant experience or ability to offer qualified experts for a favorable finding on this factor to be made. South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-78-6, 7 NRC 209, 212-213 (1978).

When an intervention patitioner addresses the 10 CFR § 2.714(a)(3) criterion for late intervention requiring a showing of how its participation may reasonably be expected to assist in developing a sound record, it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. See generally South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 894 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C. Cir. 1982); Detroit Edison Co. (Greenwood Energy Cent r, Units 2 and 3), ALAB-476, 7 NRC 759, 764 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 399 (1983), citing, Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1177 (1983); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-767, 19 NRC 984, 985 (1984); General Electric Co. (GETR Vallecitos), LBP-84-54, 20 NRC 1637, 1644 (1984); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 611 (1988), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd sub nom., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir. 1990).

Vague assertions regarding petitioner's ability or resources are insufficient. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1766 (1982), citing, Grand Gulf, supra, 16 NRC at 1730.

It is the petitioner's ability to contribute sound evidence rather than asserted legal skills that is of significance in determining whether the petitioner would contribute to the development of a sound record. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 888 (1984), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 513 n.14 (1982).

The ability to contribute to the development of a sound record is an even more important factor in cases where the grant or denial of the petition will also decide whether there will be any adjudicatory hearing. There is no reason to grant an inexcusably late intervention petition unless there is cause to believe that the petitioner not only proposes to raise at least one substantial safety or environmental issue, but is also able to make a worthwhile contribution on it. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1180-1181 (1983). See also Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977).

With regard to the fourth factor of 10 CFR § 2.714(a), the extent to which petitioner's interest will be represented by existing parties, the fact that a successful petitioner has advanced a contention concededly akin to that of a late petitioner does not necessarily mean that the successful petitioner is both willing and able to represent the late petitioner's interest. <u>Duke Power C. any immendment</u> to Materials License SNM-1773 - Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 (1979).

The Licensing Board in Florida Power and Light Company (Turkey Point Nuclear Generating Units 3 and 4), LBP-79-21, 10 NRC 183, 195 (1979) has expressed the view that NRC practice has failed to provide a clearcut answer to the question of whether the fourth factor, the extent to which the petitioner's interest will be represented by existing parties, is applicable when there are no intervening parties and no petitioners other than the latecomer, and a hearing will not be held if the late petitioner is denied leave to intervene. The Licensing Board reviewed past Licensing Board decisions on this question:

(1) In <u>St. Lucie</u> and <u>Turkey Point</u> the Licensing Board decided that the fourth factor was not directly applicable, noting that without the petitioner's admission there would be no other party to protect petitioner's interest. <u>Florida Power and Light Co.</u> (St. Lucie Plant, Units 1 and 2 and Turkey Point, Units 3 and 4), LBP-77-23, 5 NRC 789, 800 (1977).

- (2) In <u>Summer</u> the Licensing Board acknowledged uncertainty as to the applicability of factor four, but indicated that if the factor were applicable it would be given no weight because of the particular circumstances of that case. <u>South Carolina Electric and Gas Co.</u> (Virgil C. Summer Nuclear Station, Unit 1), LBP-78-6, 7 NRC 209, 213-214 (1978).
- (3) In <u>Kewaunee</u>, the Board concluded that petitioners' interest would not be represented absent a hearing and decided that the fourth factor weighed in favor of admitting them as intervenors. <u>Wisconsin Public Service Corp.</u> (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 84 (1978).

The Licensing Board ultimately ruled that the Commission intended that all five factors of 10 CFR § 2.714(a) should be balanced in every case involving an untimely petition. Florida Power and Light Company (Turkey Point Nuclear Generating Units 3 and 4), LBP-79-21, 10 NRC 183, 195 (1979). The Board also ruled that in the circumstances where denial of a late petition would result in no hearing and no parties to protect the petitioner's interest, the question, "To what extent will Petitioners' interest be represented by existing parties?" must be answered, "None." The fourth factor therefore, was held to weigh in favor of the late petitioners. Id.

In weighing the fourth factor, a board will not assume that the interests of a late petitioner will be adequately represented by the NRC Staff. The general public interest, as interpreted by the Staff, may often conflict with a late petitioner's private interests or perceptions of the public interest. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1174-1175 n.22 (1983). See also Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-80, 18 NRC 1404, 1407-1408 (1983); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 279 (1986). Contra Consolidated Edison Co. of New York (Indian Point, Unit 2), LBP-82-1, 15 NRC 37 41 (1982).

In balancing the factors in 10 CFR § 2.714(a), the Licensing Board may take into account the petitioner's governmental nature as it affects the extent to which petitioner's interest will be represented by existing parties (fourth factor of 10 CFR § 2.714(a)), although the petitioner's governmental status in and of itself will not excuse untimely petitions to intervene. Public Service Co. of Inciana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20 (1976).

With respect to the fifth factor, the extent to which a late petitioner's participation would delay a proceeding, the

Appeal Board in <u>Puget Sound Power and Light Company</u> (Skagit Nuclear Power Project, Urits 1 and 2), ALAB-559, 10 NRC 162, 172 (1979), assessed this factor, as of the time of the Appeal Board's hearing, not as of the time the petitioners filed their petition. A person who attempts to intervene three and a half years after the petition deadline has no right to assume that his intervention will go unchallenged; rather, he has every right to assume that objections will be made and that the appellate process might be invoked. <u>Skagit</u>, <u>supra</u>, 10 NRC at 172-173.

The fifth factor includes only that delay which can be attributed directly to the tardiness of the petition.

Jamesport, supra, ALAB-292, 2 NRC at 631; South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 425 (1981).

The fifth and final factor of 10 CFR § 2.714(a)(1), potential for delay, is also of immense importance in the overall balancing process. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983).

While this factor is particularly significant, it is not dispositive. <u>USERDA</u> (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976). In considering the factor of delay, the magnitude of threatened delay must be weighed since not every delay is intolerable. <u>Public Service Electric & Gas Co.</u> (Hope Creek Generating Station, Units 1 & 2), LBP-77-9, 5 NRC 474 (1977). In addition, in deciding whether petitioners' participation would broaden the issues or delay the proceeding, it is proper for the Licensing Board to consider that the petitioners agreed to allow issuance of the construction permit before their antitrust contentions were heard, thereby eliminating any need to hold up plant construction pending resolution of those contentions. <u>Florida Power & Light Co.</u> (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 23 (1977).

An untimely intervention petition need not introduce an entirely new subject matter in order to "broaden the issues" for the purposes of 10 CFR § 2.714(a); expansion of issues already admitted to the proceeding also qualifies. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 891 (1981).

The mere fact that a late petitioner will not cause additional delay or a broadening of the issue does not mean that an untimely petition should necessarily be granted. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 798 (1977). However, from the standpoint of precluding intervention, the delay factor is extremely important and the later the petition to intervene, the more

likely it is that the petitioner's participation will result in delay. <u>Detroit Edison Co.</u> (Greenwood Energy Center, Units 2 & 3), ALAB-476, 7 NRC 759, 762 (1978). The question is whether, by filing late, the petitioner has occasioned a potential for delay in the completion of the proceeding that would not have been present had the filing been timely. <u>Washington Public Power Supply System</u> (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1180 (1983).

In the instance of a very late petition, the strength or weakness of the tendered justification may thus prove crucial. The greater the tardiness, the greater the likelihood that the addition of a new party will delay the proceeding -- e.g., by occasioning the relitigation of issues already tried. Although the delay factor may not be conclusive, it is an especially weighty one. Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 394-95 (1976); Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-552, 10 NRC 1, 5 (1979).

The permissive grant of intervention petitions inexcusably filed long after the prescribed deadline would pose a clear and unacceptable threat to the integrity of the entire adjudicatory process. Although Section 2.714(c) of the Rules of Practice may not shut the door firmly against unjustifiably late petitions, it does reflect the expectation that, absent demonstrable good cause for the late filing, an individual so interested in the outcome of a particular proceeding will act to protect his interest within the established time limits. Skagit, supra, 10 NRC at 172-173.

A late intervenor may be required to take the proceeding as it finds it. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983), citing, Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 276 (1975). Licensing Boards have very broad discretion in their approach to the balancing process required under 10 CFR § 2.714(a). Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976). Given this wide latitude with regard to untimely petitions to intervene, a Licensing Board has the discretion to permit intervention, even though an acceptable excuse for the untimely filing is not forthcoming, if other considerations warrant its doing so. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 22 (1977).

A petitioner whose late-filed petition to intervene has met the five-part test of 10 CFR § 2.714(a)(1) need not meet any further late-filing qualifications to have its contentions admitted. It is not to be treated differently than a petitioner whose petition to intervene was timely filed. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), LBP-84-17A, 19 NRC 1011, 1015 (1984).

In evaluating intervention petitions to determine whether the requisite specificity exists, whether there has been an adequate delineation of the basis for the contentions, and whether the issues sought to be raised are cognizable in an individual licensing proceeding, Licensing Boards will not appraise the merits of any of the assertions contained in the petition. But when considering untimely petitions, Licensing Boards are required to assess whether the petitioner has made a substantial showing of good cause for failure to file on time. In doing so, Boards must necessarily consider the merits of claims going to that issue. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 948-949 (1978).

Non-parties, participating under 10 CFR § 2.715(c), need not comply with the requirements of 10 CFR § 2.714 that mandate that intervenors either file their contentions in a timely fashion or show cause for their late intervention. <u>Cleveland Electric Illuminating Co.</u> (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 688 (1981).

The key policy consideration for barring late intervenors is one of fairness, viz., "the public interest in the timely and orderly conduct of our proceedings." Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 648-649 (1979), citing, Nuclear Fuel Services. Inc., (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

A Licensing Board has no latitude to admit a new party, <u>i.e.</u>, an "eleventh hour" intervenor, to a proceeding as the hearing date approaches in circumstances where: (1) the extreme tardiness in seeking intervention is unjustified; (2) the certain or likely consequence would be prejudice to other parties as well as delaying the progress of the proceeding, particularly attributable to the breadening of issues; and (3) the substantiality of the contribution to the development of the record which might be made by that party is problematic. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-643, 13 NRC 898, 900 (1981). See also Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 82-83 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991).

2.9.3.3.4 Appeals from Rulings on Late Intervention

Two considerations play key roles in Appeal Board deliberations on appeals from rulings on untimely intervention. The first is the Commission's admonition in <u>Nuclear Fuel Services</u>, <u>Inc.</u> (West Valley Reprocessing Plant), CLI-75-4,

1 NRC 273, 275 (1975), that 10 CFR § 2.714(a) was purposely drafted with the idea of "giving the Licensing Boards broad discretion in the circumstances of individual cases." Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171 (1983). See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 395-396 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-769, 19 NRC 995, 1000 n.13 (1984). Consequently, an Appeal Board is free to reverse a decision granting a tardy intervention petition only where it can fairly be said that the Licensing Board's action was an abuse of the discretion conferred by Section 2.714(a). Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-704, 16 NRC 1725, 1730 (1982); Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976). The second consideration flows from the principle that the propriety of the Board's action must be measured against the backdrop of the record made by the parties before it. Accordingly, on review the Appeal Board must generally credit the facts recounted in the papers supporting the petition to intervene to the extent that they deal with the merits of the issues. Insofar as the facts relate to the excuse for untimely filing, where they are not controverted by opposing affidavits they must be taken as true. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 13 (1977).

In view of all of this, the chances of overturning a Licensing Board's finding that intervention, although late, would be valuable are slight. See, e.g., Pacific Gas & Electric Co. (Diablo Canyon Nuclear Plant, Units 1 & 2), ALAB-223, 8 AEC 241 (1974).

In a decision vacating a Licensing Board's grant of late intervention because the grant was based on improper criteria, the Appeal Board refused to examine whether the petitioner had met the regulatory requirements for intervention (i.e., 10 CFR § 2.714). Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-523, 9 NRC 58, 63-64 (1979), petition for review denied, Puget Sound Power & Light Co. (Skagit Nuclear Project, Units 1 and 2), unreported, (January 16, 1980).

Appeal Boards may closely scrutinize factual and legal components of the analysis underlying the Licensing Board's conclusion in reviewing Board decisions on untimely intervention petitions. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Plant, Unit 1), ALAB-642, 13 NRC 881, 885 (1981).

It is for the Licensing Boards to make the initial assessment of how late intervention petitions fare in light of the intervention criteria. Skaqit, supra, 9

NRC at 63. An Appeal Board will not overturn a Licensing Board's denial of a late intervention petition under the criteria specified in 10 CFR § 2.714(a) unless the Board has abused its discretion. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1763, 1764 (1982). It is not sufficient for a party to establish that the Licensing Board might justifiably have concluded that the five lateness factors listed in 10 CFR § 2.714(a)(1) favored the denial of the untimely intervention petition. An Appeal Board must be persuaded that a reasonable mind could reach no other result. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171 (1983).

2.9.3.3.5 Mootness of Petitions to Intervene

Where the Commission was in the process of ruling on an untimely petition to intervene, when the applicant moved to amend its application and conclude the proceeding, the petition to intervene was dismissed as moot. Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), CLI-80-34, 12 NRC 407, 408 (1980).

2.9.3.4 Amendment of Petition Expanding Scope of Intervention

In order to expand the scope of a previously filed petition to intervene, an intervenor carries the burn of persuading the Licensing Board that the information upon which the expansion is based: (a) was objectively unavailable at the time the original petition was filed, and (b) had it been available, the petition's scope would have been broader. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), LBP-73-31, 6 AEC 717, appeal dismissed as interlocutory, ALAB-168, 6 AFC 1155 (1973).

2.9.3.5 Withdrawal of Petition to Intervene

Voluntary withdrawal of a petition to intervene is without prejudice to reinstate the petition, although reinstatement can only be done on a showing of good cause. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), LBP-73-41, 6 AEC 1057 (1973).

Where only a single intervenor is party to an operating license proceeding, its withdrawal serves to bring the proceeding to an end. Where there is more than one intervenor in a case, the withdrawal of one does not terminate the proceeding. However, according to NRC procedure, it does serve to eliminate the withdrawing party's contentions from litigation. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2),

ALAB-799, 21 NRC 360, 382 (1985). See also Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 391-92 (1976); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 430-31 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990). Acceptance of contentions at the threshold stage of a licensing proceeding does not validate them as cognizable issues for litigation independent of their sponsoring intervenor. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2) CLI-81-36, 14 NRC 1111, 1113-14 (1981); South Texas, supra, 21 NRC at 283; Seabrook, supra, 31 NRC at 430-31, aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990).

Where a lay person sought to withdraw both as an individual intervention petitioner and as the person on whom an organization relied for standing, a Licensing Board denied the motion to withdraw as the basis for the organization's standing in order to give the petitioner an opportunity to reconsider, since granting the motion would lead to dismissal of the entire proceeding. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-12, 31 NRC 509, 514 (1990). The organizational intervenor was subsequently dismissed from the proceeding when the individual upon whom it relied for standing was terminated from his employment in the geographical zone of interest of the plant, thereby losing the basis for his standing. Although the organization earlier had been given ample opportunity to establish its standing on other grounds, it failed to do so. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-24, 32 NRC 12, 14-15 (1990), aff'd, ALAB-952, 33 NRC 521 (1991).

Safety or environmental matters which may be left as outstanding issues by a withdrawing intervenor may be raised by a Board sua sponte or be subject to non-djudicatory resolution by the NRC Staff. South Texas, supra, 21 NRC at 383 n.100. See Consolidated Edison Co. of New York (Indian Point, Units 1, 2, and 3), ALAB-319, 3 NRC 188, 189-90 (1976).

The test that should be applied to determine whether one intervenor may be permitted to adopt contentions that no longer have a sponsor when the sponsoring intervenor withdraws from the proceeding, is the five-factor test ordinarily used to determine whether to grant a nontimely request for intervention, or to permit the introduction of additional contentions by an existing intervanor after the filing date. South Texas, supra, 21 NRC at 381-82. See 10 CFR §§ 2.714(a)(1),(b). For a detailed discussion of the five-factor, test, see Sections 2.9.3.3.3 and 2.9.5.5.

2.9.3.6 Intervention in Antitrust Proceedings

In addition to meeting the requirements of 10 CFR § 2.714, a petitioner seeking to intervene in an antitrust proceeding must:

- describe the situation allegedly inconsistent with the antitrust laws which is the basis for intervention;
- (2) describe how that situation conflicts with the policies underlying the Sherman, Clayton or Federal Trade Commission Acts;
- (3) describe how that situation would be created or maintained by activities under the proposed license;
- (4) identify the relief sought; and
- (5) explain why the relief sought fails to be satisfied by license conditions proposed by the Department of Justice.

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 32 (1981) (and cases cited therein). Note that for antitrust intervention, Catawba implies that the interest of a ratepayer or consumer of electricity may be within the zone of interests protected by Section 105 of the Atomic Energy Act. The petitioner, however, must still demonstrate that an injury to its interests would be the proximate result of anticompetitive activities by the applicant or licensee and such injury must be more than remote and tenuous. Id. at 13 NRC 30-32.

The Commission's regulations make clear that an antitrust intervention petition: (1) must first describe a situation inconsistent with the antitrust laws; (2) would be deficient if it consists of a description of a situation inconsistent with the antitrust laws - however well pleaded - accompanied by a mere paraphrase of the statutory language alleging that the situation described therein would be created or maintained by the activities under the license; and (3) must identify the specific relief sought and whether, how and the extent to which the request fails to be satisfied by the license conditions proposed by the Attorney General. The most critical requirement of an antitrust intervention petition is an explanation of how the activities under the license would create or maintain an anticompetitive situation. Florida Power and Light Co. (St. Lucie Plant, Unit No. 2), ALAB-665, 15 NRC 22, 29 (1982), citing, Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 574-575 (1975) and Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619, 621 (1973).

When neither the Attorney General nor the NRC Staff has discerned antitrust problems warranting review under Section 105c, potential antitrust problems must be shown with reasonable clarity to justify granting a petition that would lead to protracted antitrust litigation involving a pro se petitioner. Detroit Edison Co. (Enrico Fermi Atomic Plant, Unit 2), LBP-78-13, 7 NRC 583, 595 (1978).

Although Section 105 of the Atomic Energy Act encourages petitioners to voice their antitrust claims early in the licensing process, reasonable late requests for antitrust review are not precluded so long as they are made concurrent with licensing. Licensing Boards must have discretion to consider individual claims in a way which does justice to all of the policies which underlie Section 105c and the strength of particular claims justifying late intervention. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 946 (1978).

Late requests for antitrust review hearings may be entertained in the period between the filing of an application for a construction permit -- the time when the advice of the Attorney General is sought -- and its issuance. However, as the time for issuance of the construction permit draws closer, Licensing Boards should scrutinize more closely and carefully the petitioner's claims of good cause. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 946 (1978). The criteria of 10 CFR § 2.714 for late petitioners are as appropriate for evaluation of late antitrust petitions as in health, safety and environmental licensing, but Section 2.714 criteria should be more stringently applied to late antitrust petitions, particularly in assessing the good cause factor, Id. Where an antitrust petition is so late that relief will divert from the licensee needed and difficult-to-replace power, the Licensing Board may shape any relief granted to meet this problem. Id.

Where a late petition for intervention in an antitrust proceeding is involved, the special factors set forth within 10 CFR § 2.714(a)(1) must be balanced and applied before petitions may be granted; the test becomes increasingly vigorous as time passes. Florida Power and Light Co. (St. Lucie Plant, Unit 2), LBP-81-28, 14 NRC 333, 338, 342 (1981).

2.9.3.7 Intervention in High-Level Waste Licensing Proceedings

The standards for intervention in high-level waste licensing proceedings are specified in 10 CFR § 2.1014.

2.9.4 Interest and Standing for Intervention

Assertions of broad public interest in (a) regulatory matters, (b) the administrative process, and (c) the development of

economical energy resources do not establish the particularized interest necessary for participation by an individual or group in NRC adjudicatory processes. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 28 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 192 (1991).

Economic interest as a ratepayer does not confer standing in NRC licensing proceedings. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 n.4 (1983); Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98, affirmed on other grounds, ALAB-816, 22 NRC 461 (1985); Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 313, 315 (1989); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 30 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 193 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 437, 443 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-26, 33 NRC 537, 544, 546 (1991), reconsid. denied, LBP-91-32, 34 NRC 132 (1991).

In Commission practice, a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens will not result in a distinct and palpable harm sufficient to support standing. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 333 (1983), citing, Transnuclear Inc., CLI-77-24, 6 NRC 525, 531 (1977); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), LBP-87-2, 25 NRC 32, 34-35 (1987).

Both the Atomic Energy Act of 1954, as amended, and the Commission's regulations permit intervention only by a "person whose interest may be affected." The term "person" in this context includes corporate environmental groups which may represent members of the group provided that such members have an interest which will be affected. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-322, 3 NRC 328 (1976). Standing to intervene as a matter of right does not hinge upon a petitioner's potential contribution to the decisionmaking process. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976). Nevertheless, a petitioner's potential contribution has a definite bearing on "discretionary intervention." See Section 2.9.4.2. infra.

In <u>Portland General Electric Co.</u> (Pebbie Springs Nuclear Plant, Units 1 & 2), ALAB-333, 3 NRC 804 (1976), the Appeal Board certified the following questions to the Commission:

- (1) Should standing in NRC proceedings be governed by "judicial" standards?
- (2) If no "right" to intervene exists under whatever standing rules are found to be applicable, what degree of discretion exists in a Board to admit a petitioner anyway?

The Commission's response to the certified question is contained in <u>Portland General Electric Co.</u> (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610 (1976). Therein, the Commission ruled that judicial concepts of standing should be applied by addicatory boards in determining whether a petitioner is entitled to intervene as of right under Section 189 of the Atomic Energy Act. As to the second question referred by the Appeal Board, the Commission held that Licensing Boards may, as a matter of discretion, grant intervention in domestic licensing cases to petitioners who are not entitled to intervene as of right under judicial standing doctrines but who may, nevertheless, <u>make some contribution to the proceeding</u>.

Standing to intervene, unlike the factual merits of contentions, may appropriately be the subject of an evidentiary inquiry before intervention is granted. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-78-27, 8 NRC 275, 277 n.1 (1978).

"There is no question that, in an operating license proceeding, the question of a potential intervenor's standing is a significant one. For if no petitioner for intervention can satisfactorily demonstrate standing, it is likely that no hearing will be held." <u>Detroit Edison Company</u> (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 582 (1978).

2.9.4.1 Judicial Standing to Intervene

The Commission has held that contemporaneous judicial concepts should be used to determine whether a petitioner has standing to intervene. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 215 (1983), citing, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976).

Judicial concepts of standing will be applied in determining whether a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right under Section 189 of the Atomic Energy Act of 1954. <a href="https://metropolitan.com/hetr

327, 332 (1983), citing, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976).

Judicial concepts of standing require a showing that (a) the action sought in a proceeding will cause "injury-in-fact," and (b) the injury is arguably within the "zone of interests" protected by statutes governing the proceeding. Metropolitan Edi-on Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983).

In order to establish standing, a petitioner must show: (1) that he has personally suffered a distinct and palpable harm that constitutes injury-in-fact; (2) that the injury fairly can be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision. Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988); Shoreham-Wading River Central School District v. NRC, 931 F.2d 102, 105 (D.C. Cir. 1991). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 28-29 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 192, 194-95 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 437, 441-42 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-9!-26, 33 NRC 537, 544, 546 (1991), reconsid. denied, !BP-91-32, 34 NRC 132 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 182 (1991).

Where a petitioner does not satisfy the judicial standards for standing, intervention could still be allowed as a matter of discretion. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 333 (1983).

2.9.4.1.1 "Injury-In-Fact" and "Zone of Interest" Tests for Standing to Intervene

Although the Commission's <u>Pebble Springs</u> ruling (CL1-76-27, 4 NRC 610) permits discretionary intervention in certain limited circumstances, it stresses that, as a general rule, the propriety of intervention is to be examined in the light of judicial standing principles. The judicial principles referred to are those set forth in <u>Sierra Club v. Morton</u>, 405 U.S. 727 (1972); <u>Barlow v. Collins</u>, 397 U.S. 159 (1970); and <u>Association of Data Processing Service Organizations v. Camp</u>, 397 U.S. 150 (1970). Such standards require a showing that (1) the action being challenged could cause injury-in-fact to the person seeking to establish standing, and (2) such injury is arguably within the zone of interests protected by the statute governing the proceeding. <u>Wisconsin Electric Power Co.</u> (Point Beach, Unit 1), CLI-80-38, 12 NRC 547 (1980); <u>Portland General Electric Co.</u> (Pebble Springs Nuclear Plant,

Units 1 and 2), CLI-76-27, 4 NRC 610 (1976); Nuclear Fuel Services, Inc. and N.Y. State Energy Research and Development Authority (Western New York Nuclear Service Center), LBP-82-36, 15 NRC 1075, 1083 (1982); Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1431, 1432 (1982), citing, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 612-13 (1976); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985); Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98 n.6 (1985), affirmed on other grounds, ALAB-816, 22 NRC 461 (1985); Sequoyah Fuels Corporation, LBP-91-5, 33 NRC 163, 165, 166 (1991); Public Service Co. of New Hampshire (Seabrook Station, Unit 1), LBP-91-28, 33 NRC 557, 559 (1991)

Purely academic interests are not encompassed by 10 CFR § 2.714(a) which states that any person whose interest is affected by a proceeding shall file a written petition for leave to intervene. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), LBP-82-52, 16 NRC 183, 185 (1982). See generally, CLI-81-25, 14 NRC 616 (1981), (guidelines for Board).

Two tests must be satisfied to acquire standing: (1) petitioner must allege "injury-in-fact" (that some injury has occurred or will probably result from the action involved); (2) petitioner must allege an interest "arguably within the zone of interest" protected by the statute. Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 983 (1982), citing, Warth v. Selden, 422 U.S. 490 (1975); Sierra Club v. Morton, 405 U.S. 727 (1972); Consumers Power Co. (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 113 (1979); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 428 (1984).

A petitioner must allege an "injury-in-fact" which must be within the "zone of interests" protected by the Atomic Energy Act or the National Environmental Policy Act of 1969. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 215 (1983). See Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 313, 315 (1989); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 443, 444 (1991).

An alleged injury to a purely legal interest is sufficient to support standing. Thus, a petitioner derived standing by alleging that a proposed license amendment would deprive it of the right to notice and opportunity for hearing provided by § 189a of the Atomic Energy Act. Cleveland Electric Illuminating Co. (Perry Muclear Power Plant, Unit 1), LBP-90-15, 31

NRC 501, 506 (1990), <u>reconsid. denied</u>, LBP-90-25, 32 NRC 21 (1990).

With respect to "zone of interest," the Appeal Board, in Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98, 103 n.6 (1976), rejected the contention that the Atomic Energy Act includes a "party aggrieved" provision which would require for standing purposes simply a showing of injury-in-fact. The Commission agreed with this analysis in its Pebble Springs decision. As such, zone of interest requirements are not met simply by invoking the Atomic Energy Act but must be satisfied by other means. The following should be noted with regard to "zone of interest" requirements:

- (1) The directness of a petitioner's connection with a facility bears upon the sufficiency of its allegations of injury-in-fact, but not upon whether its interests fall within the zone of interest which Congress was protecting or regulating. Virginia Electric & Power Sec. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976).
- (2) The Atomic Energy Act and its implementing regulations do not confer standing but rather require an additional showing that interests sought to be protected arguably fall within the zone of interests protected or regulated by the Act. Virginia Electric & Power Co., ALAB 342 supra; accord, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610 (1976).
- (3) While potential loss of business reputation is a cognizable "injury-in-fact," an interest in protecting business reputation and avoiding possible damage claims is not arguably within the zone of interest which the Act seeks to protect or regulate. Virginia Electric & Power Co., ALPB-342, supra (business reputation of reactor vessel component fabricator clearly would be injured if components failed during operation; however, fabricator's interest in protecting his reputation by intervening in hearing on adequacy of vessel supports was not within the zone of interests sought to be protected by the Atomic Energy Act).
- (4) The economic interest of a ratepayer is not sufficient to allow standing to intervene as a matter of right since concern about rates is not within the scope of interests sought to be protected by the Atomic Energy Act. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 128 (1977); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1420-1421 (1977); Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC

426 (1977); Public Service Co. of Oklahoma (Black Fox Nuclear Power Station, Units 1 & 2), LBP-77-17; 5 NRC 657 (1977); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-4, 33 NRC 153, 158 (1991). Nor is such interest within the zone of interests protected by the National Environmental Policy Act. Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 & 2), ALAB-333, 3 NRC 804 (1976).

- (5) A person's interst as a taxpayer does not fall within the zone of interests sought to be protected by either
 the Atomic Energy Act or the National Environmental
 Policy Act. Tennessee Valley Authority (Watts BarNuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1421
 (1977); Northern States Power Co. (Pathfinder Atomic
 Plant), LBP-89-30, 30 NRC 311, 315 (1989).
- (6) Economic injury gives standing under the National Environmental Policy Act only if it is environmentally related. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1421 (1977); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-91-17, 33 NRC 379, 390-91 (1991). See also Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631, 640 (1975).

The test is a cognizable interest that might be adversely affected by one or another outcome of the proceeding. No interest is to be presumed. There must be a concrete demonstration that harm could flow from a result of the proceeding. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

A petitioner must allege an "injury-in-fact" which he will suffer as a result of a Commission decision. He may not derive standing from the interests of another person or organization, nor may he seek to represent the interests of others without their express authorization. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989).

An individual alleging that violation of constitutional provisions by governmental actions based on a statute will cause him identifiable injury should have standing to challenge the constitutionality of those actions. Philadel-phia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1445 (1982), citing, Chicano Police Officer's Association v. Stover, 526 F.2d 431, 436 (10th Cir. 1975), vacated and remanded on other grounds, 426 U.S. 994 (1976), holding on standing reaffirmed, 552 F.2d 918

(10th Cir. 1977); <u>3 K. Davis Administrative Law Treatise</u> 22.08, at 240 (1958).

The courts have not resolved the issue of whether an individual who suffers economic injury as a result of a Board's decision to bar him from working in a certain job would be within the zone of interests protected by the Atomic Energy Act. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985). See, e.g., Consumers Power Co. (Palisades Nuclear Power Facility), ALAB-670, 15 NRC 493, 506 (1982) (concurring opinion of Mr. Rosenthal), vacated as moot, CLI-82-18, 16 NRC 50 (1982).

Allegations that a plant will cause radiologically contaminated food which a person may consume are too remote and too generalized to provide a basis for standing to intervene. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1449 (1982); Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98, affirmed on other grounds, ALAB-816, 22 NRC 461 (1985).

For antitrust purposes, the interest of a ratepayer or consumer of electricity is not necessarily beyond the zone of interests protected by Section 105 of the Atomic Energy Act. However, the petitioner must still demonstrate that an injury to its economic interests as a ratepayer would be the proximate result of anticompetitive activities by the licensee. <u>Cetroit Edison Co.</u> (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-13, 7 NRC 583, 592-593 (1978).

Antitrust considerations to one side, neither the Atomic Energy Act nor the National Environmental Policy Act includes in its "zone of interests" the purely economic personal concerns of a member/ratepayer of a cooperative that purchases power from a prospective facility co-owner. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-470, 7 NRC 473, 474-475 (1978). See also Puget Sound Power & Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-26, 15 NRC 742, 744 (1982).

General economic concerns are not within the proper scope of issues to be litigated before the boards. Concerns about a facility's impact on local utility rates, the local economy, or a utility's solvency, etc., do not provide an adequate basis for standing of an intervenor or for the admission of an intervenor's contentions. Such economic concerns are more appropriately raised before state economic regulatory agencies Public Service Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984); Washington Public Power Supply System (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1190 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC

1445, 1447 (1984). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 30 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 194 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 437, 443 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-26, 33 NRC 537, 544, 546 (1991), reconsid. denied, LBP-91-32, 34 NPC 132 (1991).

For an amendment authorizing transfer of 20% of the ownership of a facility, allegations that a petitione, would "receive" only 80% of the electricity produced by the plant rather than the 100% "assumed in the 'NEPA balance'" were insufficient to give standing as a matter of right cause it was an economic injury outside the zone of interests to be protected and the NEPA cost-benefit analysis considers the overall benefits to society rather than benefits to an iso ad portion. Detroit Edison Co. (Enrico Fermi Atomic Power Lant, Unit 2), LBP-78-11, 7 NRC 381, 390-90, aff'd, ALAB-470, 7 NRC 473 (1978).

The Commission applies judicial tests of "injury-in-fact" and "arguably within the zone of interest" to determine strading. "Injury" as a premise to standing must come from an action, in contrast to failure to take an action. One who claims that an Order in an enforcement action should have provided for more extensive relief does not show injury from relief granted and thus does not have standing to contest the order. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 439 (1980).

A mere academic interest in the outcome of a proceeding will not confer standing. The petitioner must allege some injury that has or will occur from the action taken as a result of the proceeding. Skagit/Hanford, supra, 15 NRC at 743.

To establish the requisite "injury-in-fact" for standing, a petitioner must have a "real stake" in the outcome, that is, a genuine, actual, or direct stake, but not necessarily a substantial stake in the outcome. An organization meets this requirement where it has identified one of its members who possesses the requisite standing. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-448 (1979).

A petitioner who supports an application must, of course, show the potential for injury-in-fact to its interests before intervention can be granted. Such a petitioner must particularize a specific injury that it or its members would or might sustain should the application it supports be denied or should the license it supports be burdened with conditions or restrictions. Nuclear Engineering Co., Inc. (Sheffield, Ill.

Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

An alleged injury to health and safety, shared equally by all those residing near a reactor, can form the basis for standing. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1434 (1982).

A petitioner may base its standing upon a showing that his or her residence, or that of its members, is within the geographical zone that might be affected by an accidental release of fission products. Houston Lightir and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 443 (1979). See also Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 78 (1979). Close proximity has always been deemed enough standing alone, to establish the requisite interest for intervention. In such a case the petitioner does not have to show that his concerns are well-founded in fact, as such concerns are addressed when the merits of the case are reached. Distances of as much as 50 miles have been held to fall within this zone. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979); <u>Duquesne Light</u> Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 410, 429 (1984), citing, South Texas, supra, 9 NRC at 443-44; Enrico Fermi, supra, 9 NRC at 78; Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977); Texas Utilities Generating Co. (Comanche Peak St. Electric Station, Units 1 and 2), LBP-79-18, 9 NRC 728, 730 (1979).

An intervention petitioner who resides near a nuclear facility need not show a causal relationship between injury to its interest and the licensing action being sought in order to establish standing. Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 153 (1982), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 n.5 (1979).

A legislator lacks standing to intervene on behalf of the interests of his constituents who live near a nuclear facility. However, the legislator may participate in a proceeding in a private capacity if he can establish his own personal standing. Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 145 (1989).

In a materials license renewal proceeding under 10 CFR Part 30, as in construction permit and operating license proceedings under 10 CFR Part 50, proximity to a large source of radioactive material is sufficient to establish the requisite

interest for standing to intervene. Whether a petitioner's stated concern is in fact justified must be left for consideration when the merits of the controversy are reached. Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 154 (1982). See generally, LBP-82-24, 15 NRC 652 (1982), (decision reversed regarding petitioner's request to intervene). However, postcards and letters from individuals allegedly living near nuclear fuel element manufacturing and fuel element decladding facilities which make only vague and generalized allusions to danger or potential injury from radiation do not constitute a proper intervention statement. Rockwell International Corp. (Energy Systems Group Special Materials License No. SNM-21), LBP-83-65, 18 NRC 774, 777 (1983).

Although residence within 50 miles is not an explicit requirement for intervention by right, that limit is consistent with precedent. Without a showing that a plant has a far greater than ordinary potential to injure outside a 50 mile limit, a person has a weak claim to the protection of a full adjudicatory proceeding; rule-making or lobbying Congress are available to protect public interests of a general nature. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 178-179 (1981).

However, the fact that a petitioner may reside within a 50-mile radius of a facility will not always be sufficient to establish standing to intervene. A Board will consider the nature of the proceeding, and will apply different standing considerations to proceedings involving construction permits or operating licenses than to proceedings involving license amendments. Thus, in a license amendment proceeding involving an existing facility's fuel pool, a Board denied intervention to a petitioner who resided 43 miles from the facility because the petitioner failed to demonstrate that the risk of injury from the fuel pool extended that far from the facility.

Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98-99 (1985), affirmed on other grounds, ALAB-816, 22 NRC 461 (1985).

A petitioner's residence within 50 miles of a nuclear facility was insufficient, by itself, to establish standing to intervene in an exemption proceeding where the exemption at issue involved the protection of workers in the facility and did not have the clear potential for offsite consequences affecting the general population. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-4, 33 NRC 153, 156-57 (1991) (proposed license amendments involved

potential offsite safety consequences). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 29, 30 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 193, 194 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 437 (1991).

Residence more than 75 miles from a plant will not alone establish an interest sufficient for standing as a matter of right. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1447 (1982), citing, Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), ALAB-497, 8 NRC 312, 313 (1978); Public Service Co. of Oklahoma (Black Fox Units 1 and 2), ALAB-397, 5 NRC 1143, 1150 (1977).

A statement of asserted injury which is insufficient to found a valid contention may well be adequate to provide a basis for standing. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 115 (1979).

Failure to produce an environmental impact statement in circumstances where one is required has been held to constitute injury - indeed, irreparable injury. Palisades, supra, 10 NRC at 115-116. Persons residing within the close proximity to the locus of a proposed action constitute the very class which an impact statement is intended to benefit. Palisades, supra, 10 NRC at 116.

An organization has established standing by asserting that the Commission's decision not to prepare an environmental impact statement of the alleged de facto decommissioning of the Shoreham facility would injure the organization's ability to disseminate information which is essential to its organizational purpose and is within the zone of interests protected by the National Environmental Policy Act. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 435-36 (1991). The organization's alleged injury also was sufficient to establish standing in the Shoreham possession-only license proceeding where the organization asserted that the application for a possession-only license was another step in the alleged de facto decommissioning of the Shoreham facility. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-26, 33 NRC 537, 541-43 (1991), reconsid. denied, LBP-91-32, 34 NRC 132 (1991). The organization is not required to suffer direct environmental harm in order to establish standing. The organization's alleged injury to its informational purpose is a cognizable injury under NEPA as long as there is a reasonable risk that environmental harm may occur. Shoreham, supra, 34 NRC at 135-36, citing, City of Los Angeles v. NHTSA, 912 F.2d 478, 492 (D.C. Cir. 1990). The Licensing Board in the Rancho Seco

possession-only license proceeding has held that the alleged injury to an organization's ability to disseminate information is insufficient by itself to establish standing. There must also be a showing of a specific cognizable injury. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-91-30, 34 NRC 23, 27-28 (1991).

2.9.4.1.2 Standing of Organizations to Intervene

A party may intervene as of right only when he asserts his own interests under either the Atomic Energy Act or NEPA, and not when he asserts interests of third persons. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1421 (1977). Commission practice requires each party to separately establish standing. 10 CFR § 2.714. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981). An organization may meet the injury-in-fact test for standing in one of two ways. It may demonstrate an effect upon its organizational interest, or it may allege that its members, or any of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justifiable case had the members themselves brought suit. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646 (1979); Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 112-113 (1979). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987). Thus, a corporate environmental group has standing to intervene and represent members who have an interest which will be affected. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-322, 3 NRC 328 (1976). Note, however, that a member's mere "interest in the problem" witing a showing that the member will be affected is insulficient to give the organization standing. Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420 (1976). An organization does not have independent standing to intervene in a licensing proceeding merely because it asserts an interest in the litigation. Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 983 (1982), citing, Allied General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976). An organization seeking to intervene in its own right must demonstrate a palpable injury-in-fact to its organizational interests that is within the scope of interests of the Atomic Energy Act or the National Environmental Policy Act. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-530 (1991). In this vein, for national environmental groups, standing is

derived from injury-in-fact to individual members. South Texas, supra, 9 NRC at 647, citing, Sierra Club v. Morton, 405 U.S. 727 (1972). However, an organization specifically empowered by its members to promote certain of their interests has those members' authorization to act as their representative in any proceeding that may affect those interests. Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Un 's 1 and 2), ALAB-700, 16 NRC 1329, 1334 (1982); see Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 342-345 (1977); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-536, 9 NRC 402, 404 n.2 (1979); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 MRC 377, 395-396 n.25 (1979). A member's authorization may be presumed when the sole or primary purpose of the organization is to oppose nuclear power in general or the facility at bar in particular. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138, 140-41 (1991).

There is a presumption of standing where an organization raises safety issues on behalf of a member or members residing in close proximity to a plant. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 115 (1979); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987). The petitioning organization must identify the members whose interests it represents, and state the members' places of residence and the extent of the members' activities located within close proximity to the plant. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-4, 33 NRC 153, 158 (1991).

For a case holding that a petitioner cannot assert the rights of third parties as a basis for intervention, see Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 387, aff'd, ALAB-470, 7 NRC 473 (1978) (mother attempted to assert the rights of her son who attended medical school near a proposed facility).

"[I]t is clear that an organization may establish its standing through the interest of its members; but, to do so, it must identify specifically the name and address of at least one affected member who wishes to be represented by the organization." Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 583 (1978); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987).

Where an organization is to be represented in an NRC proceeding by one of its members, the member must demonstrate authorization by that organization to represent it. Fermi, Supra, 8 NRC at 583. See Georgia Power Co. (Vogtle Electric

Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 92 (1990).

If an official of an organization has the requisite personal interests to support an intervention petition, her signature on the organization's petition for intervention is enough to give the organization standing to intervene. However the organization is not always necessarily required to produce an affidavit from a member or sponsor authorizing it to represent that member or sponsor. The organization may be presumed to represent the interests of those of its members or sponsors in the vicinity of the facility. (Where an organization has no members, its sponsors can be considered the equivalent to members where they financially support the organization's cojectives and have indicated a desire to be represented by the organization). Consolidated Edison Co. of N.Y. (Indian Point, Unit No. 2) and Power Authority of the State of N.Y. (Indian Point, Unit No. 3), LBP-82-25, 15 NRC 715, 728-729, 734-736 (1982).

An organization which bases its standing upon the interests of its sponsors must: (1) identify at least one sponsor who will be injured; (2) describe the nature of that injury; and (3) provide an authorization for the organization to represent the sponsor in the proceeding. Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 314 (1989). To establish injury-in-fact, an organization must show a causal relationship between the alleged injury to its sponsor and the proposed licensing activity. Northern States Power Co. (Pachfinder Atomic Plant), LBP-90-3, 31 NRC 40, 43-44 (1990).

To establish the requisite "injury-in-fact" for standing, a petitioner must have a "real stake" in the outcome, a genuine, actual, or direct stake, but not necessarily a substantial stake in the outcome. An organization meets this requirement where it has identified one of its members who possesses the requisite standing. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-448 (1979). See Dellums v. NRC, 863 F.2d 968, 972-73 (D.C. Cir. 1988).

An organization seeking to obtain standing in a representative capacity must demonstrate that a member has in fact authorized such representation. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 444 (1979), aff'd, ALAB-549, 9 NRC 644 (1979); Detroit Edison Co. (Enrico Fermi Atomic Cower Plant, Unit 2), LBP-79-1, 9 NRC 73, 77 (1979); Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 113 (1979); Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit No. 1), LBP-82-52, 16 NRC 183, 185 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535,

9 NRC 377 (1979); see generally, CLI-81-25, 14 NRC 616 (1981), (Guidelines for Board); Cincinnati Gas and Electric Co. (Zimmer Nuclear Power Station, Unit 1), LBP-82-54, 16 NRC 210, 216 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 (1979); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 411 (1984); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 92 (1990); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 30 (1991). Where the affidavit of the member is devoid of any statement that he wants the organization to represent his accrests, it is unwarranted for the Licensing Board to infer such authorization, particularly where the opportunity was offered to revise the document and was ignored. Beaver Valley, supra, 19 NRC at 411.

An organization was denied representational standing where the person on whom it based its standing was not an individual member of the organization, but instead was serving as the representative of another organization. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 530-31 (1991).

To have standing, an organization must show injury either to its organizational interests or to the interests of members who have authorized it to act for them. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1437 (1982), citing, Warth v. Seldin, 422 U.S. 490, 511 (1975); Sierra Club v. Morton, 405 U.S. 727, 739-740 (1972); Consumers Power Co. (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 113 (1979); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 91-92 (1990). See Sacramento Munic 3al Utility District (Rancho Seco Nuclear Generating Station), LBP-31-17, 33 NRC 379, 389 (1991).

An organization depending upon injury to the interests of its members to establish standing, must provide with its individual in the identification of at least one member who will be individual in the description of the nature of that injury, and an authorization for the organization to represent that individual in the proceeding. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A. Sincolor NRC 1423, 1437 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALF3-515, 9 NRC 377, 390-96 (1976); Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 149 (1989); Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC

311, 313, 315-16 (1989); Curators of the University of Missouri, LBP-90-18, 31 NRC 559, 565 (1990); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 29 (1991); Sequoyah Fuels Corporation, LBP-91-5, 33 NRC 163, 166 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 192-93 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 434 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-26, 33 NRC 537, 541 (1991), reconsid. denied, LBP-91-32, 34 NRC 132 (1991). The alleged injury-in-fact to the member must be within the purpose of the organization. Curators, supra, 31 NRC at 565-66.

Absent express authorization, an organization which is a party to an NRC proceeding may not represent persons other than its own members. Since there are no Commission regulations allowing parties to participate as private attorneys general, an organization acting as an intervenor may not claim to represent the public interest in general in addition to representing the specialized interests of its members. In this vein, a trade association of home heating oil dealers cannot be deemed to represent the interests of employees and customers of the dealers. Similarly, an organization of residents living near a proposed plant site cannot be deemed to represent the interests of other residents who are not members. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481 (1977; Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 984 (1982), citing. Shoreham, supra, 5 NRC at 481, 483. In a Subpart L proceeding, an organization lacked standing to litigate the consequences of a possible accident in a research laboratory where the health risks from the accident would be confined within the laboratory and the organization had not demonstrated that any of its members were workers inside the laboratory. Curators of the University of Missouri, LBP-90-30, 32 NRC 95, 103 (1990).

An organization must, in itself, and through its own membership, fulfill the requirements for standing. Skagit/Hanford, supra, 16 NRC at 984, citing, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976).

An organization has sufficiently demonstrated its standing to intervene if its petition is signed by a ranking official of the organization who himself has the requisite personal interest to support the intervention. An organization seeking intervention need not demonstrate that its membership had voted to seek intervention on the matter raised by a submitted contention, and had authorized the author of the intervention petition to represent the organization. <u>Duke Power Company</u>

(Amendment to Materials License SNM-1773 -- Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 151 (1979).

An organization cannot meet the "interest" requirement for standing by acquiring a new member considerably after the deadline for filing of intervention petitions who meets the "interest" requirement, but who has not established good cause for the out-of-time filing. Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 335 (1979). The organization cannot in this situation amend its original pleading to show the interest of the new member; the Licensing Board has interpreted 10 CFR § 2.714(a)(3) to permit amendment of a petition relative to interest only by those individuals who have made a timely filing and are merely particularizing how their interests may be affected. WPPSS, supra, 9 NRC at 336.

Where the petitioner organization's membership solicitation brochure demonstrates that the organization's sole purpose is to oppose nuclear power in general and the construction and operation of nuclear plants in the northwest in particular, mere membership by a person with geographic standing to intervene, without specific representational authority, is sufficient to confer standing. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-16, 17 NRC 479, 482 (1983). See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138, 140-41 (1991).

A petitioner organization cannot amend its petition to satisfy the timeliness requirements for filing without leave of the Board to include an affidavit executed by someone who became a member after the due date for filing timely petition. WPPSS, supra, 17 NRC at 483.

It is not necessary for the individual on whom organizational standing is based to be conversant with, and able to defend, each and every contention raised by the organization in pursuing his interest. Litigation strategy and the technical details of the complex prosecution of a nuclear power intervention are best left to the resources of the organizational petitioners. WPPSS, supra, 17 NRC at 485.

2.9.4.1.3 Standing to Intervene in Export Licensing Cases

In <u>Edlow International Co.</u>, CLI-76-6, 3 NRC 563 (1976), the Commission dealt with the question as to whether the Natural Resources Defense Council and the Sierra Club could intervene as of right and demand a hearing in an export licensing case. The case involved the export of fuel to India for the Tarapur project. The petitioners contended that at least one member of the Sierra Club and several members of NRDC lived in India

and thus would be subject to any hazards created by the reactor.

In rejecting the argument that there was a right to intervene, the Commission stated:

If petitioners aliege a concrete and direct injury their claim of standing is not impaired merely because similar harm is suffered by many others. However, if petitioners' 'asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally dies not warrant exercise of jurisdiction'. 3 NRC at 576.

The Commission held that the alleged interests were <u>deminimis</u> (3 NRC at 575), noting that, while in domestic licensing cases claims of risk that were somewhat remote have been recognized as forming a basis for intervention, Section 189(a) of the Act (42 U.S.C. § 2239(a)) would not be given such a broadly permissive reading (3 NRC at 571) in export licensing cases.

Consistent with its decision in Edlow International Co., CLI-76-6, 3 NRC 563 (1976), the Commission has held that a petitioner is not entitled to intervene as a matter of right where its petition raises abstract issues relating to the conduct of U.S. foreign policy and protection of the national security. The petitioner must establish that it will be injured and that the injury is not a generalized grievance shared in substantially equal measure by all or a large class of citizens. In the Matter of Ten Applications, CLI-77-24, 6 NRC 525, 531 (1977). Nevertheless, the Commission may, in its discretion, direct further public proceedings if it determines that such proceedings would be in the public interest even though the petitioner has not established a right under Section 189 of the Atomic Energy Act to intervene or demand a public hearing. Id. at 532. See also Braunkohle Transport, USA (Import of South African Uranium Gre Concentrate), CLI-87-6, 25 NRC 891, 893 (1987), citing, 10 CFR § 110.84(a).

The contention that a major Federal action would have a significant environmental impact on a foreign nation is not cognizable under NEPA, and cannot support intervention.

Babcock & Wilcox (Application for Considerations of Facility Export License), CLI-77-18, 5 NRC 1332, 1348 (1977).

Judicial precedents wil! be relied on in deciding issues of standing to intervene in export licensing. Westinghouse Electric Corp. (Export to South Korea), CLI-80-30, 12 NRC 253, 258 (1980).

Institutional interests in disseminating information and educating the public do not establish a claim of right under Section 189a of the Atomic Energy Act for purposes of standing because it would not constitute an interest affected by the proceeding. There must be a causal nexus between the refusal to allow standing and the inability to disseminate information. Id. at 259.

2.9.4.1.4 Standing to Intervene in Specific Factual Situations

Residence within 30-40 miles of the plant site has been held to be sufficient to show the requisite interest in raising safety questions. Virginia Electric & Power Co. (North Anna Power Station. Units 1 & 2), ALAB-146, 6 AEC 631, 633-634 (1973); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372, n.6 (1973); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 190, 193, reconsid. den., ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 454-55 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988). Similarly, a person whose base of normal, everyday activities is within 25 miles of a nuclear facility ca. fairly be presumed to have an interest which might te affected by reactor construction and/or operation. Gul States Utilities Co. (River Bend Station, Units 1 & 2), LAB-183, 7 AEC 222, 226 (1974). A petitioner must affirmatively state his place of residence and the extent of his work activities which are located within close proximity to the facility. Florida Power and Light Co (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-91-2, 33 NRC 42, 47 (1991). A person who regularly commutes past the entrance of a nuclear facility while conducting normal activities is presumed to have the requisite interest for standing. Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 45 (1990). Moreover, persons who allege that they use an area whose recreational benefits may be diminished by a nuclear facility have been found to possess an adequate interest to allow intervention. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-73-10, 6 AEC 173 (1973). On the other hand, it is proper for a Board to dismiss an intervention petition where the intervenor changes residence to an area not in the proximity of the reactor and totally fails to assume any significant participatory role in the proceeding. Guli States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-358, 4 NRC 558 (1976).

A petitioner who resides far from a facility cannot acquire standing to intervene by asserting the interests of a third party who will be near the facility but who is not a minor or otherwise under a legal disability which would preclude his own participation. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-470, 7 NRC 473, 474 n.1 (1978).

"A petitioner may base its standing upon a showing that his or her residence, or that of its members, is 'within the geographical zone that might be affected by an accidental release of fission products.' Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 371 n.6 (1973)." Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 78 (1979). Distances of as much as 50 miles have been held to fall within this zone. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977) (50 miles); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 193 (1973) (40 miles); Fermi, supra (35 miles).

A petitioner which bases its standing on its proximity to a nuclear facility must describe the nature of its property or residence and its proximity to the facility, and should describe how the health and safety of the petitioner may be jeopardized. Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 315 (1989).

The Licensing Board refused to allow intervention on the basis of the possibility of petitioners' consuming produce, meat products, or fish originating within 50 miles of the site. Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 336 (1979).

A petitioner owning and renting out farmland 10 to 15 miles from the site and visiting the farm occasionally was held not to meet standing requirements. <u>WPPSS</u>, <u>supra</u>, 9 NRC at 336-338.

One living 26 miles from a plant cannot claim, without more, that his aesthetic interests are harmed. Conjectural interests do not provide a basis for standing. Nor does economic farm or one's status as a ratepayer provide a basis for standing. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242, 243 n.8 (1980).

The fact that the petitioner is an intervenor with respect to the same issue in another proceeding does not give him standing to intervene for the purpose of protecting himself from adverse precedent in the proceeding in question.

Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Power Station, Units 1, 2 & 3), ALAB-304, 3 NRC 1, 4 (1976).

A petitioner's standing in a non-NRC proceeding is insufficient to establish standing in an NRC proceeding, at least in the absence of a showing of the equivalence of applicable

standards and an overlap of relevant issues. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 91 (1990).

Under certain circumstances, petitioners who participated in an earlier NRC proceeding will not be required to establish again their interests to participate in a subsequent, separate NRC proceeding involving the same facility. Thus, an organization which participated in an earlier proceeding as the representative of one of its members who resided in close proximity to the facility was conditionally granted leave to intervene in a subsequent, separate proceeding involving the same facility even though the organization failed to append affidavits to its intervention petition establishing the residence of its member. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138, 141 (1991).

Where a license amendment grants a co-licensee precisely the relief which the co-licensee seeks as a party to a pending proceeding, the co-licensee loses its standing to assert its claim in the proceeding. Nuclear Fuel Services and New York State Energy Research and Development Authority (Western New York Nuclear Service Center), LBP-82-36, 15 NRC 1075, 1083 (1982).

For the views of various Appeal Board members on whether a petitioner has the requisite interest where he has an economic interest which competes with nuclear power in generating electricity, see the three opinions in Long Island Lighting Co. (Jamesport Nuclear Power Station), ALAB-292, 2 NRC 631 (1975).

A petitioner who supports an application must, of course, show the potential for injury-in-fact to its interests before intervention can be granted. Such a petitioner must particularize a specific injury that it or its members would or might sustain should the application it supports be denied or should the license it supports be burdened with conditions or restrictions. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

In a license amendment proceeding to allow two electric cooperatives to become co-owners of a nuclear plant, interests of a petitioner which stemmed from membership in the cooperative ("loss of equity," "threat of bankruptcy," "higher rates," "cost of replacement power," or "loss of property taxes") were insufficient to support standing as a matter of right. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386, aff'd, ALAB-470, 7 NRC 473 (1978).

Those persons who would have standing to intervene in new construction permit hearings, which would be required if good cause could not be shown for an extension of an existing construction permit, would have standing to intervene in [extension proceedings] to show that no good cause existed and, consequently, that new construction permit hearings would be required to complete construction. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), LBP-80-22, 12 NRC 191, 195, affirmed, ALAB-£19, 12 NRC 558, 563-565 (1980).

Economic injury to ratepayers is not sufficient to confer standing upon State Commissions to challenge proposed license revocation because such injury results from termination of the project and not Commission "action," and because such injury cannot be redressed by favorable Commission action. Northern States Power Company (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 526-527 (1980) (views of Chairman Ahearn and Commissioner Hendrie).

A statement of asserted injury which is insufficient to found a valid contention may well be adequate to provide a basis for standing. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 115 (1979). Failure to produce an environmental impact statement in circumstances where one is required has been held to constitute injury - indeed, irreparable injury. Palisades, supra, 10 NRC at 115-116. Persons residing within the close proximity to the locus of a proposed action constitute the very class which an impact statement is intended to benefit. Palisades, supra, 10 NRC at 116.

2.9.4.2 Discretionary Intervention

Although a petitioner may lack standing to intervene as of right under judicial standing concepts, he may nevertheless be admitted to the proceeding in the Licensing Board's discretion. In determining whether discretionary intervention should be permitted, the Commission has indicated that the Licensing Board should be guided by the following factors, among others:

- (a) Weighing in favor of allowing intervention --
 - 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 which 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 the petitioner's interest will be represented by existing parties.
 - (6) The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CL1-76-27, 4 NRC 610, 616 (1976). See also Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CL1-81-25, 14 NRC 616, 623 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1435 (1982); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), LBP-87-2, 25 NRC 32, 35 (1987); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-24, 32 NRC 12, 17 n.16 (1990), aff'd, ALAB-952, 33 NRC 521, 532 (1991). The discretionary intervention doctrine comes into play only in circumstances where standing to intervene as a matter of right has not been established. Duke Power Company (Oconee Nuclear Station and McGuire Nuclear Station), ALAB-528, 9 NRC 146, 148 n.3 (1979).

The primary factor to be considered is the significance of the contribution that a petitioner might make. Pebble Springs, supra. Thus, foremost among the factors listed above is whether the intervention would likely produce a valuable contribution to the NRC's decisionmaking process on a significant safety or environmental issue appropriately addressed in the proceeding in question. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418 (1977). See also Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-470, 7 NRC 473, 475 n.2 (1978). The need for a strong showing as to potential contribution is especially pressing in an operating license proceeding where no petitioners have established standing as of right and where, absent such a showing, no hearing would be held. Watts Bar, supra, 5 NRC at 1422.

For a case in which the Commission's discretionary intervention rule was applied, see Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-363, 4 NRC 631 (1976), where, despite petitioner's lack of judicial standing, intervention was permitted based upon petitioner's demonstration of the potential significant contribution it could make

on substantial issues of law and fact not otherwise raised or presented and a showing of the importance and immediacy of those issues.

for discretionary intervention, the burden of convincing the Licensing Board that a petitioner could make a valuable contribution lies with the petitioner. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 745 (1978). Considerations in determining the petitioner's ability to contribute to development of a sound record include:

- a petitioner's showing of significant ability to contribute on substantial issues of law or fact which will not be otherwise properly raised or presented;
- (2) the specificity of such ability to contribute on those substantial issues of law or fact;
- (3) justification of time spent on considering the substantial issues of law or fact;
- (4) provision of additional testimony, particular expertise, or expert assistance;
- (5) specialized education or pertinent experience.

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 33 (1981) (and cases cited therein). See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-24, 32 NRC 12, 16-17 (1990), aff'd, ALAB-952, 33 NRC 521, 532 (1991). Where a petitioner failed to respond to a Licensing Board order seeking clarification following presentation of evidence casting shadow on his purported qualifications, the Board was entitled to conclude that a petitioner would not help to create a sound record, and that the veracity of his other statements were suspect, leading to denial of his petition. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 139, 457-458 (1979).

As to the second and third factors to be considered with regard to discretionary intervention (the nature and extent of property, financial or other interests in the proceeding and the possible effect any order might have on the petitioner's interest), interests which do not establish a <u>right</u> to intervention because they are not within the "zone of interests" to be protected by the Commission should not be considered as positive factors for the purposes of granting discretionary intervention. <u>Detroit Edison Co.</u> (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 388, <u>aff'd</u>, ALAB-470, 7 NRC 473 (1978).

The Commission has broad discretion to allow intervention where it is not a matter of right. Such intervention will not be granted where conditions have already been imposed on a licensee, and no useful purpose will be served by that intervention. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442 (1980).

2.9.5 Contentions of Intervenors

Contentions constitute the method by which the parties to a licensing proceeding frame issues under NRC practice, similar to the use of pleadings in their judicial counterparts. Such contentions may be amended or refined as a result of additional information gained by discovery. <u>Texas Utilities</u> <u>Generating Co.</u> (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 NRC 241, 243 (1981).

The basis for a contention may not be undercut, and the contention thereby excluded, through an attack on the credibility of the expert who provided the basis for the contention. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-98, 16 NRC 1459, 1466 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).

The admission of a contention does not require anticipation of the contents of a document that has not been filed. A contention may address any current deficiency of the application, providing the contention is specific. Perry, supra, 16 NRC at 1469.

The Commission could not have intended that prior to admitting a contention advocating a safety measure, the Board should have found that a significant risk surely existed without such a safety measure. Such a finding should reflect the outcome of that litigation rather than its starting point. Consolidated Edison Co. of N.Y. (Indian Point, Unit 3) and Power Authority of the State of N.Y. (Indian Point, Unit 3), LBP-82-105, 16 NRC 1629, 1634 (1982).

A contention about a matter not covered by a specific rule need only allege that the matter poses a significant safety problem. That would be enough to raise an issue under the general requirement for operating licenses [10 CFR § 50.57(a)(3)] for finding of reasonable assurance of operation without endangering the health and safety of the public. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1946 (1982).

An intervenor's failure to particularize certain contentions or even, arguendo, to pursue settlement negotiations, when

taken by itself, does not warrant the out-of-hand dismissal of intervenors' proposed contentions. There is a sharp contrast between an intervenor's refusal to provide information requested by another party on discovery, even after a Licensing Board order compelling its disclosure, and the asserted failure of intervenors to take advantage of additional opportunity to narrow and particularize their contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-75, 16 NRC 986, 990 (1982).

Pursuant to 10 CFR § 2.707, the Licensing Board is empowered, on the failure of a party to comply with any prehearing conference order, "to make such orders in regard to the failure as are just." The just result, where intervenors have not fully availed themselves of an opportunity to further particularize their contentions, is to simply rule on intervenors' contentions as they stand, dismissing those proposed contentions which lack adequate bases and specificity. Shoreham, supra, 16 WRC at 990; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 592 (1985).

The Licensing Board may limit the time for the filing of contentions to less than that normally allotted by the rules, 10 CFR § 2.714(a)(3) and (b), so that all participants know before they arrive at the special prehearing conference, what position the proponents of the plant are taking or the various contentions. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 523 (1979). See also General Electric Co. (GETR Villecitos), LBP-83-19, 17 NRC 573, 578 (1983) and Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 12-13 (1980).

Commission regulations direct that contentions be filed in advance of a prehearing conference. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n.4 (1983), citing, 10 CFR § 2.714(b).

A Licensing Board ...Juid not address the merits of a contention when determining its admissibility. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1654 (1982), citing, Allens Creek, supra, 11 NRC at 542; Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29, 34 (1984); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 617 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 541 (1986); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 933 (1987); Vermont Yankee Nuclear Power Corp.

(Vermont Yankee Nuclear Power Station), L67-88-26, 28 NRC 440, 446 (1988), reconsidered on other grounds, L8P-89-6, 29 NRC 127 (1989), rev'd on other grounds, ALAB-919, 30 NRC 29 (1989), vacated in part on other grounds and remanded, CL1-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CL1-90-7, 32 NRC 129 (1990); Sierra Club v. NRC, 862 F.2d 222, 228 (9th Cir. 1988). See Consumers Power Co. (Midland Plant, Units 1 and 2), L8P-84-20, 19 NRC 1285, 1292 (1984), citing, Allens Creek, supra, 11 NRC 542; Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 216 (1974), rev'd on other grounds, CL1-74-12, 7 AEC 203 (1974); and Ducus Light Co. (Beaver Valley Power Station, Unit 1), ALAB-09, 6 AEC 243, 244-45 (1973). What is required is that an intervenor state the reasons for its concern. Seabrook, supra, citing, Allens Creek, supra.

The issue sought to be raised by a contention must fall within the scope of the issues specified in the Notice of Opportunity for Hearing. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 411-12 (1991), appeal denied on other grounds, CLI-91-12, 34 NRL 149 (1991).

Relevance is not the only criterion for admissibility of a contention. 10 CFR § 2.714 requires that the bases for each contention must be set forth with reasonable specificity. Wisconsin Electric Power Co. (Point Beach N. lear Plant, Unit 1), LBP-82-108, 16 NRC 1811, 1821 (1982). See [leveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 181-84, (1981); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 617, 627 (1985), rev'd and remanded on other grounds, CLI-SC-8, 23 NRC 241 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-85-15, 22 NRC 184, 187 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-8, 23 NRC 182, 188 (1986); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-10, 23 NRC 283, 285 (1986): Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 541 (1986); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 851 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 230 (1986); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 842, 847 (1987), aff'd in part on other grounds, ALAB-869, 26 NRC 13 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 930

(1987); Pacitic Gas and Electric Co. (Diable Canyon Nuclear Power Plant, Units 1 and 2), LBP-87-24, 26 N3C 159, 162, 165 (1987), aff'd, ALAB-880, 26 NRC 449, 456 (1987), remanded, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-877, 26 NRC 287, 292-94 (1987); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 455, 458 (1988), aff'd, ALAB-893, 27 NRC 627 (1988): Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 45-47 (1989) (documents cited by intervenors did not provide adequate bases for proposed contention), vacated in part and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990). A long and detailed list of omissions and problems does not, without more, provide a basis for believing that there is a safety issue. Discovered problems are not in themselves grounds for admitting a contention. <u>Texas Utilities Generating Co.</u> (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1263 n.6 (1983); Philadelphia <u>Clectric Co.</u> (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 725 (1985). <u>See Philadelphia Electric</u> Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 240 (1986).

The purposes of the basis-for-contention requirement are: (1) to help assure that the hearing process is not improperly invoked, for example, to attack statutory requirements or regulations; (2) to help assure that other parties are sufficiently put on notice so that they will know at least generally what they will have to defend against or oppose: (3) to assure that the proposed issues are proper for adjudication in the particular proceeding -i.e., generalized views of what applicable policies ought to be are not proper for adjudication; (4) t. assure that the contentions apply to the facility at bar; and (5) to assure that there has been sufficient foundation assigned for the contentions to warrant further explanation. General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-10, 23 NRC 283, 285 (1986), citing, Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). See <u>Texas Utilities Electric Co.</u> (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 931-33 (1987); Sierra Club v. NRC, 862 F.2d 222, 227-28 (9th Cir. 1988).

The fact that the Office of Investigation and the Office of Inspector and Auditor are investigating otherwise unidentified allegations is insufficient basis for admitting a contention. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 857-858 (1986).

Neither the Commission's Rules of Practice nor the pertinent statement of consideration puts an absolute or relative limit on the number of contentions that may be admitted to a licensing proceeding. See 10 CFR § 2.714(a), (b); 43 Fed. Req. 17798, 17799 (April 26, 1978). Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1757 (1982).

Pro se intervenors are not held in NRC proceedings to a high degree of technical compliance with legal requirements and, accordingly, as long as parties are sufficiently put on notice as to what has to be defended against or opposed, specificity requirements will generally be considered satisfied. However, that is not to suggest that a sound basis for each contention is not required to assure that the proposed issues are proper for adjudication. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2) and Power Authority of the State of N.Y. (Indian Point, Unit 3), LBP-83-5, 17 NRC 134, 136 (1983).

Agency procedural requirements simply raising the threshold for admitting some contentions as an incidental effect of regulations designed to prevent unnecessary delay in the hearing process are reasonable. <u>Duke Power Co.</u> (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1047 (1983).

Should the subsequent issuance of the SER lead to a change in the FSAR and thereby modify or moot a contention based on that document, that contention can be amended or promptly disposed of by summary disposition or a stipulation. However, the possibility that such a circumstance could occur does not provide a reasonable basis for deferring the filing of safety-related contentions until the Staff issues its SER. <u>Catawba</u>, supra, 17 NRC at 1049.

NRC has the burden of complying with NEPA. The adequacy of the NRC's environmental review as reflected in the adequacy of a DES or FES is an appropriate issue for litigation in a licensing proceeding. Because the adequacy of those documents cannot be determined before they are prepared, contentions regarding their adequacy cannot be expected to be proferred at an earlier stage of the proceeding before the documents are available. That does not mean that no environmental contentions can be formulated before the Staff issues a DES or FES. While all environmental contentions may, in a general sense, ultimately be challenges to the NRC's compliance with NEPA, factual aspects of particular issues can be raised before the DES is prepared. Just as the submission of a safety-related contention based on the FSAR is not to be deferred simply because the Staff may later issue an SER requiring a change in a safety matter, so too, the Commission expects that the filing of an environmental concern based on the applicant's environmental report

will not be deferred simply because the Staff may subsequently provide a different analysis in its DES. <u>Duke Power Co.</u> (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983). <u>See</u> 10 CFR § 2.714(b)(2)(iii), 54 <u>Fed. Reg.</u> 33168, 33180 (August 11, 1989), as corrected, 54 <u>Fed. Reg.</u> 39728 (Sept. 28, 1989).

When information is not available, there will be good cause for filing a contention based on that information promptly after the information becomes available. However, the five late-filing factors must be balanced in determining whether to admit such a contention filed after the initial period for submitting contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

2.9.5.1 Pleading Requirements for Contentions

In <u>BPI v. AEC</u>, 502 F.2d 424 (D.C. Cir. 1974), the U.S. Court of Appeals for the D.C. Circuit upheld, in part, the pleading requirements of 10 CFR § 2.714 governing patitions to intervene. Specifically, the Court ruled that:

(a) the requirement that contentions be specified does not violate Section 189(a) of the Act; and

(b) the requirement for a basis for contentions is valid.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-75, 16 NRC 986, 993 (1982), citing. BPI v. Atomic Energy Commission, 502 F.2d 424, 428-429 (D.C. Cir. 1974); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 591 n.5 (1985).

A petitioner who satisfies the interest requirement will be granted intervention if he states at least one contention within the scope of the proceeding with a proper factual basis. The Licensing Board has no duty to consider additional contentions for the purpose of determining the propriety of intervention once it has found that at least one good contention is stated. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-130, 6 AEC 423, 424 (1973); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371. 372 (1973); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 245 (1973); Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 & 2), LBP-76-10, 3 NRC 209, 220 (1976). Although these cases predate amendments to 10 CFR § 2.714, those amendments retain, and in fact specifically recite, the "one good contention rule." See also Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 622 (1981); Public Service Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984); Georgia Power Co. (Volte Electric Generating Plant, Units 1 and 2), LBP-84-35, 20 NRC 887, 916 (1984); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-833, 23 NRC 257, 261 (1986); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-20, 33 NRC 416, 417 (1991).

Since a mandatory hearing is not required at the operating license stage, Licensing Boards should "take the utmost care" to assure that the "one good contention rule" is met in such a situation because, absent successful intervention, no hearing need be held. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 12 (1976). See also Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-183, 7 AEC 222, 226 n.10 (1974).

Note that a State participating as an "interested State" under 10 CFR § 2.715(c) need not set forth in advance any affirmative contentions of its own. Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 392-393 (1976).

Reasonable specificity requires that a contention include a reasonably specific articulation of its rationale. If an applicant believes that it can readily disprove a contention admissible on its face, the proper course is to move for summary disposition following its admission, not to assert a lack of specific basis at the pleading stage. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2070-2071 (1982).

An intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention. Neither Section 189a of the Atomic Energy Act nor Section 2.714 of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or Staff. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 412 (1984), citing, Catawba, supra, 16 NRC at 468. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 175-76 (1991). In Catawba, supra, the Board dealt with the question of whether the intervenor had provided sufficient information to support the admission of its contentions. An Appeal Board has rejected an applicant's claim that Catawba imposes on an

intervenor the duty to include in its contentions a critical analysis or response to any applicant or NRC Staff positions on the issues raised by the conter ions which might be found in the publicly available documen by material. Such detailed answers to the positions of other parties go, not to the admissibility of contentions, but to the actual merits of the contentions. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 629-31 (1988).

The basis and specificity requirements are particularly important for contentions involving broad quality assurance and quality control issues. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 634 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1740-41 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 89 (1983).

Nor is a Licensing Board authorized to admit conditionally, for any reason, a contention that falls short of meeting the specificity requirements. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 635 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 725 (1985). The Braidwood Board permitted the intervenor to conduct further discovery and to amend its late-filed contention in order to comply with the basis and specificity requirements. The Board was willing to accommodate the intervenor because its contention involved potentially serious safety issues concerning the applicant's QA/QC program. Braidwood, supra, 21 NRC at 634-636, citing, Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-31, 20 NRC 446, 509-511 (1984). According to the Board, its decision was not a conditional admission of a contention in violation of the Catawba ruling. The Board explained that it did reject the intervenor's late-filed contention, and that it properly exercised its discretion by giving the intervenor the opportunity to file an amended contention. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1737-39 (1985), rev'd and remanded, CLI-86-8, 23 NRC 241 (1986). The precedential value of the Licensing Board's allowance of further discovery and the subsequent filing of an amended contention is in doubt because of the Commission's reversal of the Licensing Board's admission of the contention for failure to satisfy the 10 CFR § 2.714(a)(1) standards for late-filed contentions. Braidwood, supra, 23 NRC 241. See also Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 476-79 (1985) (Moore, J., dissenting).

A Licensing Board has defined the failure to demonstrate the existence of a genuine dispute on a material issue of fact as a failure to provide any factual evidence or supporting documents that produce some doubt about the adequacy of a specified portion of applicant's documents or that provide supporting reasons that tend to show that there is some specified omission from applicant's documents. The intervention petitioner in this case did not advance an independent basis for any of its contentions, and instead relied on alleged omissions and errors in the applicant's documents and analyses. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 515, 521 & n.12 (1990), citing, 10 CFR §§ 2.714(b)(2)(ii) and (iii).

A recent amendment to the Commission's regulations has superceded prior NRC caselaw which held that 10 CFR § 2.714 did not require a petitioner to detail the evidence which would be offered in support of its proposed contentions. Fed. Reg. 33168, 33180 (August 11, 1989), as corrected, 54 Fed. Reg. 39728 (Sept. 28, 1989). 10 CFR § 2.714(b)(2)(ii) now specifically requires a petitioner to provide a concise statement of the alleged facts or expert opinion which support its proposed contention, together with references to those specific sources and documents of which the petitioner is aware, and on which the petitioner intends to rely to establish those facts or expert opinion. The petitioner also must provide sufficient information to establish the existence of a genuine dispute with the applicant on a material issue of law or fact. 10 CFR § 2.714(b)(2)(iii). See Georgia Power Co. (Vostle Electric Generating Plant, Units 1 and 2), LBP-91-21, 33 NRC 419, 422-24 (1991); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CL1-91-12, 34 NRC 1:9, 155-56 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 166, 169-170, 175-76 (1991).

contentions must give notice of facts which petitioners desire to litigate and must be specific enough to satisfy the requirements of 10 CFR § 2.714. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit No. 1), LBP-82-52, 16 NRC 183, 188-190, 193 (1982); see generally, CLI-81-25, 14 NRC 616 (1981) (guidelines for Board).

A simple reference to a large number of documents does not provide a sufficient basis for a contention. An intervenor must clearly identify and summarize the incidents being relied upon, and identify and append specific portions of the documents. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1741 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 200, 216 (1976);

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989).

When a broad contention (though apparently admissible) has been admitted at an early stage in the proceeding, intervenors should be required to provide greater specificity and to particularize bases for the contention when the information required to do so has been developed. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-84-28, 20 NRC 129, 131 (1984).

The Commission's Rules of Practice do not require that a contention be in the form of a detailed brief; however, a contention, alleging an entire plan to be inadequate in that it fails to consider certain matters, should be required to specify in some way each portion of the plan alleged to be inadequate. Long Island Lighting to. (Shoreham Nuclear Power Station, Unit 1), LBP-82-75, 16 NRC 986, 993 (1982).

Originality of framing contentions is not a pleading requirement. Commonwealth Edison Company (Boron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 689 (1980).

Extraneous matters such as preservation of rights, statements of intervention, and directives for interpretation which accompany an intervenor's list of contentions will be disregarded as contrary to the Commission's Rules of Practice. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 689-690 (1980).

It is not essential that pleadings of contentions be technically perfect. The Licensing Board would be reluctant to deny intervention on the basis of skill of pleading where it appears that the petitioner has identified interests which may be affected by a proceeding. Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 650 (1979).

It is neither Congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly observed. Sounder practice is to decide issues on their merits, not to avoid them on technicalities.

Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 116-117 (1979); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 860 (1987), aff'd in part on other grounds.

ALAB-869, 26 NRC 13 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987). However, a party is bound by the literal terms of its own contention.

Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 709 (1985); Philadelphia Electric Co. (Limerick Generating Station,

Units 1 and 2), ALAB-836, 23 NRC 479, 505 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 208 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 242 (1986); Carolina Power and Light Co. and North Carolina Fastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 545 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 316 (1986); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 284 (1987); Public Service Co. of New Hampshire (Seabrool Station, Units 1 and 2), LBP-88-6, 27 NRC 245, 254 (1988), aff'd on other grounds, ALAB-892, 27 NRC 485 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 371-372 & n.310 (1991).

In order to determine the scope of an otherwise admissible contention, a Board will consider the contention together with its stated bases to identify the precise issue which the intervenor seeks to raise. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 & n.11 (1988).

A contention must be rejected where: it constitutes an attack on applicable statutory requirements; it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations; it is nothing more than a generalization regarding the intervenor's views of what applicable policies ought to be; it seeks to raise an issue which is not proper for adjudication in the proceeding; or it does not apply to the facility in question; or it seeks to raise an issue which is not concrete or litigable. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982), citing, Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1263 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-83-76, 18 NRC 1266, 1268-1269 (1983).

At the pleading stage all that is required for a contention to be acceptable for litigation is that it be specific and have a basis. Whether or not the contention is true is left to litigation on the merits in the licensing proceeding.

Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 551 n.5 (1983), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2),

ALAB-806, 21 NRC 1183, 1193 n.39 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 694 (1985). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, 23-24 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271, 282 (1989), aff'd on other grounds, ALAB-940, 32 NRC 225 (1990); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 411 (1991), appeal denied, CLI-91-12, 34 NRC 149 (1991).

In pleading for the admission of a contention, an intervenor is not required to prove the contention, but must allege at least some credible foundation for the contention. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 457 (1987), remanded, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1987).

A basis for a contention is set forth with reasonable specificity if the applicants are sufficiently put on notice so that they will know, at least generally, what they will have to defend against or oppose, and if there has been sufficient foundation assigned to warrant further exploration of the proposed contention. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29, 34 (1984), citing, Peach Bottom, supra. 8 AEC at 20-21; Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1742 (1985), rev'd and remanded on other grounds, CLI-86-E, 23 NRC 241 (1986). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 427-28 (1990).

2.9.5.2 Requirement of Oath from Intervenors

Amendments to 10 CFR § 2.714, effective on May 26, 1978, eliminated the requirement that petitions to intervene be filed under oath.

2.9.5.3 Requirement of Contentions for Purposes of Admitting Petitioner as a Party

10 CFR § 2.714 requires that there be some basis for the contentions set forth in the supplement to the petition to intervene and that the contentions themselves be set forth with particularity. In deciding whether these criteria are met, Licensing Boards are not to decide whether the proposed contentions are meritorious. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), ALAB-183, 7 AEC 210, 216 (1974); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244 (1973). The Appeal Board has prohibited Licensing Boards from dismissing contentions on the

merits at the pleading stage even if demonstrably insubstantial. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-66, 18 NRC 780, 789 (1983), citing. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 (1980).

For a petitioner who supports a license application, all that need be initially asserted to fulfill the contention requirement of 10 CFR § 2.714 is that the application is meritorious and should be granted. After contentions opposing the license application have been set forth, however, the Licensing Board is free to require intervenors supporting the application to take a position on those contentions. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 n.5 (1978).

Where intervenors have been consolidated, it is not necessary that a contention or contentions be identified to any one of the intervening parties, so long as there is at least one contention admitted per intervenor. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 687 (1981).

Recent amendments of 10 CFR § 2.714 have raised the threshold for the admission of a petitioner's proposed contentions. 54 Fed. Reg. 33168, 33180 (August 11, 1989), as corrected, 54 Fed. Reg. 39728 (Sept. 28, 1989). A petitioner must provide a concise statement of the alleged facts or expert opinion which support its proposed contentions, together with references to those specific sources and documents of which the petitioner is aware, and on which the petitioner intends to rely to establish those facts or expert opinion. 10 CFR § 2.714(b) (2)(ii). The petitioner also must provide sufficient information to establish the existence of a genuine dispute with the applicant on a material issue of law or fact. 10 CFR § 2.714(b)(2)(iii). See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-21, 33 NRC 419, 422-24 (1991); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155-56 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 166, 169-170, 175-76 (1991).

The basis with reasonable specificity standard requires that an intervenor include in a safety contention a statement of the reason for his contention. This statement must either allege with particularity that an applicant is not complying with a specified regulation, or allege with particularity the existence and detail of a substantial safety issue on which the regulations are silent. In the absence of a "regulatory gap," the failure to allege a violation of the regulations or

an attempt to advocate stricter requirements than those imposed by the regulations will result in a rejection of the contention, the latter as an impermissible collateral attack on the Commission's rules. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982), citing, 10 CFR § 2.758.

Prior to entertaining any suggestion that a contention not be admitted, the proponent of the contention must be given some chance to be heard in response. The petitioners cannot be required to have anticipated in the contentions themselves the possible arguments their opponents might raise as grounds for denying admission of those proffered contentions. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979).

Although the Rules of Practice do not explicitly provide for the filing of either objections to contentions or motions to dismiss them, each presiding board must fashion a fair procedure for dealing with such objections to contentions as are filed. The cardinal rule of fairness is that each side must be heard. Allens Creek, supra. 10 NRC at 524.

2.9.5.4 Material Used in Support of Contentions

While it may be true that the important document in evaluating the adequacy of an agency's environmental review is the agency's final impact statement, a petitioner for intervention may look to the applicant's Environmental Report for factual material in support of a proposed contention. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 303 (1979). A petitioner must file contentions based on any environmental issues raised by the applicant's Environmental Report. However, the petitioner may be permitted to file new or amended contentions based on new information contained in subsequent NRC environmental documents. 10 CFR § 2.714(b)(2)(iii), 54 d. Reg. 33168, 33180 (August 11, 1989), as corrected, 54 Fed. Reg. 39728 (Sept. 28, 1989).

The specificity and basis requirements for a projosed contention under 10 CFR § 2.714(b) can be satisfied where the contention is based upon allegations in a sworn complaint filed in a judicial action and the applicable passages therein are specifically identified. This holds notwithstanding the fact that the allegations are contested. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292-94 (1984).

An intervenor can establish a sufficient basis for a contention by referring to a source and drawing an assertion from that reference. <u>Commonwealth Edison Co.</u> (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC

1732, 1740 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548-49 (1980). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 69-70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded on other grounds. Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). However, where a contention is based on a factual underpinning in a document which has been essentially repudiated by the source of that document, a licensing Board will dismiss the contention if the intervenor cannot offer another independent source of information on which to base the contention. Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 136 (1987); Public Service Co. of New Hampshire (Seabrook Station. Units 1 and 2), CLI-89-3, 29 NRC 234, 241 (1989).

2.9.5.5 Timeliness of Submission of Contentions

Not later than 15 days before a special prehearing conference or, where no special prehearing conference is held, 15 days prior to the holding of the first prehearing conference, the petitioner shall file a supplement to his petition to intervene which must include a list of his contentions. Additional time for filing he supplement may be granted based upon a balancing of the factors listed in 10 CFR § 2.714(a)(1). 10 CFR § 2.714(b); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 576 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508 (1982); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-82-91, 16 NRC 1364, 1366-67 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 67-68 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 40 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990).

Commission regulations direct that contentions be filed in advance of a prehearing conference. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n.4 (1983), citing, 10 CFR § 2.714(b).

In considering the admissibility of late-filed contentions, the Licensing Board must balance the five factors specified in 10 CFR § 2.714(a) for dealing with nontimely filings. Cincinnati Gas and Electric Company (William H. Zimmer Nuclear

Station), LBP-79-22, 10 NRC 213, 214 (1979); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 725 (1985).

A late filed contention must meet the requirements concerning good cause for late filing pursuant to 10 CFR § 2.714(a)(1). Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-90, 16 NRC 1359, 1360 (1982); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-82-91, 16 NRC 1364, 1366-67 (1982); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 117 (1983).

The factors which must be balanced in determining whether to admit a late filed contention pursuant to 10 CFR § 2.714(a)(1) are: (1) Good cause, if any, for failure to file on time; (2) The availability of other means whereby the petitioner's interest will be protected; (3) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (4) The extent to which the petitioner's interest will be represented by existing parties; (5) The extent to which the petitioner's participation will broaden the issues or delay the proceeding. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1141 (1983): Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1261-1262 (1983), citing, Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167 (1983); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-80, 18 NRC 1404, 1405 (1983); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29, 31 (1984), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1291 (1984), citing, Catawba, supra, 17 NRC 1041; Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 326 (1985); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 628 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant), LBP-85-49, 22 NRC 899, 909, 913-14 (1985); <u>Texas Utilities Electric Co.</u> (Comanche Peak Steam Electric Station, Unit 1), LBP-86-36A, 24 NRC 575, 579-80 (1986), aff'd, ALAB-868, 25 NRC 912, 921 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 74 n.4 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-883, 27 NRC 43, 49 (1988), vacated in part on other grounds, CLI-88-8, 28 NRC 419 (1988); <u>Vermont Yankee Nuclear Power Corp.</u> (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 447-48 & n.9 (1988), reconsidered on other grounds, LBP-89-6, 29 NRC

127 (1989), rev'd on other grounds, ALAB-919, 30 NRC 29 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 68 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 34 (1990), aff'd on other grounds, ALAB-936, 32 NRC 75 (1990).

A Board must perform this balancing of the five lateness factors, even where all the parties to the proceeding have waived their objections and agreed, by stipulation, to the admission of the late-filed contention. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CL1-86-8, 23 NRC 241, 251 (1986). See Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 (1985).

The required balancing of factors is not obviated by the circumstances that the proffered contentions are those of a participant that has withdrawn from the proceeding. South Texas, supra, 16 NRC at 1367, citing, Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 795-98 (1977).

In balancing the lateness factors, all factors must be taken into account; however, there is no requirement that the same weight be given to each of them. South Texas, supra, 16 NRC at 1367, citing South Carolina Electric and Gas Co. (Virgil C. Summer Nucl tation, Unit 1), ALAB-642, 13 NRC 881, 895 (1981): Consum. Power Co. (Midland Plant, Units and 2), LBP-84-20, 19 NRC 1, 35, 1292 (1984). A Board is entitled to considerable discretion in the method it employs to balance the five lateness factors. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 631 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 107 (1976).

When nere are no other available means to protect a petitioner's interests, that factor and the factor of the extent to which other parties would protect that interest are entitled to less weight than the other three factors enumerated in 10 CFR § 2.714(a). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 118 (1983); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 528 (1985, citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1

and 2), LBP-C5-11, 21 NRC 609, 629 (1985), rev'd and remanded on other grounds. CLI-86-8, 23 NRC 241, 245 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 75 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), a 'd, ALAB-918, 29 NRC 473 (1989), remanded, Massachusetts v. ARC, 924 F.26 311, 333-337 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 34 (1990), aff'd on other grounds. ALAB-936, 32 NRC 75 (1990).

Where good cause for failure to file on time has not been demonstrated, a contention may still be accepted, but the burden of justifying acceptance of a late contention on the basis of the other factors is considerably greater. Even where the factors are balanced in favor of admitting a late-filed contention, a tardy petitioner without a good excuse for lateness may be required to take the proceeding as he finds it. South Texas, supra, 16 NRC at 1367, 1368, citing, Nuclear Services, Inc. and N.Y.S. Atomic and Space Development Authority (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275, 276 (1975).

Where good cause for a late filing is demonstrated, the other factors are given lesser weight. Midland, supra, 16 NRC at 589; Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1261 (1983); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292 (1984).

In considering the extent to which the petitioner had shown good cause for filing supplements out-of-time, the Licensing Board recognized that the petitioner was appearing pro se until just before the special prehearing conference. Petitioner's early performance need not adhere rigidly to the Commission's standards and, in this situation, the Board would not weigh the good cause factor as heavily as it might otherwise. Florida Power and Light Company (Turkey Point Nuclear Generating Station, Units 3 and 4), LBP-79-21, 10 NRC 183, 190 (1979).

Withdrawal of one party has been held not to constitute good cause for the delay of a petitioner in seeking to substitute itself for the withdrawing party, or, comparably, to adopt the withdrawing party's contentions. South Texas, supra, 16 NRC at 1369, citing, Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 796-97 (1977). The same standards apply to an existing intervenor seeking to adopt the abandoned contentions of another intervenor as to a "newly arriving legal stranger." South Texas, supra, 16 NRC at 1369. However, if under the circumstances of a particular case, there is a sound foundation for allowing one entity to

replace another, it can be taken into account in making the "good cause" determination under 10 CrR & 2.714(a). Houston ighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 384 (1985), citing, River Bend, supra, 6 NRC at 796.

The appearance of a newspaper article is not sufficient grounds for the late-filing of a contention about matters that have been known for a long time. Cleveland electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-11, 15 NRC 348 (1982). Compare, LBP-82-53, 16 NRC 196, 200-01 (1982) (Up-to-date journals demonstrate good cause) and LBP-82-15, 15 NRC 555, 557 (1982).

An intervenor cannot establish good cause for filing a late contention when the information on which the contention is based was public's available several months prior to the filing of the contention. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 628-629 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Philadelphia Electric Co. (Limerick Generating Station, Uni ~ 1 and 2), ALAB-828, 23 NRC 13, 21 (1986).

The determination whether to accept a contention tha "vas susceptible of filing within the period prescribed by the Rules of Practice on an untimely basis involves a consideration of all five 10 CFR § 2.714(a) factors and not just the reason, substantial or not as the case may be, why the petitioner did not meet the deadline. <u>Duke Power Co.</u> (Catawba Nuclear Station, Unit: 1 and 2), ALAB-687, 16 NRC 460, 470 (1982), <u>vacated in part on other grounds</u>, CLI-83-19, 17 NRC 1041 (1983).

The proponent of a late contention should affirmatively address the five factors and demonstrate that, on balance, the contention should be admitted. Consumers P Jer Co. (Midland Plant, Units 1 and 2), LBP-82-63, 15 NRC 571, 578 (1982), citing, Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980).

Section 189a of the Atomic Energy Act of 1954, as amended ("Atomic Energy Act" or "Act") does not require the Commission in give controlling weight to the good cause factor in 10 CFR 2 2 714(a)(1)(i) in determining whether to admit a late-filed contention based on licensing documents which were not required to be prepared early enough to provide a basis for a timely-filed contention. The unavailability of those documents does not constitute a showing of good cause for admitting a late-filed contention when the factual prodicate for this contention is available from other sources in a timely manner. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1043 (1983).

The institutional unavailability of a licensing-related document does not establish good cause for filing a contention late if information was publicly available early enough to provide the basis for the timely filing of that contention. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045, 1048 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 117 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-30, 20 NRC 426, 436-37 (1984); <u>Duke Power Co.</u> (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 84-85 (1985). Section 189a of the Act is not offended by a procedural rule that simply recognizes that the public's interest in an efficient administrative process is not properly accounted for by a rule of automatic admission for certain late-filed contentions. Catawba, supra, 17 NRC at 1046. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 82 (1985), citing, Catawba, CLI-83-19, supra, 17 NRC at 1045-47. Cf. BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974).

10 CFR § 2.714(a)(1) requires that all five factors enumerated in that regulation should be applied : : latefiled contentions even where the licensing-related document, upon which the contentions are predicated, was not available within the time prescribed for filing timely contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 116 (1983); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 82 (1985), citing, Catawba, CLI-83-19, supra, 17 NRC at 1045. The Commission has held that any refiled contention would have to meet the five-factor test of 10 CFR § 2.714(a)(1), if not timely filed, even if the specifics could not have been known earlier because the documents on which they were based had not yet been issued. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-66, 18 NRC 780, 796 (1983), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).

Even where an applicant does not comply with a standing order to serve all relevant papers on the Board and parties, the admissibility of an intervenor's late-filed contention directed toward such papers must be determined by a balancing of all five factors. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 657 (1984), overruling in part, LBP-84-16, 19 NRC 857, 868 (1984).

Under 10 CFR § 2.714(a), good cause may exist for a late-filed contention if it: (1) is wholly dependent upon the content of a particular document; (2) could not therefore be advanced with any degree of specificity in advance of the public availability of that document; and (3) is tendered with the requisite degree of promptness once that document comes into

existence and is accessible for public examination. Nevertheless, such a contention is amenable to rejection on the strength of a balancing of all five of the late intervention factors set forth in that section. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n.4 (1983), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983); Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29, 31 (1984). See also Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-16, 29 NRC 508, 514 (1989). When a licensing-related document becomes available, an intervenor must file promptly its contentions based on that document. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-945, 33 NRC 245 (1991). However, an intervenor is not required to file contentions based upon a draft licensing-related document. West Chicago, supra, 29 NRC at 514.

An intervenor who has previously submitted timely contentions may establish good cause for the late filing of amended contentions by showing that the amended contentions: restate portions of the earlier timely-filed contentions; and were promptly filed in response to a Commission decision which stated a new legal principle. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), LBP-86-36A, 24 NRC 575, 579 (1986), aff'd, ALAB-868, 25 NRC 912, 923 (1987).

A submitted document, while perhaps incomplete, may be enough to require contentions related to it to be filed promptly. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

The fact that a party may have delayed the filing of a contention in the hopes of settling the issue without resorting to litigation in an adjudicatory proceeding does not constitute good cause for failure to file on time.

Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986).

The admissibility of a late-filed contention must be determined by a balancing of <u>all</u> five of the late intervention factors in 10 CFR § 2.714(a). <u>Public Service Co. of New Hampshi</u>: (Seabrook Station, Units 1 and 2), CLI-83-23, 18 NKC 311, 312 (1983).

When an intervenor does not show good cause for the non-timely submission of contentions, it must make a compelling showing on the other four criteria of 10 CFR § 2.714(a). Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear

Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983), citing, Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Unit: 1 and 2), LBP-85-11, 21 NRC 609, 629 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241, 244 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 76 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded. Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 34 (1990), aff'd on other grounds, ALAB-936, 32 NRC 75 (1990).

With respect to the second factor of 10 CFR § 2.714(a) (availability of other means of protecting late petitioners' interest) and the fourth factor (the extent to which late petitioners' interest will be represented by existing parties), the applicants in Zimmer, supra, 10 NRC at 215, claimed that the Staff would represent the public interest and by inference, late petitioners' interest as well. The Licensing Board ruled that although the Staff clearly represents the public interest, it cannot be expected to pursue all issues with the same diligence as an intervenor would pursue its own issue. Moreover, unless an issue was raised in a proceeding, the Staff would not attempt to resolve the issue in an adjudicatory context. Applicants' reliance on the Staff review gave inadequate consideration to the value of a party's pursuing the participational rights afforded it in an adjudicatory hearing. Zimmer, supra, 10 NRC at 215; Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-80, 18 NRC 1404, 1407-1408 (1983); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 527-528 (1985); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 629 (1985), rev'd and remanded on other grounds. CLI-86-8, 23 NRC 241 (1986). See Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 384 n.108 (1985); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173-77 (1983); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant), LBP-85-49, 22 NRC 899, 913-14 (1985).

When considering the second factor of 10 CFR § 2.714(a)(1), the availability of other means to protect an interveror's interests, a Board may only inquire whether there are other forums in which the intervenor itself might protect its interests. Houston Lighting and Power Co. (South Texa: oject, Units 1 and 2), LBP-85-9, 21 NRC 524, 528 (1985), siting, Houston Lighting and Power Co. (Allens Creek

Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 513 n.13 (1982).

Informal negotiations among parties, even under a Board's aegis, is not an adequate substitute for a party's right to pursue its legitimate interest in issues in formal adjudicatory hearings. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1191 (1985).

Late contentions filed by a city did not overlap a contention of another intervenor which had already been accepted in the proceeding. The representative of a private party cannot be expected to represent adequately the presumably broader interests represented by a governmental body. Zimmer, supra, 10 NRC at 216 n.4, citing, Nuclear Fuel Services, inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

In determining what other means are available to protect a petitioner's interests, a board will consider the issues sought to be raised, the relief requested, and the stage of the proceeding. There may well be no alternative to providing a petitioner with an opportunity to participate in an adjudicatory hearing. However, in some circumstances, such as where the proposed contention deals with routinely filed post licensing reports by an applicant, a 10 CFR 2.206 petition may be sufficient to protect the petitioner's interests. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 21-22 (1986).

A contention based on a Draft Environmental Statement (DES) which contains no new information relevant to the contention, lacks good cause for late filing. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-79, 16 NRC 1116, 1118 (1982).

Before a contention is excluded from consideration, the intervenor should have a fair opportunity to respond to applicant's comments. When an intervenor files a late contention and argues that it has good cause for late filing because of the recent availability of new information, intervenor should have the chance to comment on applicant's objection that the information was available earlier. Intervenors should be permitted to reply to the opposition to the admission of a late filed contention. The principle that a party should have an opportunity to respond is reciprocal. When intervenor introduces material that is entirely new, applicant will be permitted to respond. Due process requires an opportunity to comment. If intervenors find that they must make new factual or legal arguments, they should clearly identify the new material and give an explanation of why they did not anticipate the need for the material in their initial filing. If the explanation is satisfactory, the material may be considered, but

applicant will be permitted to respond. <u>Cleveland Electric Illuminating Co.</u> (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-89, 16 NRC 1355, 1356 (1982).

The finding of good cause for the late filing of contentions is related to the total previous unavailability of information. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 59 (1983).

Ability to contribute to the record is relevant to the admissibility of late-filed contentions. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52, 56 n.5 (1983). An intervenor should specify the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986), citing, Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 75 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). An intervenor must demonstrate special expertise concerning the subjects which it seeks to raise. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 35-36 (1990), aff'd on other grounds, ALAB-936, 32 NRC 75 (1990). An intervenor need not present expert witnesses or indicate what testimony it plans to present if it has established its ability to contribute to the development of a sound record in other ways. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-80, 18 NRC 1404, 1408 n.14 (1983). See also Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1182-1183 (1983).

Nevertheless, an intervenor should provide specific information from which a Board can infer that the intervenor will contribute to the development of a sound record on the particular issue in question. An intervenor's bare assertion of past effectiveness in contributing to the development of a sound record on other issues in the current proceeding and in past proceedings is insufficient. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 85 (1985), citing, WPPSS, supra, 18 NRC at 1181, and Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station),

ALAB-919, 30 NRC 29, 40-41 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990).

In determining an intervenor's ability to assist in the development of a sound record, it is erroneous to consider the performance of counsel in a different proceeding.

Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246-47 (1986). Contra Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 926-27 (1987).

The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record is only meaningful when the proposed participation is on a significant, triable issue. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-30, 20 NRC 426, 440 (1984).

The extent to which an intervenor may reasonably be expected to assist in developing a sound record is the most significant of the factors to be balanced with respect to late-filed contentions, at least in situations where litigation of the contention will not delay the proceeding. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRc 524, 528 (1985).

Given a proceeding initially noticed in 1978 for which a Special Prehearing Conference was held early in 1979, any currently filed contentions would be untimely. That does not mean, after balancing the factors in 10 CFR § 2.714(a) that the untimeliness should bar admission of the contention. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52, 55 (1983), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982).

A party seeking to add a new contention after the close of the record must satisfy both standards for admitting a late-filed conte. ion set forth in 10 CFR § 2.714(a)(1) and the criteria, as established by case law, for reopening the record, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1136 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1715 (1982), despite the fact that nontimely contentions raise matters which have not been previously litigated. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983), citing, Diablo Canyon, supra, 16 NRC at 1714-15.

In evaluating the extent to which admission of a late-filed contention would delay the proceeding, a Board must determine

whether, by filing late, the intervenor has occasioned a potential for delay in the completion of the proceeding that would not have been present had the filing been timely. <u>Texas Utilities Electric Co.</u> (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 927 (1987).

Where the delay in filing contentions is great and the issues are serious, the seriousness of an issue does not imply that the party raising it is somehow forever exempted from the Rules of Practice. <u>Cincinnati Gas and Electric Co.</u> (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983).

The fifth criteria for admission of a late-filed contention requires a board to determine whether the proceeding, and not the issuance of a license or the operation of a plant, will be delayed. Philadelphia Electric Co. (Limerick Generaling Station, Units 1 and 2), ALAB-828, 23 NRC 13, 23 (1986).

The admission of any new contention may broaden and delay the completion of a proceeding by increasing the number of issues which must be considered. A Board may consider the following factors which may minimize the impact of the new contention: how close to the scheduled hearing date the new contention was filed; and the extent of discovery which had been completed prior to the filing of the new contention. A Board will not admit a new contention which is filed so close to the scheduled hearing date that the parties would be denied an adequate opportunity to pursue discovery on the contention. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 630-631 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 889 (1981).

A Board may refuse to admit a late-filed contention where it determines that the contention is so rambling and disorganized that any attempt to litigate the contention would unduly broaden the issues and delay the proceeding. <u>Texas Utilities Generating Co.</u> (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1262-1263 (1983).

An intervenor's voluntary withdrawal of other, unrelated contentions may not be used to counterbalance any delays which might be caused by the admission of a late-filed contention. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 248 (1986).

In evaluating the potential for delay, it is improper for the Board to balance the significance of the late-filed contention against the likelihood of delay. Such a balancing of factors is made in the overall evaluation of the five criteria for the

admission of a late-filed contention. Braidwood, supra, 23 NRC at 248.

The Licensing Board's general authority to shape the course of a proceeding, 10 CFR § 2.718(e), will not be utilized as the foundation for the Board's acceptance of a late-filed contention. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1290 (1984).

2.9.5.6 Contentions Challenging Regulations

The assertion of a claim in an adjudicatory proceeding that a regulation is invalid is barred as a matter of law. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-456, 7 NRC 63, 65 (1978).

Contentions challenging the validity of NRC regulations are inadmissible under the provisions of 10 CFR § 2.758.

Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 692-93 (1980); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-784, 20 NRC 845, 846 (1984); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 544 (1986). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-89-1, 29 NRC 5, 18 (1989); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 410 (1991), appeal denied, CLI-91-12, 34 NRC 149, 156 (1991) (petitioner may not attack the testing methodology specified in a regulation, but may attack new proposed performance requirements).

When a Commission regulation permits the use of a particular analysis or technique, a contention which asserts that a different analysis or technique should be utilized is inadmissible because it attacks the Commission's regulations. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-83-76, 18 NRC 1266, 1273 (1983).

Although Commission regulations may permit a board in some situations to approve minor adjustments to Commission-prescribed standards, a board will reject as inadmissible a contention which seeks major changes to those standards. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit I), ALAB-832, 23 NRC 135, 147-48 (1986) (intervenors sought major expansion of the emergency planning zone), rev'd in part, CLI-87-12, 26 NRC 383, 395 (1987) (the Appeal Board incorrectly admitted contentions which involved more than just minor adjustments to the emergency planning zone). See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 507 n.48 (1986).

Under 10 CFR § 2.758, the Commission has withheld jurisdiction from Licensing Boards to entertain attacks on the validity of Commission regulations in individual licensing proceedings except in certain "special circumstances."

Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 88-89 (1974); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-85-33, 22 NRC 442, 444 (1985).

10 CFR § 2.758 sets out those special circumstances which an intervenor must show to be applicable before a contention attacking the regulations will be admissible. Further, 10 CFR § 2.758 provides for certification to the Commission of the question of whether a rule or regulation of the Commission should be waived in a particular adjudicatory proceeding where an adjudicatory board determines that, as a result of special circumstances, a prima facie showing has been made that application of the rule in a particular way would not serve the purposes for which the rule was adopted and, accordingly, that a waiver should be authorized. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 584-585 (1978); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 546 (1986).

Intervenors are authorized to file a petition for a waiver of a rule, pursuant to 10 CFR § 2.758. It is not, however, enough merely to allege the existence of special circumstances; such circumstances must be set forth with particularity. The petition should be supported by proof, in affidavit or other appropriate form, sufficient for the Licensing Board to determine whether the petitioning party has made a prima facie showing for waiver. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2073 (1982).

2.9.5.7 Contentions Involving Generic Issues

Licensing Boards should not accept in individual licensing cases any contentions which are or are about to become the subject of general rulemaking. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 816 (1981); Duke Power Co. (Catawba Nuclear Station. Units 1 and 2), ALAB-813, 22 NRC 59, 86 (1985). They appear to be permitted to accept "generic issues" which are not and are not about to become the subject of rulemaking, however. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79 (1974). See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-83-76, 18 NRC 1266, 1271 (1983). In order for a party or interested State to introduce such an

issue into a proceeding, it must do more than present a list of generic technical issues being studied by the Staff or point to newly issued Regulatory Guides on a subject. There must be a nexus established between the generic issue and the particular permit or application in question. To establish such a nexus, it must be shown that (1) the generic issue has safety significance for the particular reactor under review, and (2) the fashion in which the application deals with the matter is unsatisfactory or the short term solution offered to the problem under study is inadequate. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 773 (1977); Illinois Power Co. (Clinton Power Station, Unit No. 1), LBP-82-103, 16 NRC 1603, 1608 (1982), citing. River Bend, supra, 6 NRC at 773; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1657 (1982); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 418, 420 (1984), citing, River Bend, supra, 6 NRC at 773, and Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245, 248 (1978).

Parties interested in litigating unresolved safety issues must do something more than simply offer a checklist of unresolved issues; they must show that the issues have some specific safety significance for the reactor in question and that the application fails to resolve the matters satisfactorily.

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-729, 17 NRC 814, 889 (1983), aff'd on other grounds, CLI-84-11, 20 NRC I (1984), citing, Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 772-73 (1977).

In Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-1A, 15 NRC 43 (1982), the Licensing Board rejected the applicant's contention that Douglas Point, supra, requires dismissal whenever there is pending rulemaking on a subject at issue. The Board distinguished Douglas Point on several grounds: (1) In Douglas Point, there were no existing regulations on the subject, while in Perry, regulations do exist and continue in force regardless of proposed rulemaking; (2) The issue in Perry -whether Perry should have an automated standby liquid control system (SLCS) given the plant's specific characteristics -- is far more specific than the issues in Douglas Point (i.e., nuclear waste disposal issues); (3) The proposed rules recommend a variety of approaches on the SLCS issue requiring analysis of the plant's situation, so any efforts by the Board to resolve the issue would contribute to the analysis; (4) The Commission did not bar consideration of such issues during the pendency of its proposed rulemaking, as it could have. Unless the Commission has specifically directed that contentions be dismissed during pendency of proposed rulemaking, no such dismissal is required.

Where the Commission has explicitly barred Board consideration of the subject of a contention on which rulemaking is pending, the Board may not exercise jurisdiction over the contention. Cleveland Electric Illuminating Co. (Perry Nuclear Plant, Units 1 and 2), LBP-82-11, 15 NRC 348, 350 (1982). Where the Commission has held its own decision whether to review an Appeal Board opinion in abeyance pending its decision whether or not to initiate a further rulemaking, and has instructed the Licensing Boards to defer consideration of the issue, a contention involving the issue is unlitigable and inadmissible. Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 417-18 (1984), citing, Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79 (1974).

A brief suspension of consideration of a contention will not be continued when it no longer appears likely that the Commission is about to issue a proposed rule on the matter which was the subject of the contention. <u>Cleveland Electric Illuminating Co.</u> (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-42, 14 NRC 842, 846-847 (1981).

While a Licensing Board should not accept contentions that are or are about to become the subject of general rulemaking, where a contention has long since been admitted and is still pending when notice of rulemaking is published, the intent of the Commission determines whether litigation of that contention should be undertaken. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-51, 14 NRC 896, 898 (1981), citing, Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79 (1974).

Before a contention presenting a generic issue can be admitted, the intervenor must demonstrate a specific nexus between each contention and the facility that is the subject of the proceeding. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-15, 15 NRC 555, 558-59 (1982); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-87-24, 26 NRC 159, 165 (1987). aff'd on other grounds, ALAB-880, 26 NRC 449, 456-57 n.7 (1987), remanded on other grounds, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988).

Contentions which constitute a general attack upon the methods used by the NRC Staff to insure compliance with regulations, without raising any issues specifically related to matters under construction, are not appropriate for resolution in a particular licensing proceeding. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 690 (1980).

2.9.5.8 Contentions Challenging Absent or Incomplete Documents

At the contention formulation stage of the proceeding, an intervenor may plead the absence or inadequacy of documents or responses which have not yet been made available to the parties. The contention may be admitted subject to later refinement and specification when the additional information has been furnished or the relevant documents have been filed. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), IBP-80-30, 12 NRC 683 (1980). Note, however, that the absence of licensing documents does not justify admission of contentions which do not meet the basis and specificity requirements of 10 CFR § 2.714. That is, a nonspecific contention may not be admitted, subject to later specification, even though licensing documents that would provide the basis for a specific contention are unavailable. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

Rulings on contentions concerning undeveloped portions of emergency plans may be deferred. To admit such contentions would be to risk unnecessary litigation. But to deny the contentions would unfairly ignore the insufficient development of these portions. Fairness and efficiency seem to dictate that rulings on such contentions be deferred. The objectives of such deferrals are to encourage negotiation, to avoid unnecessary litigation, and to make necessary litigation as focused as possible. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-18, 19 NRC 1020, 1028 (1984). Cf. Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1), ALAB-727, 17 NRC 760, 775-76 (1983).

When information is not available, there will be good cause for filing a contention based on that information promptly after the information becomes available. However, the five late-filing factors must be balanced in determining whether to admit such a contention filed after the initial period for submitting contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1190 (1985).

2.9.5.9 Contentions re Adequacy of Security Plan

The adequacy of a nuclear facility's physical security plan may be a proper subject for challenge by intervenors in an operating license proceeding. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), CLI-80-24, 11 NRC 775, 777 (1980); Consolidated Edison Co. (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 949 (1974).

An intervanor may not introduce a contention which questions the adequacy of an applicant's security plan "against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person, or (b) use or deployment of weapons incident to U.S. defense activities." Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-27. 22 NRC 126, 135-36, 138 (1985), citing, 10 CFR § 50.13.

Where an intervenor seeking to challenge an applicant's security plan does not produce a qualified expert to review the plan and declines to submit to a protective order, its vague contentions must be dismissed for failure to meet conditions that could produce an acceptably specific contention. <u>Duke Power Co.</u> (Catawba Nuclear Station, Units 1 and 2), LBP-82-51, 16 NRC 167, 177 (1982).

2.9.5.10 Defective Contentions

Where contentions are defective, for whatever reason, Licensing Boards have no duty to recast them to make them acceptable under 10 CFR § 2.714. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 406 (1974).

However, although a Licensing Board is not required to recast contentions to make them acceptable, it also is not precluded from doing so. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 295-296 (1979). See also Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 406-408, 412-413 (1991), appeal denied on other grounds, CLI-91-12, 34 NRC 149 (1991). The Palo Verde Licensing Board erred by inferring a basis for the petitioners' contention when the petitioners failed to comply with the requirements of 10 CFR § 2.714(b)(2) to clearly state the basis for its contention and to provide sufficient information to support its contention. Palo Verde, supra, 34 NRC at 155-56.

It is the responsibility of the intervenor, not the Licensing Board, to provide the necessary information to satisfy the basis requirement for the admission of its contentions.

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 416-417 (1990).

A Licensing Board has consolidated otherwise inadmissible contentions with properly admitted contentions involving the same subject matter where such consolidation would not require the applicant to mount a defense that is substantially different or expanded from that which would be required by the admitted contentions. Long Island Lighting Co. (Shoreham

Nuclear Power Station, Unit 1), LBP-89-1, 29 NRC 5, 33-34 (1989).

2.9.5.11 Discovery to Frame Contentions

A petitioner is not entitled to discovery to assist him in framing the contentions in his petition to intervene.

Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 192, reconsid. den., ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973).

An intervenor may not file a vague contention and place the burden upon the applicants and Staff to obtain further details through discovery. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 426-27 (1990).

2.9.5.12 Stipulations on Contentions

(RESERVED)

2.9.5.13 Appeals of Rulings on Contentions

Appellate review of a Licensing Board ruling rejecting some but not all of a party's contentions is available only at the end of the case. Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-492, 8 NRC 251, 252 (1978).

An Appeal Board may grant interlocutory review of a Licensing Board's rejection of one or more contentions only if the effect of the rejection is to wholly deny a petition to intervene. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-873, 26 NRC 154, 155 (1987), citing, 10 CFR § 2.714a.

Appeal Boards grant Licensing Boards broad discretion in balancing the five factors which make up the criteria for late-filed contentions listed in 10 CFR § 2.714(a)(1). However, an Appeal Board may overturn a Licensing Board's decision where no reasonable justification can be found for the outcome that is determined. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1190 (1985), citing, Washington Public Power Supply System (WPPSS Nuclear Project 3), ALAB-747, 18 NRC 1167, 1171 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20-21 (1986) (abuse of discretion by Licensing Board). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 443 (1987); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 922 (1987); Public Service Co. of New Hampshire

(Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 481-82 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. Cir. 1991), dismissed as moot, ALAB-946, 33 NRC 245 (1991).

2.9.6 Conditions on Grants of Intervention

10 CFR § 2.714(f) (formerly, 10 CFR § 2.714(e)) empowers a Licensing Board to condition an order granting intervention on such terms as may serve the purposes of restricting duplicative or repetitive evidence and of having common interests represented by a single spokesman. 10 CFR § 2.715a deals with the general authority to consolidate parties in construction permit or operating license proceedings. In a license amendment proceeding, there is no good reason why the provisions of Section 2.715a cannot be looked to in exercising the power granted by Section 2.714(f) (formerly, 10 CFR § 2.714(e)), which section applies to all adjudicatory proceedings. Duke Power Company (Oconee Nuclear Station and McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 n.9 (1979).

2.9.7 Appeals of Rulings on Intervention

The regulations contain a special provision allowing an interlocutory appeal from a Licensing Board order on petitions to intervene. The appellant must file a notice to appeal and supporting brief within 10 days after service of the Licensing Board's order. 10 CFR § 2.714a. Other parties may file briefs in support of or in opposition to the appeal within 10 days of service of the appeal.

An Appeal Board will not review the grant or denial of an intervention petition unless an appeal has been taken under 10 CFR § 2.714a. Once the time prescribed in that Section for perfecting an appeal has expired, the order below becomes final. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), ALAB-713, 17 NRC 83, 84 n.1 (1983).

It is settled under the Commission's Rules of Practice that a petitioner for intervention may not take an interlocutory appeal from Licensing Board action on his petition unless that action constituted an outright denial of the petition. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 384 (1979); Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), ALAB-712, 17 NRC 81, 32 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 235-36 (1991). A petitioner may appeal only if the Licensing Board has denied the petition in its entirety, i.e., has refused the petitioner entry into the case. A petitioner may not appeal an order admitting petitioner but

denying certain contentions. 10 CFR § 2.714(b); Power Authority of the State of New York (Greene County Nuclear Plant), ALAB-434, 6 NRC 471 (1977); Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-302, 2 NRC 856 (1975); Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-286, 2 NRC 213 (1975); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), ALAB-273, 1 NRC 492, 494 (1975); Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-269, 1 NRC 411 (1975); Philadelphia Electric Co. (Fulton Generating Station, Units 1 & 2), ALAB-206, 7 AEC 841 (1974).

A Licensing Board's failure, after a reasonable length of time, to rule on a petition to intervene is tantamount to a denial of the petition. Where the failure of the Licensing Board to act is both unjustified and prejudicial, the petitioner may seek interlocutory review of the Licensing Board's delay under 10 CFR § 2.714a, which provides for interlocutory review of denials of petitions to intervene. Detroit Edison Company (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426 (1977).

A State seeking to participate as an "interested State" under 10 CFR § 2.715(c) may appeal an order barring such participation. However, the State's special status does not confer any right to seek review of an order which allows the State to participate but excludes an issue which it seeks to raise. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976).

Unlike a private litigant who must file at least one acceptable contention in order to be admitted as a party to a proceeding, an interested State may participate in a proceeding regardless of whether or not it submits any acceptable contentions. Thus, an interested State may not seek interlocutory review of a Licensing Board rejection of any or all of its contentions because such rejection will not prevent an interested State from participating in the proceeding. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-838, 23 NRC 585, 589-90 (1986).

The applicant, the Staff and any party other than the petitioner can appeal an intervention order only on the ground that the petition should have been delied in whole. 10 CFR § 2.714a(c). An appeal from an intervention order carries with it a mandatory briefing requirement. Failure to file a brief will result in dismissal of the appeal. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-140, 6 AEC 575 (1973). See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-5, 33 NRC 238, 241 (1991).

For a reaffirmation of the established rule that an appeal concerning an intervention petition must await the ultimate grant or denial of that petition, see Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-586, 11 NRC 472 (1980); Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-472, 7 NRC 570, 571 (1978). In this vein, a Licensing Board order which determines that petitioner has met the "interest" requirement for intervention and that mitigating factors overcome the untimeliness of the petition but does not rule on whether petitioner has met the "contentions" requirement is not a final disposition of the petition to intervene. Cincinnati Gas & Electric Company (William H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 864 (1980); Greenwood, supra; Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-833, 23 NRC 257, 260-61 (1986).

Similarly, the action of a Licensing Board in provisionally ordering a hearing and preliminarily ruling on petitions for leave to intervene is not appealable under 10 CFR § 2.714a in a situation where the Board cannot rule on contentions and the need for an evidentiary hearing until after the special prehearing conference required under 10 CFR § 2.751a and where the petitioners denied intervention may qualify on refiling. Consumers Power Company (Midland Plant, Units 1 & 2), LBP-78-27, 8 NRC 275, 280 (1978).

While the regulations do not explicitly provide for Commission review of decisions on intervention, the Commission has entertained appeals in this regard and review by the Commission apparently may be sought. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939 (1978).

With regard to briefing on appeals, 10 CFR § 2.714a does not authorize an appellant to file a brief in reply to parties' briefs in opposition to the appeal. Rather, leave to file a reply brief must be obtained. Nuclear Engineering Co. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 745 n.9 (1978).

2.9.7.1 Standards for Reversal of Rulings on Intervention

A Licensing Board has wide latitude to permit the amendment of defective petitions prior to the issuance of its final order on intervention. The Board's decision to allow such amendment will not be disturbed on appeal absent a showing of gross abuse of discretion. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 128, 194 (1973).

A Licensing Board's determination as to the "personal interest" of a petitioner will be reversed only if it is irrational. <u>Duquesne Light Co.</u> (Beaver Valley Power Station,

Unit 1), ALAB-109, 6 AEC 243, 244 (1973); Prairie Island, supra.

Similarly, a Licensing Board's determination that good cause exists for untimely filing will be reversed only for an abuse of discretion. <u>USERDA</u> (Clinch River Breeder Peactor Plant), ALAB-354, 4 NRC 383 (1976); <u>Virginia Electric Power Co.</u> (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976); <u>Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20 (1976); <u>Gulf States Utilities Co.</u> (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976).</u>

A Licensing Board ruling on a discretionary intervent' request will be reversed only if the Licensing Board List discretion. Florida Power and Light Co. (Turkey Pour Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NKC 521, 532 (1991).

The principle that Licensing Board determinations on the sufficiency of allegations of affected interest will not be overturned unless irrational presupposes that the appropriate legal standard for determining the "personal interest" of a petitioner has been invoked. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 n.5 (1979).

2.9.8 Reinstatement of Intervenor After Withdrawal

A voluntary withdrawal of intervention is "without prejudice" in that it does not constitute a legal bar to the later reinstatement of the intervention upon the intervenor's showing of good cause. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), LBP-73-41, 6 AEC 1057 (1973). The factors to be considered in the good cause determination are generally the same as those considered under 10 CFR § 2.714(a) with primary emphasis on the delay of the proceeding, prejudice to other parties and adequate protection of the intervenor's interests. Grand Gulf, supra.

2.9.9 Rights of Intervenors at Hearing

In an operating license proceeding (with the exception of certain NEPA issues), the applicant's license application is in issue, not the adequacy of the Staff's review of the application. An intervenor in an operating license proceeding is free to challenge directly an unresolved generic safety issue by filing a proper contention, but it may not proceed on the basis of allegations that the Staff has somehow failed in its performance. Concomitantly, once the record has closed, a generic safety issue may be litigated directly only if standards for late-filed contentions and reopening the record are met. Pacific Gas and Electric Co. (Diablo Canyon Nuclear

Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

The rules cannot legitimately be read as requiring that, once an intervenor is represented by counsel, that counsel be the party's sole representative in the proceeding. <u>Consumers Power Co.</u> (Midland Plant, Units 1 and 2), LBP-83-28, 17 NRC 987, 994 (1983).

When a party is permitted to enter a case late, it is expected to take the case as it finds it. It follows that when a party that has participated in a case all along simply changes representatives in midstream, knowledge of the matters already heard and received into evidence is imputed to it. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1246 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

An intervenor's status as a party in a proceeding does not of itself make it a spokesman for others. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-34, 24 NRC 549, 550 n.1 (1986), aff'd, ALAB-854, 24 NRC 783 (1986), citing, Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 33 (1979).

Under principles enunciated in Prairie Island, an intervenor may ordinarily conduct additional cross-examination and submit proposed factual and legal findings on contentions sponsored by others. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 863, 867-68 (1974), aff'd in pertinent part, CLI-75-1, 1 NRC 1 (1975). However, that does not elevate the intervenor's status to that of co-sponsor of the contentions. The Commission's regulations require that, at the outset of a case, each intervenor submit "a list of the contentions which it seeks to have litigated." 10 CFR § 2.714(b). It follows from this that one intervenor may not introduce affirmative evidence on issues raised by another intervenor's contentions. Prairie Island, supra, 8 AEC at 869 n.17; Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 383 n.102 (1985).

Contentions left without a sponsor due to the withdrawal of one intervenor may be adopted by another intervenor upon satisfaction of the five-factor balancing test ordinarily used to determine whether to grant a non-timely request for intervention, or to permit the introduction of additional contentions by an existing intervenor after the filing date. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 381-82 (1985). See 10 CFR §§ 2.714(a)(1),(b). For a detailed discussion of the five-factor test, See Sections 2.9.3.3.3 and 2.9.5.5.

A contention which has been joined by two joint intervenors may not be withdrawn without the consent of both joint intervenors. Either of the joint intervenors may litigate the contention upon the other intervenor's withdrawal of sponsorship for the contention. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-22, 24 NRC 103, 106 (1986).

An intervenor in an operating license proceeding may not proceed on the basis of allegations that the Staff has somehow failed in its performance; at least when the evidence shows that the alleged inadequate Staff review did not result in inadequacies in the analyses and performance of the applicant. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 565 n 29 (1983), citing, Profic Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

2.9.9.1 Burden of Proof

A licensee generally bears the ultimate burden of proof.

Metropolitan Edison Co. (Three Mile Island Nuclear Station,
Unit 1), ALAB-697, 16 NRC 1265, 1271 (1982), citing, 10 CFR
§ 2.732. But intervenors must give some basis for further
inquiry. Three Mile Island, supra. 16 NRC at 1271, citing,
Pennsylvania Power and Light Co. and Alleghany Electric
Cooperative. Inc. (Susquehanna Steam Electric Station, Units 1
and 2), ALAB-613, 12 NRC 317, 346 (1980). See Section 3.7.

An intervenor has the burden of going forward with respect to issues raised by his contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 191 (1975); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 388-89 (1974). For a more detailed discussion, see Section 3.7.2.

2.9.9.2 Presentation of Evidence

2.9.9.2.1 Affirmative Presentation by Intervenor/Participants

An intervenor may not adduce affirmative evidence on an issue not raised by him unless and until he amends his contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 869 n.17, reconsid. den., ALAB-252, 8 AEC 1175 (1974), aff'd, CLI-75-1, 1 NRC 1 (1975). This rule does not apply to an interested State participating under 10 CFR § 2.715(c). Such a State may produce evidence on issues not raised by it. Project Management Corp. (Clinch River Breeder Reactor), ALAB-354, 4 NRC 383, 392-93 (1976).

2.9.9.2.2 Consolidation of Intervenor Presentations

A Licensing Board, in permitting intervention, may consolidate intervenors for the purpose of restricting duplicalive or repetitive evidence and argument. 10 CFR § 2.714(f) (formerly, 10 CFR § 2.714(e)). In addition, parties with substantially similar interests and contentions may be ordered to consolidate their presentation of evidence, cross-examination and participation in general pursuant to 10 CFR § 2.715a. An order consolidating the participation of one party with the others may not be appealed prior to the conclusion of the proceeding. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-496, 8 NRC 308-309 (1978); Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-83-52A, 18 NRC 265, 272-73 (1983), citing, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981). See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1601 (1985).

The NRC Rules of Practice permit the consolidation of intervenors, but only where those parties have substantially the same interest that may be affected by the proceeding and where consolidation would not prejudice the rights of any party. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-28, 17 NRC 987, 993 (1983)

Only parties to a Commission licensing proceeding may be consolidated. Petitioners who are not admitted as parties may not be consolidated for the purposes of participation as a single party. 10 CFR § 2.715a; Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981).

Where intervenors have filed consolidated briefs they may be treated as a consolidated party; one intervenor may be appointed lead intervenor for purposes of coordinating responses to discovery, but discovery requests should be served on each party intervenor. It is not necessary that a contention or contentions be identified to any one of the intervening parties, so long as there is at least one contention admitted per intervenor. Cieveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 687 (1981).

The Commission has issued a policy statement relating to consolidation of intervenors and the conduct of licensing proceedings. Pursuant to that Commission guidance, consolidation should not be ordered when it will prejudice the rights of any intervenor; however, in all appropriate cases, single, lead intervenors should be designated to present evidence, conduct cross-examination, submit briefs, and propose findings of fact, conclusions of law, and argument. Except where other

intervenors' interests will be prejudiced or upon a showing that the record will be incomplete, those activities should not be performed by such other intervenors. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981).

2.9.9.3 Cross-Examination by Intervenors

An intervenor may engage in cross-examination of witnesses dealing with issues not raised by him if the intervenor has a discernible interest in resolution of those issues. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-75-1, 1 NRC 1 (1975); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 867-68 (1974); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-85-2, 21 NRC 24, 32 (1985), vacated as moot, ALAB-842, 24 NRC 197 (1986). Licensing Poards must carefully restrict and monitor such cross-examination, however, to avoid repetition. Prairie Island, supra, 1 NRC 1.

In general, the intervenor's cross-examination may not be used to expand the number or boundaries of contested issues. Prairie Island, supra, 8 AEC 857. For a further discussion, see Section 3.13.1.

2.9.9.4 Intervenor's Right to File Proposed Findings

An intervenor may file proposed findings with respect to all issues whether or not raised by his own contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 863 (1974); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-85-2, 21 NRC 24, 32 (1985), vacated as moot, ALAB-842, 24 NRC 197 (1986).

A Board in its discretion may refuse to rule on an issue in its initial decision if the party raising the issue has not filed proposed findings of fact and conclusions of law. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981).

The right to file proposed findings of fact in an adjudication is not unlawfully abridged unless there was prejudicial error in refusing to admit the evidence that would have been the subject of the findings. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-82-11, 15 NRC 1383, 1384 (1982).

2.9.9.5 Attendance at/Participation in Prehearing Conferences/ Hearings

An intervenor seeking to be excused from a prehearing conference should file a request to this effect before the

conference date. Such a request should present the justification for not attending. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187, 190-91 (1978). For a discussion of a party's duty to attend hearings, see Section 3.6.

Where an intervenor indicates its intention not to participate in the evidentiary hearing, the intervenor may be held in default and its admitted contentions dismissed although the Licensing Board will review those contentions to assure that they do not raise serious matters that must be considered.

Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-76-7, 3 NRC 156, 157 (1976). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-93-12, 31 NRC 427, 429-31 (1990), aff'd in part, ALAB-934, 32 NRC 1 (1990).

An appropriate sanction for willful refusal to attend a Prehearing Conference is dismissal of the petition for intervention. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-13, 33 NRC 259, 262-63 (1991). In the alternative, an appropriate sanction is the acceptance of the truth of all statements made by the applicant or the NRC Staff at the Special Prehearing Conference. Application of that sanction would also result in dismissal. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), LBP-82-108, 16 NRC 1811, 1817 (1982).

A Licensing Board is not expected to sit idly by when parties refuse to comply with its orders. Pursuant to 10 CFR § 2.718, a Licensing Board has the power and the duty to maintain order, to take appropriate action to avoid delay and to regulate the course of the hearing and the conduct of the participants. Furthermore, pursuant to 10 CFR § 2.707, the refusal of a party to comply with a Board order relating to its appearance at a proceeding constitutes a default for which a Licensing Board may make such orders in regard to the failure as are just. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982).

A party may not be heard to complain that its rights were unjustly abridged after having purposefully refused to participate. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1935 (1982).

Dismissal of a party is the ultimate sanction applicable to an intervenor. On the other hand, where a party fails to carry out the responsibilities imposed by the fact of its participation in the proceeding, such a party may be found to be in default and its contentions dismissed. Consumers Power Co. (Palisades Nuclear Power Facility), LBP-82-101, 16 NRC 1594.

1595-1596 (1982), citing, Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit No. 2), LBP-76-7, 3 NRC 156 (1976).

2.9.9.6 Pleadings and Documents of Intervenors

An intervenor may not disregard an adjudicatory board's direction to file a memorandum without first seeking leave of the board. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187 (1978).

2.9.10 Cost of Intervention

2.9.10.1 Financial Assistance to Intervenors

The question of funding of intervenors' participation was addressed by the Commission in <u>Nuclear Regulatory Commission</u> (Financial Assistance to Participants in Commission Proceedings), CLI-76-23, 4 NRC 494 (1976). Therein, the Commission stated that it would not provide funding for participants in licensing, enforcement or antitrust proceedings and that it also would not provide such funding for participants in rulemaking proceedings as a general proposition, although it would attempt to provide funds for qualified GESMO participants.

Part of the basis for the Commission's determination was an opinion issued by the Comptroller General. Noting that the Commission lacks express statutory authority to provide funds, the opinion stated that the Commission might nevertheless provide funds to a participant if the Commission determines that: (1) it cannot make the necessary licensing or rulemaking determinations unless financial assistance is extended to the participant who requires it; and (2) the funded participation is "essential" to the Commission's disposition of the issues. The Commission found that it could not make these determinations with respect to participants in licensing, enforcement, antitrust and general rulemaking proceedings. On the other hand, due to the singular importance of the GESMO proceedings, the Commission would seek to provide financial assistance to GESMO participants who applied by a specified deadline and who qualified for such assistance.

Subsequent to CLI-76-23, the Comptroller General issued an opinion on funding of intervenors in FDA proceedings. That ruling was a major shift from the opinion issued by the Comptroller General in the NRC case in that the test set out therein was not whether intervention was "essential" but whether it could "reasonably be expected to contribute substantially to a full and fair determination" of the pending matter.

In 1976, the Comptroller General issued two decisions in which he held that "funding of intervenors in the absence

of specific Congressional authorization was permissible where participation by the intervenor is required by statute or intervention is necessary to assure adequate representation of opposing points of view and the intervenor is indigent or otherwise unable to bear the financial cost of participation." However, this position was overruled by the Second Circuit Court of Appeals, which held that an agency could not fund participants in its proceedings without a specific grant of authority from the Congress. Greene County Planning Board v. FPC, 559 F.2d 1227 (2d Cir. 1977), cert. denied, 434 U.S. 1086 (1978). Or this basis, in part, funding for intervenors was denied in an Nuclear Company, Inc. (Low Enriched Uranium Exports to EURATOM Member Nations), CLI-77-31, 6 NRC 849 (1977).

The Commission is in favor of funding intervenors but Congress has precluded such funding for fiscal year 1980. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-80-19, 11 NRC 700 and CLI-80-20, 11 NRC 705 (1980). Authorization acts for subsequent fiscal years have explicitly prohibited NRC from utilizing appreciated monies to fund intervenors. See Rochester Gas a . Electric Corp. (R.E. Ginna Nuclear Plant, Unit 1), LBP-83-73, 18 NRC 1231, 1239 (1983).

A claim for funding by intervenor for past participation is precluded because the Commission has determined not to initiate a program to provide funding for intervenors. Puerto Rico Power Authority (North Coast Nuclear Plant, Unit 1), LBP-80-15, 11 NRC 765, 767-768 (1980).

Some financial assistance was made available to intervenors for procedural matters, such as free transcripts in adjudicatory proceedings on an application for a license or an amendment thereto in prior Commission rules. 19 CFR §§ 2.708(d), 2.712(f) and 2.750(c). (45 $\underline{\text{Fed. Reg.}}$ 49535, July 25, 1980). Those rules have since been amended so that procedural financial assistance is not now available.

The Commission is n. t empowered to expend its appropriated funds for the purpose of funding consultants to intervenors. See P.L. 97-88, Title V Section 502 [95 Stat. 1148 (1981)] and P.L. 97-276 Section 101(g) [96 Stat. 1135 (1982)]. Nor does it appear that the Commission has authority to require the utility-applicants to do so or to assess fees for that purpose where the service to be performed is for intervenors' benefit and is not one needed by the Commission to discharge its own licensing responsibilities. See Mississippi Power and Light Co. v. NRC, 601 F.2d 223 (5th Cir. 1979), cert. denied, 444 U.S. 1102 (1980). See also National Cable Television

Association, Inc. v. United States, 415 U.S. 336 (1978); Federal Power Commission v. New England Power Co., 415 U.S. 345 (1974); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-40, 16 NRC 1717 (1982); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1273 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1212 (1985), citing, Pub. L. No. 98-360, 98 Stat. 403 (1984). See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-625, 13 NRC 13, 14-15 (1981).

2.9.10.2 Intervenors' Witnesses

The Appeal Board has indicated that where an intervenor would call a witness but for the intervenor's financial inability to do so, the Licensing Board may call the witness as a Board witness and authorize NRC payment of the usual witness fees and expenses. The decision to take such action is a matter of Licensing Board discretion which should be exercised with circumspection. If the Board calls such a witness as its own, it should limit cross-examination to the scope of the direct examination. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-382, 5 NRC 603, 607-608 (1977).

2.9.11 Appeals by Intervenors

An intervenor may seek appellate redress on all issues whether or not those issues were raised by his own contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 863 (1974).

2.9.12 Intervention in Remanded Proceedings

The Licensing Board was "manifestly correct" in rejecting a petition requesting intervention in a remanded proceeding where the scope of the remanded proceeding had been limited by the Commission, and the petition for intervention dealt with matters outside that scope. The Licensing Board had limited jurisdiction in the proceeding and could consider only what had been remanded to it. Carolina Power and Light Ampany (Shearon Harris Nuclear Power Plant, Units 1-4). ALAB-526, 9 NRC 122, 124 n.3 (1979).

2. J Nonparty Participation - Limited Appearance and Interested States

2.10.1 Limited Appearances in NRC Adjudicatory Proceedings

Although limited appearees are not parties to any proceeding, statements by limited appearees can serve to alert the Licensing Board and the parties to areas in which evidence may need to be adduced. <u>Iowa Electric Light & Power Co.</u> (Duane Arnold Energy Center), ALAB-108, 6 AEC 195, 196 n.4 (1973).

2.10.1.1 Requirements for Limited Appearance

The requirements for becoming a limited appearee are set out in 10 CFR § 2.715. Based upon that section, the requirements for limited appearances are generally within the discretion of the presiding officer in the proceeding. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981).

2.10.1.2 Scope/Limitations of Limited Appearances

Under 10 CFR § 2.715(a), the role of a limited appearee is restricted to making oral or written statements of his position on the issues within such limits and on such conditions as the Board may fix.

Pursuant to 10 CFR § 2.715(a), limited appearance statements may be permitted at the discretion of the presiding officer, but the person admitted may not otherwise participate in the proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI 83-25, 18 NRC 327, 333 (1983).

A limited appearance statement is not evidence and need only be taken into account by the Licensing Board to the extent that it may alert the Board or parties to areas in which evidence may need to be adduced. <u>Iowa Electric Light & Power Co.</u>, ALAB-108, <u>supra</u>, (dictum).

The purpose of limited appearance statements is to alert the Licensing Board and parties to areas in which evidence may need to be adduced. Such statements do not constitute evidence, and accordingly, the Board is not obligated to discuss them in its decision. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1087 n.12 (1983), citing, 10 CFR § 2.715(a); Iowa Electric Light and Power Co. Duane Arnold Energy Center), ALAB-108, 6 AEC 195, 196 n.4 (1973).

A person who makes a limited appearance before a Licensing Board may not appeal from that Board's decision. Metropolitan Edison Company (Three Mile Island Nuclear Generating Station, Unit 2), ALAB-454, 7 NRC 39 (1978).

2.10.2 Farticipation by Nonparty Interested States

Under 15 CFR 6 2.715(c), an interested State may participate in a proceeding even though it is not a party. In this context, the Board must afford representatives of the interested State the opportunity to introduce evidence, interrogate witnesses and advise the Commission. In so doing, the interested State need not take a position on any of the issues. Even though a State has submitted contentions and intervened under 10 CFR § 2.714, it may participate as an "interested State" under 10 CFR § 2.715(c) on issues in the proceeding rot raised by its own contentions. USERDA (Clinch River weeder Reactor Plant), ALAB-354, 4 NRC 383 (1976); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NRC 601, 617 (1982). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1079 (1982), citing, Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977). However, once a party is admitted as an interested State under Section 2.715(c), it may not reserve the right to intervene later under Section 2.714 with full party status. A petition to intervene under the provisions of the latter section must conform to the requirements for late filed petitions. Consolidated Edison Co. of N.Y. (Indian Point, Unit No. 2) and Power Authority of the State of N.Y. (Indian Point, Unit No. 3), LBP-82-25, 15 NRC 715, 723 (1982).

A Licensing Board may require the representative of an interested State to indicate in advance of the hearing the subject matter on which it wishes to participate, but such a showing is not a prerequisite of admission under 10 CFR § 2.715(c). Indian Point, supra, 15 NRC at 723.

Section 2.715(c) states that the Commission shall "afford representatives of an interested State... and or agencies thereof, a reasonable opportunity to participate." Given this language, a Licensing Board is not limited to recognizing only one representative of a State. Thus the Licensing Board may admit the Attorney General of an interested State even though a State law designates another per on as the State's representative. Indian Point, supra, 15 h at 719. Although some language in the <u>Indian Point</u> decision seemed to indicate that State law does not control the designation of a State representative, the decision actually rested upon the fact that the State Attorney Coneral did not agree that the State law designated someone other than the Attorney General to represent the State. In the absence of a contrary judicial decision, the Commission will defer to the Attorney General's interpretation of the State law designating the State's representative. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 148, 149 and n.13 (1987).

A State participating as an interested State may appeal an adjudicatory board's decision so that an interested State participating under 10 CFR § 2.715(c) constitutes the sole exception to the normal rule that a nenparty to a proceeding may not appeal from the decision in that proceeding.

Metropolitan Edison Co. (Three Mile Island Nuclear Generating Station, Unit 2), ALAB-454, 7 NRC 39 (1978).

Section 274(1) of the Atomic Energy Act confers a right to participate in licensing proceedings on the State of location for the subject facility. However, 10 CFR § 2.715(c) of the Commission's Rules of Practice extends an opportunity to participate not merely to the State in which a facility will be located, but also to those other States that demonstrate an interest cognizable under Section 2.715(c). Exxon Nuclear Company, Inc. (Nuclear Fuel Recovery and Recycling Center), ALAB-447, 6 NRC 873 (1977). See, e.g., Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-74-32, 8 AEC 217 (1974).

Although a State seeking to participate as an "interested State" under Section 2.715(c) need not state contentions, once in the proceeding it must comply with all the procedural rules and is subject to the same requirements as parties appearing before the Board. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760 (1977); Illinois Power Co. (Clinton Power Station, Unit No. 1), LBP-82-103, 16 NRC 1603, 1615 (1982), citing, River Bend, supra, 6 NRC at 768. Nevertheless, the Commission has emphasized that the participation of an interested sovereign State, as a full party or otherwise, is always desirable in the NRC licensing process. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-25, 6 NRC 535 (1977). A State's participation may be so important that the State's desire to be a party to Commission review may be one factor to consider in determining whether the State should be permitted to participate in the Commission review, even though the State has not fully complied with the requirements for such participation. Id.

A State has no right to participate in administrative appeals when it has not participated in the underlying hearing. The Commission will deny a State's extremely untimely petition to intervene as a non-party interested State which is filed on the eve of the Commission's licensing decision. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CL1-86-20, 24 NRC 518, 519 (1986), aff'd sub nom. Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987).

10 CFR § 2.715(c) has been amended to include counties and municipalities and agencies thereof as governmental entities in addition to States which may participate in NRC adjudicatory proceedings as "interested" government bodies.

A governmental body must demonstrate a genuine interest in participating in the proceeding. A Licensing Board denied a municipality permission to participate as an interested State in a reopened hearing where the municipality failed to: file proposed findings of fact; comply with a Board Order to indicate with reasonable specificity the subject matters on which it desired to participate; appear at an earlier evidentiary hearing; and specify its objections to the Staff reports which were the focus of the reopened hearing. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP 86-24, 24 NRC 132, 136 (1986).

Section 2.715(c) was also amended to more clearly delineate the participation rights of "interested" government bodies. As amended, this section provides that 'interested" government bodies may introduce evidence, interrogate witnesses, advise the Commission without taking a position on any issue, file proposed findings, appeal the Licensing Board's decision, and seek review by the Commission.

The mere filing by a State of a petition to participate in an operating license application pursuant to 10 CFR § 2.715(c) as an interested State is not cause for ordering a hearing. The application can receive a thorough agency review, outside of the hearing process, absent indications of significant controverted matters or serious safety or environmental issues. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 216 (1983); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 426 (1984), citing, Northern States Power Co. (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 527 (1980).

Although a State has a statutory right to a reasonable opportunity to participate in NRC proceedings, it may not seek to appeal on issues it did not participate in below, or seek remand of those issues. However, the State is given an opportunity to file a brief amicus curiae. Pacific Gas and Flectric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-583, 11 NRC 447 (1980).

A late decision by the Governor of a State to participate as representative of an interested State can be granted, but the Governor must take the proceeding as he finds it. He cannot complain of rulings made or procedural arrangements cettled prior to his participation. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-600, 12 NRC 3, 8 (1980); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-13, 17 NRC 469, 471-72 (1983), citing, 10 CFR § 2.715(c); Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Station), LBP-80-6, 11 NRC 148, 151 (1980).

An interested State that has elected to litigate issues as a full party under 10 CFR § 2.714 is accorded the rights of an "interested State" under 10 CFR § 2.715(c) as to all other issues. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-9, 17 NRC 403, 407 (1983), citing, Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 392-93 (1976).

10 CFR § 2.715(c) authorizes an interested State to introduce evidence with respect to those issues on which it has not taken a position. However, at the earliest possible date in advance of the hearing, an interested State must state with reasonable specificity those subject areas, other than its own contentions, in which it intends to participate. Seabrook, supra, 17 NRC at 407.

The presiding officer may require an interested governmental entity to indicate with reasonable specificity, in advance of the hearing, the subject matters on which it desires to participate. However, once the time for identification of new issues by even a governmental participant has passed, either by schedule set by the Board or by circumstances, any new contention thereafter advanced by the governmental participant must meet the test for nontimely contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1140 (1983). See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NRC 601, 617 (1982).

An interested State, once admitted to a proceeding, must observe the procedural requirements applicable to other participants. Every party, however, may seek modification for good cause of time limits previously set by a Board. Moreover, good cause, by its very nature, must be an ad hoc determination based on the facts and circumstances applicable to the particular determination. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-26, 17 NRC 945, 947 (1983).

Although an interested State must of the applicable procedural requirements, including time lamit, the facts and circumstances which would constitute good cause for extending the time available to a State may not be coextensive with those warranting that action for another party. States need not, although they may, take a position with respect to an issue in order to participate in the resolution of that issue. Reflecting political changes which uniquely bear upon bodies such as States, a State's position on an issue (and the degree of its participation with respect to that issue) might understandably change during the course of a Board's consideration of the issue. The Commission itself has recognized such factors, and it has permitted States to participate even where contrary to a procedural requirement which might bar another

party's participation. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-26, 17 NRC 945, 947 (1983), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-25, 6 NRC 535 (1977). See 10 CFP § 2.715(c).

A county does not lose its right to participate as an interested governmental agency pursuant to 10 CFR § 2.715(c) because it has elected to participate as a full intervenor on specified contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1139 (1983), citing, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NR/. 601, 617 (1982).

A State's status as an interested State does not confer upon it any special power to adopt contentions which have been abandoned by their sponsor. A State must observe the procedural requirements applicable to other participants.

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 430-31 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990).

Any governmental participant seeking to advance a late contention or issue, whether or not it be a participant already in the case or one seeking to enter, must satisfy the criteria for late-filed contentions as well as the criteria for reopening the record. Shoreham, supra, 17 NRC at 1140.

2.11 Discovery

2.11.1 Time for Discovery

Discovery begins on admitted contentions after the first prehearing conference. 10 CFR 2.740(a)(1). <u>Duke Power Co.</u> (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1945 (1982).

Under 10 CFR § 2.740(b)(1), there can be no formal discovery prior to the special prehearing conference provided for in Section 2.751a. In any event, a potential intervenor has no right to seek discovery prior to filing his petition to intervene. Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 & 2), CLI-74-45, 8 AEC 928 (1974); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, reconsid. den., ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973). See also BPI v. AEC, 502 F.2d 424, 428-29 (D.C. Cir. 1974). Once an intervenor has been admitted, formal discovery is limited to matters in controversy which have been admitted. 10 CFR § 2.740(b)(1). Discovery on the subject matter of a contention in a licensing proceeding can be obtained only after the contention has been admitted to the proceeding. Wisconsin

Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-25, 28 NRC 394, 396 (1988) (the scope of a contention is determined by the literal terms of the contention, coupled with its stated bases), reconsid, denied on other grounds, LBP-88-25A, 28 NRC 435 (1988).

A Licensing Board denied an applicant's motion for leave to commence limited discovery against persons who had filed petitions to intervene (at that point, nonparties). The Board entertained substantial doubt as to its authority to order the requested discovery, but denied the motion specifically because it found no necessity to follow that course of action. The Board discussed at length the law relating to the prohibition found in 10 CFR § 2.740(b)(1) against discovery beginning prior to the prehearing conference provided for in 10 CFR § 2.751a. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 577-584 (1978).

Prior to the grant of a formal hearing on a proposed operating licens. And imer., a Licensing Board directed questions to the application. Not Staff to clarify the record regarding a possibly satisfy and the parties. The Board believed its questions were permitted inquiry, 10 CFR § 2.756, to determine whether possible areas of concern could be resolved informally without a formal hearing. Such questions did not constitute impormissible discovery prior to the grant of a hearing. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-6, 33 NRC 169, 171-72 (1991).

Applicants are entitled to prompt discovery concerning the bases of contentions, since a good deal of information is already available from the FSAR and other documents early in the course of the proceeding. Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-30-A, 14 NRC 364, 369 (1981).

Under 10 CFR § 2.740(b)(1), discovery is ordinarily to be completed before the prehearing conference held pursuant to 10 CFR § 2.752, absent good cause shown. The fact that a party did not engage in prehearing discovery to obtain an expert witness' "backup" calculations does not preclude a request at trial for such information, but the Licensing Board may take into account the delay in deciding to grant such a last minute request. Illinois Power Co. (Clinton Power Station, Units 1 & 2), ALAB-340, 4 NRC 27 (1976).

The fact that late intervention has been permitted should not disrupt established discovery schedules since a tardy petitioner with no good excuse must take the proceeding as he

finds it. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975).

Under 10 CFR § 2.740(b)(1), discovery is available after a contention is admitted and may be terminated a reasonable time thereafter. Litigants are not entitled to further discovery as a matter of right with respect to information relevant to a contention which first surfaces long after discovery on that contention has been terminated. <u>Duke Power Co.</u> (Catawba Nuclear Station, Units 1 and 2), LBP-84-24, 19 NRC 1416, 1431-32 (1984), aff'd, ALAB-813, 22 NRC 59 (1985). However, an Appeal Board has recently held that a Licensing Board abused its discretion by denying intervenors the opportunity to conduct discovery of new information submitted by the applicant and admitted by the Board on a reopened record. The Appeal Board found that, although there might have been a need to conduct an expeditious hearing, it was improper to deny the intervenors the opportunity to conduct any discovery concerning the newly admitted information where it was not shown that the requested discovery would delay the hearing. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 160-61 (1986), rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987).

The Commission has expressly advised the Licensing Boards to see that the licensing process moves along at an expeditious pace, consistent with the demands of fairness, and the fact that a party has personal or other obligations or fewer resources than others does not relieve the party of its hearing obligations. Nor does it entitle the party to an extension of time for discovery absent a showing of good cause, as judged by the standards of 10 CFR § 2.711. Iexas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-18, 15 NRC 598, 599 (1982).

A party is not excused from compliance with a Board's discovery schedule simply because of the need to prepare for a related state court trial. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-46, 22 NRC 830, 832 (1985).

Though the period for discovery may have long since terminated, at least one Appeal Board decision seems to indicate that a party may obtain discovery in order to support a motion to reopen a hearing provided that the party demonstrates with particularity that discovery would enable it to produce the needed materials. Vermont Yankee Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 524 (1973). But see Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985) and

Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 (1986) where the Commission was made it very clear that a movant seeking to reopen the record is not entitled to discovery to support its motion.

The question of Board management of discovery was addressed by the Commission in its Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455-456 (1981). The Commission stated that in virtually all cases individual Boards should schedule an initial conference with the parties to set a general discovery schedule immediately after contentions have been admitted. A Licensing Board may establish reasonable deadlines for the completion of discovery. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-79, 18 NRC 1400, 1401 (1983), citing, Statement of Policy, supra. 13 NRC at 456. Although a Board may extend a discovery deadline upon a showing of good cause, a substantial delay between a discovery deadline and the start of a hearing is not sufficient, without more, to reopen discovery. Perry, supra, 18 NRC at 1461.

An intervenor who has agreed to an expedited discovery schedule during a prehearing conference is considered to have waived its objections to the schedule once the hearing has started. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-85-15, 22 NRC 184, 185 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 251 (1986).

2.11.2 Discovery Rules

In general, the discovery rules as between all parties except the Staff follow the form of the Federal Rules of Civil Procedure. The legal authorities and court decisions pertaining to Rule 26 of the Federal Rules of Civil Procedure provide appropriate guidelines for interpreting NRC discovery rules. Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 494-95 (1983), citing, Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 760 (1975).

If there is no NRC rule that parallels a Federal Rule of Civil Procedure, the Board is not restricted from applying the rederal rule. While the Commission may have chosen to adopt only some of the Federal rules of practice to apply to all cases, it need not be inferred that the Commission intended to preclude a Licensing Board from following the guidance of the Federal rules and decisions in a specific case where there is no parallel NRC rule and where that guidance results in a fair determination of an issue. Seabrook, supra, 17 NRC at 497.

Rule 25(b)(4) differentiates between experts whom the party expects to call as witnesses and those who have been retained or specially employed by the party in preparation for trial. The Notes of Advisory Committee on Rules explain that discovery of expert witnesses is necessary, particularly in a complex case, to narrow the issues and eliminate surprise, but that purpose is not furthered by discovery of non-witness experts. Seabrook, supra, 17 NRC at 497; Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-7, 23 NRC 177, 178-79 (1986) (discovery of a non-witness expert permitted only upon a showing of exceptional circumstances). The filing of an affidavit as part of a non-record filing with a Licensing Board does not make an individual an expert witness. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-87-18, 25 NRC 945, 947 (1987).

In modern administrative and legal practice, including NRC practice, pretrial discovery is liberally granted to enable the parties to ascertain the facts in complex litigation, refine the issues, and prepare adequately for a more expeditious hearing or trial. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 NRC 241, 243 (1981); Pacific Gas & Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 494 (1984).

A party may seek discovery of another party without the necessity of Licensing Board intervention. Where, however, discovery of a nonparty is sought (other than by deposition), the party must request the issuance of a subpoena under Section 2.720. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 690 (1979).

Only those State agencies which are parties in NRC proceedings are required to respond to requests under 10 CFR § 2.741 for the production of documents. In order to obtain documents from non-party State agencies, a party must file a request for a subprena pursuant to 10 CFR § 2.720. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-1, 21 NRC 11, 21-22 (1985), citing, Stanislaus, supra, 9 NRC at 683.

Applicants are entitled to discovery against intervenors in order to obtain the information necessary for applicant to meet its burden of proof. This does not amount to shifting the burden of proof to intervenors. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-613, 12 NRC 317, 338 (1980).

Each co-owner of a nuclear facility has an independent responsibility, to the extent that it is able, to provide a

Licensing Board with a full and accurate record and with complete responses to discovery requests. The majority owner must keep the minority owners sufficiently well informed so that they can fulfill their responsibilities to the Board. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-87-27, 26 NRC 228, 230 (1987).

Intervenor may not directly seek settlement papers of the applicant through discovery. Rule 408 of the Federal Rules of Evidence provides that offers of settlement and conduct and statements made in the course of settlement negotiations are not admissible to prove the validity of a claim. 10 CFR § 2.759 states a policy encouraging settlement of contested proceedings and requires all parties and boards to try to carry out the settlement policy. Requiring a party to produce its settlement documents because they are settlement documents would be inconsistent with this policy. Florida Power & Light Company (St. Lucie Plant, Unit No. 2), LBP-79-4, 9 NRC 164, 183-184 (1979).

A plan to seek evidence primarily through discovery is a permissible approach for an intervenor to take. <u>Duke Power Co.</u> (Catawba Nuclear Station, Units 1 and a), LBP-82-116, 16 NRC 1937, 1943 (1982).

Lack of knowledge is always an adequate response to discovery. A truthful "don't know" response is not sanctionable as a default in making discovery. <u>Duke Power Co.</u> (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1945, 1945 n.3 (1982).

At least one Licensing Board has held that intervenors may develop and support their contentions by getting a first round of discovery against other parties before the intervenors are required to provide responses to discovery against them. Catawba, supra, lo NRC at 1945. But see 2.9.5.11, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 192, reconsid. den., ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973).

Discovery of the foundation upon which a contention is based is not only clearly within the realm of proper discovery, but also is necessary for an applicant's preparation for hearing. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 494 (1983); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 81 (1986).

A party's need for discovery outweighs any risk of harm from the potential release of information when the NRC Staff has indicated that no ongoing investigation will be jeopardized, when all identities and identifying information are excluded from discovery; and when all other information is discussed under the aegis of a protective order. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 283 (1983), reconsideration denied, LBP-83-64, 18 NRC 766, 768 (1983), affirmed, ALAB-764, 19 NRC 633 (1984).

2.11.2.1 Construction of Discovery Rules

For discovery between parties other than the Staff, the discovery rules are to be construed very liberally. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-185, 7 AEC 240 (1974); Illinois Power Co. (Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735, 1742 (1981).

Where a provision of the NRC discovery rules is similar or analogous to one of the Federal rules, judicial interpretations of that Federal rule can serve as guidance for interpreting the particular NRC rule. <u>Detroit Edison Company</u> (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 581 (1978).

2.11.2.2 Scope of Discovery

The test as to whether particular matters are discoverable is one of "general relevancy." This test will be easily satisfied unless it is clear that the evidence sought can have no possible bearing on the issues. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-185, 7 AEC 240 (1974). A party seeking discovery after the discovery period is over, however, must meet a higher standard of relevance. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), LBP-76-8, 3 NRC 199, 201 (1976). While the "general relevancy" test is fairly liberal, it does not permit the discovery of material far beyond the scope of issues to be considered in a proceeding. Thus, parties may obtain discovery only of information which is relevant to the controverted subject matter of the proceeding, as identified in the prehearing order, or which is likely to lead to the discovery of admissible evidence. This rule applies as much to Part 70 licenses for special nuclear material as to Part 50 licenses for construction of utilization facilities. <u>Allied General Nuclear Services</u> (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489 (1977). Moreover, while the scope of discovery is rather broad, requests phrased in terms of "all documents..." are not favored. Illinois Power Co. (Clinton Nuclear Station, Units 1 & 2), ALAB-340, 4 NRC 27 (1976).

An intervenor may obtain information about other reactors in the course of discovery. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-102, 16 NRC 1597, 1601 (1982).

An intervenor's motion which sought to preserve deficient components which the applicant was removing from its plant was denied because the motion did not comply with the requirements for (1) a stay, or (2) a motion for discovery, since it did not express an intention to obtain information about the components. The questions raised in the intervenor's motion, including the possible need for destructive evaluation of the components, were directed to the adequacy and credibility of the applicant's evidence concerning the components. IEXAS
Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-85-32, 22 NRC 434, 438 n.6 (1985).

In general, the discovery tools are the same as or similar to those provided for by the Federal Rules of Civil Procedure. The Commission's regulations permit depositions and requests for production of documents between intervenors and applicants without leave of the Commission and without any showing of good cause (10 CFR §§ 2.740a, 2.741). The regulations (10 CFR § 2.740b) specifically provide for interrogatories similar to those addressed by Rule 33 of the Federal Rules, although such interrogatories are not available for use against nonparties. The scope of discovery under the Commission's Rules of Practice is similar to discovery under the Federal Rules of Civil Procedure. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978).

Since written answers to interrogatories under oath as provided by 10 CFR § 2.740(b) are binding upon a party and may be used in the same manner as depositions, the authority of the person signing the answers to, in fact, provide such answers may be ascertained through discovery. Statements of counsel in briefs or arguments are not sufficient to establish this authority. Pacific Gas & Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1045 (1978).

If a party has insufficient information to answer interrogatories, a statement to that effect fulfills its obligation to respond. If the party subsequently obtains additional information, it must supplement its earlier response to include such newly acquired information, 10 CCR § 2.740(c). Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-80-18, 11 NRC 906, 911 (1980).

To determine subject matter relevance for discovery purposes, it is first necessary to examine the issue involved. In an antitrust proceeding, a discovery request will not be denied where the interrogatorier are relevant only to proposed antitrust license conditions and not to whether a situation inconsistent with the antitrust laws exists. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978).

At least one Licensing Board has that, in the proper circumstances, a party's right to ke the deposition of another party's expert witness may be made contingent upon the payment of expert witness fees by the party seeking to take the deposition. Public Service Co. of Oklahoma (Black Fox, Units 1 & 2), LBP-77-18, 5 NRC 671, 673 (1977).

Based on 10 CFR § 2.720(d) and § 2.740a(h), fees for subpoenas and the fee for deponents, respectively, are to be paid by the party at whose instance the subpoena was issued, and the deposition was held. Pursuant to 10 CFR § 2.740a(d). objections on questions of evidence at a deposition are simply to be noted in shore form, without argument. The relief of a stay of a hearing to permit deposition of witnesses is inappropriate in the absence of any allegation of prejudice. Each party to an NRC proceeding is not required to convene its own deposition if it seeks to question a witness as to any matter beyond the scope of those issues raised on direct by the party noticing the deposition. No party has a proprietary interest in a deposition; therefore, no party has a proprietary interest in a subpoena issued to a deponent. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-82-47, 15 NRC 1538, 1544-1546 (1982).

The Licensing Board, as provided by 10 CFR § 2.740(c) and 10 CFR § 2.740(d), may and should, when not inconsistent with fairness to all parties, limit the extent or control the sequence of discovery to prevent undue delay or imposition of an undue Lurden on any party. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), C! I-79-8, 10 NRC 141, 147-148 (1979). Thus, a Licensing Board may issue a protective order which limits the representatives of a party in a proceeding who may conduct discovery of particular documents. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-870, 26 NRC 71, 75 (1987).

A party is only required to reveal information in its possession or control. A party need not conduct extensive independent research, although it may be required to perform some investigation to determine what information it actually possesses. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 334 (1980). This holding has been codified in the Rules of Practice at 10 CFR § 2.740(b)(3) which also prohibits the use of interrogatories which request a party to explain the reasons why the party did not use alternative data, assumptions, and analyses in developing its position on a matter in the proceeding. 54 Fed. Req. 33168, 33181 (August 11, 1989).

A party is not required to search the record for information in order to respond to interrogatories where the issues that are the subject of the interrogatories are already defined in the record and the requesting party is as able to search the record as the party from whom discovery is requested. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-87-18, 25 NRC 945 948 (1987).

2.11.2.3 Requests for Discovery During Hearing

Requests for background documents from a witness, to supply answers to cross-examination questions which the witness is unable to answer, cannot be denied solely because the material had not been previously requested through discovery. However, it can be denied where the request will cause significant delay in the hearing and the information sought has been substantially supplied through other testimony. Illinois Power Co. (Clinton Nuclear Station, Units 1 & 2), ALAB-340, 4 NRC 27 (1976).

2.11.2.4 Privileged Matter

As under the Federal Rules of Civil Procedure, privileged or confidential material may be protected from discovery under Commission regulations. To obtain a protective order (10 CFR § 2.740(c)), it must be demonstrated that:

- the information in question is of a type customarily held in confidence by its originator;
- (2) there is a rational basis for having customarily held it in confidence;
- (3) it has, in fact, been kept in confidence; and
- (4) it is not found in public sources.

Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408 (1976). See also Section 6.23.3.

The claimant of a privilege must bear the burden of proving that it is entitled to such protection, including pleading it adequately in its response. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1153 (1982), citing, In re Fischel, 557 F.2d 209 (9th Cir. 1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 495 (1983). See Shoreham, supra, 16 NRC at 1153. Intervenors' mere assertion that the material it is withholding constitutes attorney work product is insufficient to meet that burden. Seabrook, supra, 17 NRC at 495.

It is not sufficient for a party asserting certain documents to be privileged from discovery to await a motion to compel from the party seeking discovery prior to the asserting party setting forth its assertions of privilege and specifying those matters which it claims to be privileged. Shoreham, supra, 16 NRC at 1153.

Pursuant to 10 CFR § 2.740(b)(1), parties may generally obtain discovery regarding any matter, not privileged, which is relevant to the subject matter in the proceeding. While the Federal Rules of Civil Procedure are not themselves directly applicable to practice before the Commission, judicial interpretations of a Federal Rule can serve as guidance for the interpretation of a similar or analogous NRC discovery rule. By choosing to model Section 2.740(b) after Federal Rule 26(b), without incorporating specific limitations, the Commission implicitly chose to adopt those privileges which have been recognized by the Federal Courts. Shoreham, supra, 16 NRC at 1157.

A party objecting to the production of documents on grounds of privilege has an obligation to specify in its response to a document request those same matters which it would be required to set forth in attempting to establish "good cause" for the issuance of a protective order, i.e., there must be a specific designation and description of (1) the documents claimed to be privileged, (2) the privilege being asserted, and (3) the precise reasons why the party believes the privilege to apply to such documents. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBF-82-82, 16 NRC 1144, 1153 (1982); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1942 (1982).

Claims of privilege must be specifically asserted with respect to particular documents. Privileges are not absolute and may or may not apply to a particular document, depending upon a variety of circumstances. Shoreham, supra, 16 NRC at 1153, citing, United States v. El Paso Co., 682 F.2d 530, reh'g denied, 688 F.2d 840 (1982), cert. denied, 104 S. Ct. 1927 (1984); United States v. Davis, 636 F.2d 1028, 1044 n.20 (5th Cir. 1981).

In determining whether a party's inadvertent disclosure of a privileged document constitutes a waiver of the privilege, a Board will consider the adequacy of the precautions taken initially to prevent disclosure, whether the party was compelled to produce the document under a Board-imposed expedited discovery schedule, the number of documents which the party had to review, and whether the party, upon learning of the inadvertent disclosure, promptly objected to the production of the document. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-1, 21 NRC 11, 19-20 (1985).

Even where a First Amendment or common law privilege is found applicable to a party or nonparty resisting discovery, that privilege is not absolute. A Licensing Board must balance the value of the information sought to be obtained with the harm caused by revealing the information. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 288 (1983), reconsideration denied, LBP-83-64, 18 NRC 766, 768 (1983), aff'd, ALAB-764, 19 NRC 633, 641 (1984).

Although a report prepared by a party's non-witness experts qualifies for the work product privilege, a Licensing Board may order discovery of those portions of the report which are relevant to 10 CFR 50, Appendix B determinations concerning the causes of deficiencies in the plant. <u>Texas Utilities</u> <u>Electric Co.</u> (Comanche Peak Steam Electric Station, Unit 1), LBP-37-20, 25 NRC 953, 957 (1987).

Statements from an attorney to the client are privileged only if the statements reveal, either directly or indirectly, the substance of a confidential communication by the client. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1158 (1982), citing, In re Fischel, 557 F.2d 209 (9th Cir. 1977); Ohio-Sealy Mattress Manufacturing Co. v. Kaplan, 90 F.R.D. 21, 28 (N.D. Ill. 1980). An attorney's involvement in, or recommendation of, a transaction does not place a cloak of secrecy around all incidents of such a transaction. Shoreham, supra, 16 NRC at 1158, citing, Fischel, 557 F.2d at 212.

The attorney-client privilege does not protect against discovery of underlying facts from their source, merely because those facts have been communicated to an attorney. Shoreham, supra, 16 NRC at 1158, citing, Upjohn Co. v. United States, 449 U.S. 383, 395 (1981).

The attorney-client privilege may not be asserted where there is a conflict of interests between various clients represented by the same attorney. There is no attorney-client relationship unless the attorney is able to exercise independent professional judgment on behalf of the interests of a client. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-50, 20 NRC 1464, 1468-1469 (1984), citing, Rule 1.7 of the ABA Model Rules of Professional Conduct.

A qualified work product immunity extends over material gathered or prepared by an attorney for use in litigation, either current or reasonably anticipated at a future time. Although the privilege is not easily overridden, a party may gain discovery of such material upon a showing of a substantial need for the material in the preparation of its case and an inability to obtain the material by any other means without undue hardships. Texas Utilities Electric Co. (Comanche Peak

Steam Electric Station, Units 1 and 2), LBP-84-50, 20 NRC 1464, 1473-1474 (1984), citing, Hickman v. Taylor, 329 U.S. 495 (1947), and 10 CFR § 2.740(b)(2).

To claim the attorney-client privilege, it must be shown that: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom a communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with the communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client, (b) without the presence of strangers, (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) legal assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-70, 18 NRC 1094, 1098 (1983), citing, United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

The fact that a document is authored by in-house counsel, rather than by an independent attorney is not relevant to a determination of whether such a document is privileged. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1158 (1982), citing, O'Brien v. Board of Education of City School District of New York, 86 F.R.D. 548, 549 (S.D.N.Y. 1980).

The attorney-client privilege is only available as to communications revealing confidences of the client or seeking legal advice. Shoreham, supra, 16 NRC at 1158, citing, SCM Corp. v. Xerox Corp., 70 F.R.D. 508 (D. Conn.), interlocutory appeal dismissed, 534 F.2d 1031 (2d Cir. 1976). Even if some commonly known factual matters were included in the discussion, or non-legal advice was exchanged, where the primary purpose of a meeting was the receipt of legal advice, the entire contents thereof are protected by privilege. Midland, supra, 18 NRC at 1103, citing, Barr Marine Products Co. v. Borg-Warner Corp., 84 F.R.D. 631, 635 (E.D. Pa. 1979); United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 359 (D. Mass. 1950).

An attorney's representation, that all communications between the attorney and the party were for the purpose of receiving legal advice, is sufficient for an assertion of attorney-client privilege. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 285 (1983), reconsideration denied, LBP-83-64, 18 NRC 766 (1983).

Communications from the attorney to the client should be privileged only if it is shown that the client had a reasonable expectation in the confidentiality of the statement; or,

put another way, if the statement reflects a client communication that was necessary to obtain info med legal advice [and] which might not have been made absent the privilege.

Shoreham, supra, 16 NRC at 1159, citing, Ohio-Sealy Mattress Manufacturing Co. v. Kaplan, 90 F.R.D. 21, 28 (N.D. III. 1980).

Where legal advice is sought from an attorney in good faith by one who is or is seeking to become a client, the fact that the attorney is not subsequently retained in no way affects the privileged nature of the communications between them.

Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-70, 18 NRC 1094 (1983).

The attorney-client privilege was not waived by the presence of third persons at a meeting between client and attorney, where the situation involved representatives of two joint clients seeking advice from the attorney of one such client about common legal problems. Midland, supra, 18 NRC at 1100.

Where the date of a meeting, its attendees, its purpose, and its broad general subject matter are revealed, the attorney-client privilege was not waived as to the substance of the meeting. Midland, supra, 18 NRC at 1102.

Under appropriate circumstances, the attorney-client privilege may extend to certain communications from employees to corporate counsel. However, not every employee who provides a privileged communication is thereby a "client" represented by corporate counsel, or a "party" to any pending legal dispute, for purposes of ABA Disciplinary Rule 7-104. <u>Duke Power Co.</u> (Catawba Nuclear Station, Units 1 and 2), CLI-83-31, 18 NRC 1303, 1305 (1>23), citing, Upjohn Co. v. United States, 449 U.S. 383 (1981). <u>Upjohn, supra, did not overturn the wellestablished principle that counsel should be at liberty to approach witnesses for an opposing party. <u>Catawba, supra, 18 NRC at 1305, citing, Vega v. Bloomsburgh, 427 F. Supp. 593 (D. Mass. 1977)</u>.</u>

Drafts of canned testimony not yet filed by a party are not subject to discovery. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-75-28, 1 NRC 513, 514 (1973).

Security plans are not "classified," and are discoverable in accordance with the provisions of 10 CFR § 2.790(d). However, they are sensitive documents and are not to be made available to the public at large. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-410, 5 NRC 1398, 1402 (1977). In order to discover such plans, (1) the moving party must demonstrate that the plan or a portion of it is relevant to the party's contentions; (2) the release of the plant security plan must usually be subject to a protective

order; and (3) no witness may review the plan until he is first qualified as an expert with sufficient competence to evaluate it. <u>Id.</u> Only those portions of a security plan which are both relevant and necessary for the litigation of a party's contentions are subject to discovery. <u>Id.</u> at 1405.

An interrogatory seeking the identity and professional qualifications of persons relied upon by intervenars to review, analyze and study contentions and issues in a proceeding and to provide the bases for contentions is proper discovery. Such information is not privileged and is not a part of an attorney's work product even though the intervenor's attorney solicited the views and analyses of the persons involved and has the sole knowledge of their identity. General Electric Company (Vallecitos Nuclear Center, General Electric Test Reactor), LBP-78-33, 8 NRC 461, 464-468 (1978).

The Government enjoys a privilege to withhold from disclosure the identity of persons furnishing information about violations of law to efficers charged with enforcing the law. Rovario v. United States, 353 U.S. 53, 59 (1957), cited in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 473 (1981).

This applies not only in criminal but also civil cases, In re United States, 565 F.2d 19, 21 (1977), cert. denied sub nom. Bell v. Socialist Workers Party, 436 U.S. 962 (1978), and in Commission proceedings as well, Northern States Power Co. (Monticello Plant, Unit 1), ALAB-16, 4 AEC <35, affirmed by the Commission, 4 AEC 440 (1970); 10 CFR §§ 2.744(u), 2.790(a)(7); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 91 (1983); and is embodied in FOIA, 5 USC 552(b)(7)(D). The privilege is not absolute; where an informer's identity is (1) relevant and helpful to the defense of an accused, or (2) essential to a fair determination of a cause (Rovario, supra) it must yield. However, the Appeal Board reversed a Licensing Board's order to the Staff to reveal the names of confidential informants (subject to a protective order) to intervenors as an abuse of discretion, where the Appeal Board found that the burden to obtain the names of such informants is not met by intervenor's speculation that identification might be of some assistance to them. To require disclosure in such a case would contravene NRC policy in that it might jeopardize the likelihood of receiving future similar reports. South Texas, supra.

There may be a limited privilege for the identity of individuals who have expressly asked or been promised anonymity in coming forward with information concerning safety-related problems at a nuclear plant. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-59, 16 NRC 533, 537 (1982).

When the NRC Staff seeks the disclosure of the identities of sources of information alloging public health and safety violations at a facility, the Staff must explore any possible alternative means of obtaining the requested information from the individuals in order to protect their confidentiality and to minimize the intrusion into their First Amendment association rights. Richard E. Dow, CLI-91-9, 33 NRC 473, 478-80 (1991), citing, United States v. Garde, 673 F. Supp. 604, 607 (D.D.C. 1987).

In determining whether or not to issue a protective order to protect the confidentiality or to limit the disclosure of the identities of prospective witnesses, a Board will weigh the benefit of encouraging the testimony of such witnesses against the detriment of inhibiting public access to that information and the cumbersome procedures necessitated by a protective order. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-40, 22 NRC 759, 763 (1985).

Privilege to withhold the names of confidential informants is not absolute; it must yield where the informer's identity is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause. Comanche Peak, supra. 16 NRC at 537.

Even where an informer's qualified privilege exists, it will fail in light of the Board's need for the particular information in informed decisionmaking. <u>Texas Utilities Generating Co.</u> (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-59, 16 NRC 533, 538 (1982).

FOIA does not establish new government privileges against discovery. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 121 (1980).

The Commission's rules on discover have incorporated the exemptions contained in the FOIA. Id.

Section 2.790 of the Rules of Practice is the NRC's promulgation in obedience to the Freedom of Information Act. Id. at 120. The Commission, in adopting the standards of Exemption 5, and "necessary to a proper decision" as its document privilege standard under 10 CFR § 2.744(d), has adopted traditional work product/executive privilege exemptions from disclosure. Id. at 123. The Government is no less entitled to normal privilege than is any other party in civil litigation. Id. at 127.

The executive or deliberative process privilege protects from discovery governmental documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated. Long Island Lighting Co. (Shoreham Nuclear Power

Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984), citing, Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), aff'd, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967). A government decision-maker will not be compelled to testify about the mental processes and methods by which a decision was made, unless there is a clear showing of misconduct or wrongdoing. Franklin Savings Association v. Ryan, 922 F.2d 209, 211-212 (4th Cir. 1991), citing, United States v. Morgan, 313 U.S. 409 (1941).

The executive privilege may be invoked in NRC proceedings. Shoreham, supra, 19 NRC at 1333, citing, Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-33, 4 AEC 701 (1971).

Documents shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice including analysis, reports, and expression of opinion within the agency. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1164 (1982), citing, Federal Open Marks, Committee of the Federal Reserve System v. Merril, 443 U.S. 340, 360 (1979).

The executive privilege is a qualified privilege, and does not attach to purely factual communications, or to severable factual portions of communications, the disclosure of which would not compromise military or state secrets. Shoreham, supra, 16 NRC at 1164, citing, EPA v. Mink, 410 U.S. 73, 87-88 (1973); Smith v. FTC, 403 F. Supp. 1000, 1015 (D. Del. 1975); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221, 1225 (1983). The executive privilege does apply where purely factual material is inextricably intertwined with privileged communications or the disclosure of the factual material would reveal the agency's decisionmaking process. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1342 (1984), citing, Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

The executive privilege protects both intra-agency and inter-agency documents and may even extend to nutside consultants to an agency. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1346 (1984), citing, Lead Industries Ass'n v. OSHA, 610 F.2d 70, d3 (2d Cir. 1979).

Communications that fall within the protection of the privilege may be disclosed upon an appropriate showing of need. Shoreham, supra, 16 NRC at 1164, citing, United States v. Leggett and Platt, Inc., 542 F.2d 655, 658-659 (6th Cir.

1976), cert. denied, 430 U.S. 945 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221, 1225 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984), citing, Carl Zeiss Stiftung, supra, 40 F.R.D. at 327.

In determining the need of a litigant seeking the production of documents covered by the executive privilege, an objective balancing test is employed, weighing the importance of documents to the party seeking their production and the availability elsewhere of the information contained in the documents against the Government interest in secrecy. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1164-1165 (1982), citing, United States v. Leggett and Platt, Inc., 542 F.2d 655, 658-659 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221, 1225 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984).

The burden is upon the claimant of the executive privilege to demonstrate a proper entitlement to exemption from disclosure, including a demonstration of precise and certain reasons for preserving the confidentiality of governmental communications. Shoreham, supra, 16 NRC at 1144, 1165, citing, Smith v. FTC, 403 F. Supp. 1000, 1016 (D. Del 1975); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984).

It is appropriate to look to cases decided under Exemption 5 of the FOIA for guidance in resolving claims of executive privilege in NRC proceedings related to discovery, so long as it is done using a common-sense approach which recognizes any differing equities presented in such FOIA cases. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1163-1164 (1982).

A claim of executive privilege is not waived by participation as a litigant in the proceeding. Shoreham, supra, 16 NRC at 1164.

The privilege against disclosure of intragovernment documents containing advisory opinions, recommendations and deliberations is a part of the Loader executive privilege recognized by the courts. Shoreham, supra, 16 NRC at 1164, citing, United States v. Nixon, 418 U.S. 683, 705-711 (1974); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221, 1226-1227 (1983).

The executive privilege is not limited to policymaking but may attach to the deliberative process that precedes medecisions of government agencies. Long Island Lighting Co.

(Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984), citing, Russell v. Dep't of the Air Force, 682 F.2d 1045, 1047 (D.C. Cir. 1982).

The purpose behind the privilege is to encourage frank discussions within the Government regarding the formulation of pol.zy and the making of decisions. Shoreham, supra, 16 NRC at 1164, citing, United States v. Berrigan, 482 F.2d 171, 181 (3rd Cir. 1973).

2.11.2.5 Protective Orders

In using protected information, "those subject to the protective order may not corroborate the accuracy (or inaccuracy) of outside information by using protected information gained through the hearing process." Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-600, 12 NRC 3, 6 (1980).

An affidavit in support of a corporation's request for a protective order is insufficient where it does not establish the basis for the affiant's personal knowledge (if any) respecting the basis for the protective order -- that is, the policies and practices of the corporation with regard to preserving the confidentiality of information said to be proprietary in nature. The Board might well disregard the affidavit entirely on the ground that it was not shown to have been execute by a qualified individual. While it may not be necessary to have the chief executive officer of the company serve as affiant, there is ample warrant to require that facts pertaining to management policies and practices be presented by an official who is in a position to attest to those policies and practices (and the reasons for them) from personal knowledge. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 NRC 23, 28 (1979). In North Anna, the Appeal Board granted a projective order request but explicitly declined to find that the corporation requesting the order had met its burden of showing that the information in question was proprietary and entitled to protection from public disclosure under the standards set forth in Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408 (1976). No party had objected to the order, and the Appeal Board granted the order in the interest of obtaining the requested information without untoward further delay. However, its action should not be taken as precedent for future cases in which relief might be sought from an adjudicatory board based upon affidavits containing deficiencies as described above. North Anna, supra, 10 NRC at 28.

Pursuant to 10 CFR § 2.740(f)(2), the Board is empowered to make a protective order as it would make upon a motion pursuant to Section 2.740(c), in ruling upon a motion to

compel made in accordance with Section 2.740(f). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1152 (1982).

In at least one instance, a Licensing Board deemed it unnecessary to act on a motion for a protective order where a timely motion to compel is not filed. In such a case, the motion for protective order will be deemed granted and the matter closed upon the expiration of the time for filing a motion to compel. <u>Duke Power Co.</u> (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1952 (1982).

Where a demonstration has been made that the rights of association of a member of an intervenor group in the area have been threatened through the threat of compulsory legal process to defend contentions, the employment situation in the area is dependent on the nuclear industry, and there is no detriment to applicant's interests by not having the identity of individual members of petitioner publicly disclosed, the licensing Board will issue a protective order to prevent the public disclosure of the names of members of the organizational petitioner. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-16, 17 NRC 479, 485-86 (1983).

A movant seeking a grant of confidentiality with regard to its identity must demonstrate the harm which it could suffer if its identity is disclosed. <u>Joseph J. Macktal</u>, CLI-89-12, 30 NRC 19, 24 (1989), <u>reconsid. denied</u>, CLI-89-13, 30 NRC 27 (1989).

Licensing and Appeal Boards assume that protective orders will be obeyed unless a concrete showing to the contrary is made. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-764, 19 NRC 633, 643 n.14 (1984); see Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 287-88 (1983), reconsideration denied, LBP-83-64, 18 NRC 766, 769 (1983), citing, Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC 19, 25 (1983). One who violates such orders risks "serious sanction". Midland, supra, 18 NRC at 769. A Board may impose sanctions to remedy the harm resulting from a party's violation of a protective order, and to prevent future violations of the order. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-28, 28 NRC 537, 541 (1988).

2.11.2.6 Work Product

To be privileged from discovery by the work product doctrine, as codified in 10 CFR § 2.740(b)(2), a document must be both prepared by an attorney, or by a person working at the direction of an attorney, and prepared in anticipation of litigation. Ordinary work product, which does not include the mental impressions, conclusions, legal theories

or opinions of the attorney (or other agent), may be obtained by an adverse party upon a showing of "substantial need of materials in preparation of the case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Opinion work product is not discoverable, so long as the material was in fact prepared by an attorney or other agent in anticipation of litigation, and not assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1162 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 495 (1983). See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-7, 23 NRC 177, 179 (1986) (documents required by NRC regulations are discoverable even though attorneys may have assisted in preparing the documents in anticipation of litigation). An intervenor's mere assertion that the material it is withholding constitutes attorney work product is insufficient to meet the burden of proving it is entitled to protection from discovery. Seabrook, supra, 17 NRC at 495.

In the absence of unusual circumstarces, a corporate party cannot immunize itself from otherwise proper discovery merely by using lawyers to make file searches for information required to answer an interrogatory. Houston Lighting & Power Company (South Texas Project, Units 1 & 2), LBP-79-5. 9 NRC 193, 195 (1979).

Drafts of testimony are not covered by the attorney work product privilege. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-81-63, 14 NRC 1768, 1793-1794 (1981).

2.11.2.7 Updating Discovery Responses

The requirements for updating discovery responses are set forth in 10 CFR § 2.740(e). Generally, a response that was accurate and complete when made need not be updated to include later acquired information with certain exceptions set forth in Section 2.740(e). Of course, an adjudicatory board may impose the duty to supplement responses beyond that required by the regulations. 10 CFR § 2.740(e)(3).

2.11.2.8 Interrogatories

Interrogatories must have at least general relevancy, for discovery purposes, to the matter in controversy. <u>Texas</u> <u>Utilities Generating Co.</u> (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 NRC 241, 243 (1981).

Interrogatories will not be rejected solely on the number of questions. <u>Pennsylvania Power & Light Company</u> (Suscuehanna Steam Electric Station, Units 1 and 2), ALAB-613,

Numbers alone do not determine the propriety of interrogatories. While a Board is authorized to impose a limit on interrogatories, the rules do not do so of their own force. In the absence of specific objections there is no occasion to review the propriety of interrogatories individually. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937. 1941 (1982).

An intervenor must come forward with evidence "sufficient to require reasonable minds to inquire further" to insure that its contentions are explored at the hearing. Interrogatories designed to discover what, if any, evidence underlies an intervenor's own contentions are not out of order. <u>Duke Power Co.</u> (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1942 (1982).

Interrogatories served to determine the "regulatory basis" or "legal theory" for a contention are appropriate and important. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1946 (1982).

Answers should be complete in themselves; the interrogating party should not need to sift through documents or other materials to obtain a complete answer. Instead, a party must specify precisely which documents cited contain the desired information. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-67, 16 NRC 734, 736 (1982), citing, Commonwealth Edison Co. (Byran Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NR. 1421, n.39 (1982); 4A Moore's Federal Practice 33.25(1) at 33-129-130 (2d ed. 1981); Martin v. Easton Publishing Co., 85 F.R.D. 312, 315 (E.D. Pa. 1980)

To the extent the interrogatory seeks to uncover and examine the foundation upon which an answer to a specific interrogatory is based, it is proper, particularly where it relates to the interrogee's own contention. Interrogatories which inquire into the basis of a contention serve the dual purposes of narrowing the issues and preventing surprise at trial. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 493-94 (1983); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 81 (1986).

2.11.3 Discovery Against the Staff

Discovery against the Staff is on a different footing than discovery in general. <u>Consumers Power Co.</u> (Midland Plant,

Units 1 and 2). ALAB-634, 13 NRC 96, 97-98 (1981); Pennsylvania Power & Light Co. (Susquehanna Stees. Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 323 (1980). Discovery against the NRC Staff is not governed by the general rules but, instead, is governed by special provisions of the regulations. See, e.g., 10 CFR §§ 2.740(f)(3), 2.740a(j) and 2.741(e). Special provisions for discovery against the Staff are contained in 10 CFR § 2.720(h)(2)(i) (depositions); § 2.720(h)(2)(ii) (interrogatories); §§ 2.744, 2.790 (production of records and documents).

Depositions of named NRC Staff members may be required only upon a showing of exceptional circumstances. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-81-4, 13 NRC 216 (1981); 10 CFR § 2.720(h)(2). Factors considered in such a showing include whether: disclosure of the information is necessary to a proper decision in the proceeding; the information is not reasonably obtainable from another source; there is a need to expedite the proceeding. Id. at 223, citing, Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974).

According to provisions of 10 CFR § 2.720, interrogatories against the Staff may be enforced only upon a showing that the answers to be produced are necessary to a proper decision in the proceeding. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 119 (1980).

Document requests against the Staff must be enforced where relevancy has been demonstrated unless production of the document is exempt under 10 CFR § 2.790. In that case, and only then, must it be demonstrated that disclosure is necessary to a proper decision in the matter. Palisades, supra.

The NRC Staff is not required to compile a list of criticisms of a proposal nor to formulate a position on them in response to an interrogatory. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2), LBP-82-113, 16 NRC 1907, 1908 (1982).

FEMA (Federal Emergency Management Agency) is acting as a consultant to the NRC in emergency planning matters; therefore, its employees are entitled to limitations on discovery afforded NRC consultants by 10 CFR § 2.720(h)(2)(i). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-61, 18 NRC 700, 701 (1983).

Provisions of the Memorandum of Understanding between FEMA and NRC qualify FEMA as an NRC consultant for purposes of 10 CFR § 2.720(h)(2)(i). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-61, 18 NRC 700, 704 (1983).



2.11.4 Responses to Discovery Requests

It is an adequate response to any discovery request to state that the information or document requested is available in public compilations and to provide sufficient information to locate the material requested. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141, 147-148 (1979). This holding has been codified at 10 CFR § 2.740(b)(1). 54 Fed. Reg. 33168, 33181 (August 11, 1989).

A party's response to an interrogatory is adequate if it is true and complete, regardless of whether the discovering party is satisfied with the response. However, where a party's response is inconsistent with the party's previous statements and assertions made to the 'taff, a Board will grant a motion to compel discovery. Vermon: Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-25, 28 NRC 394, 397-99 (1988). reconsid. denied. LBP-88 25A, 28 NRC 435 (1988).

An applicant is entitled to prompt answers to interrogatories inquiring into the factual bases for contentions and evidentiary support for them, since intervenors are not permitted to make skeletal contentions and keep the bases for them secret. Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-52, 14 NRC 901, 903 (1981), citing, Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317 (1980); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 81-82 (1986). An intervenor's failure to timely answer an applicant's interrogatories is not excused by the fact that the delay in answering the interrogatories might not delay the remainder of the proceeding. West Chicago, supra, 23 NRC at 82.

Answers to interrogatories should be complete in themselves. The interrogating party should not need to sift through documents or other materials to obtain a complete answer. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1421 n.39 (1982), citing, 4A Moore's Federal Practice 33.25(1) at 33-129-130 (2d ed. 1981).

10 CFR § 2.74v(b)(1) provides in part that:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding ... including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Answers to interrogatories or requests for documents which do not comply with this provision are inasequate. I inois Power Co. (Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735, 1737-1738 (1981).

Pursuant to 10 CFR § 2.741(d), a party upon whom a request for the production of documents is served is required to serve, within 30 days, a written response stating either that the requested inspection will be permitted or stating its reasons for objecting to the request. A response must state, with respect to each item or category, either that inspection will be permitted or that the request is objectionable for specific reasons. Long Island Lighting Co. (Shoreham Nuclear Flower Station, Unit 1), LBP-82-82, 16 NRC 1144, 1152 (1982).

A Board may require a party, who has been served with a discovery request which it believes is overly broad, to explain why the request is too broad and, if feasible, to incerpret the request in a reasonable fashion and supply documents (or answer interrogatories) within the realm of reason. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-85-41, 22 NRC 765, 763 (1985).

A request for documents should not be deemed objectionable solely because there might be some burden attendant to their production. Shoreham, supra, 16 NRC at 1155. Pursuant to 10 CFR § 2.740(f)(1), failure to answer or respond shall not be excused on the ground that the discovery sought is objectionable unless in a protective order pursuant to 10 CFR § 2.740(c). A party is not required to seek a protective order when it has, in fact responded by objecting. An evasive or incomplete answer or response shall be treated as a failure to answer or respond. Shoreham, supra, 16 NRC at 1152.

Where intervenors have filed consolidated L efs they may be treated as a consolidated party; one intervenor may be appointed lead intervenor for purposes of coordinating responses to discovery, but discovery requests should be served on each party intervenor. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 687-688 (1981).

The involvement of a party's attorneys in litigation or other professional business does not excuse noncompliance with, nor extend deadlines for compliance with, discovery requests or other rules of practice, and is an inadequate response to a motion to compel discovery. Commonwealth Edison Co. (Byron Static., Units 1 and 2), LBP-81-30-A, 14 NRC 364, 373 (1981).

2.11.5 Compelling Discovery

Discovery can be compelled where the person against whom discovery is sought resists (See 10 CFR § 2.740(f)). Subpoenas may also issue pursuant to 10 CFR § 2.720.

In the first instance, no one appears to be immune from an order compelling discovery. The ACRS, for example, has been ordered to provide materials which it declined to provide voluntarily. Virginia Electric Power Co. (North Anna Power Station, Units 1 & 2), CLI-74-16, 7 AEC 313 (1974). Nevertheless, where discovery is resisted by a charty (discovery against nonparties impliedly permitted and language of 10 CFR §§ 2.720(f), 2.740(c)), a greater and got relevance and materiality appears to be necessary. As a party seeking discovery must show that:

- (1) information sought is otherwise unavailable; and
- (2) he has minimized the burden to be placed on the nonparty.

Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-118, 6 AEC 263 (1973). Moreover, Licensing Boards have, on cocasion, shown reluctance to enforce the discovery rules to the letter against intervenors. See, e.g., Gulf States Utilities Co. (River Bend Station, Units 1 & 2), LBP-74-74, 8 AEC 669 (1974).

Section 2.740 of the NRC's Rules of Practice, under which subpoenas are issued, is not founded upon the Commission's general rulemaking powers; rather, it rests upon the specific authority to issue subpoenas <u>duces tecum</u> contained in Section 161(c) of the Atomic Energy Act. Therefore, the rule of <u>FMC v. Anglo-Canadian Shipping Company</u>, 335 F.2d 255 (9th Cir. 1964) that agency discovery rules cannot be founded on general rulemaking powers does not come into play. <u>Pacific Gas and Electric Company</u> (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 694 (1979). <u>See also OIA Investigation</u>, CLI-89-11, 30 NRC 11, 14-15 (1989), <u>aff'd sub nom. U.S. v. Comley</u>, 890 F.2d 539 (1st Cir. 1989).

The federal courts generally will enforce an administrative subpoena if: (1) the agency can articulate a proper purpose for issuing the subpoena; (2) the information sought by the subpoena is reasonably relevant to the purpose of the investigation; and (3) the subpoena is not too indefinite. The Commission can establish a proper purpose for issuing a subpoena by showing that the matter under investigation implicates public health and safety concerns in matters involving nuclear materials. U.S. v. Comley, 890 F.2d 539, 541-42 (1st Cir. 1989). The courts may deny enforcement of

the subpoena if it is shown by firm evidence that: the subpoena was issued for an improper purpose, such as bac faith or harassment; or enforcement of the subpoena would infringe upon the right to freedom of association by compelling a private organization to reveal the identities of its existing members, subjecting them to harassment, and discouraging the recruitment of new members. <u>U.S. v. Comley</u>, 890 F.2d 539, 542-44 (1st Cir. 1989).

The information sought by an administrative subpoena need only be "reasonably relevant" to the inquiry at hand. Stanislaus, supra, 9 NRC at 695.

Subpoenas must be issued in good faith, and pursuant to legitimate agency investigation. Metropolitan Edison Co. (Three Mile Island, Unit 2), CLI-80-22, 11 NRC 724, 729 (1980).

The referral of matters to the Department of Justice for comparison of proceedings, which are separate and distinct from matte s covered by subpoenas issued by the Director of Office of Inspection and Enforcement, does not bar the Commission from pursuing its general health and safety and civil enforcement responsibilities through issuance of subpoena. Section 161(c) of Atomic Energy Act, 42 U.S.C. § 2201(c). Metropolitan Edison Company (Three Mile Island, Jnit 1), CLI-80-22, 11 NRC 724, 725 (1980).

10 CFR § 2.720(a) contemplates ex parte applications for the issuance of subpoenas. Although the Chairman of the Licensing Board "may require a showing of general relevant of the testimony or evidence sought," he is not obligated to do so. The matter of relevance can be entirely deferred until such time as a motion to quash or modify the subpoena raises the question of relevance. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 698 n.22 (1979).

A Licensing Board is required to issue a subpoena if the discovering party has made a showing of general relevance concerning the testimony or evidence sought. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 279 (1987).

Section 2.720(f) of the Rules of Practice specifically provides that a Licensing Board may condition the denial of a motion to quash or modify a subpoena <u>duces tecum</u> "on just and reasonable terms." That phrase is expansive enough in reach to allow the imposition of a condition that the subpoenaed person or company be reimbursed for document production costs. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 698-699 (1979).

The Commission denied a motion to quash a Staff subpoena where the subpoenaed individual simply alleged that the records sought by the subpoena contained information of Staff misconduct. Richard E. Dow, CLI-91-9, 33 NRC 473, 478-79 (1991).

Generally, document production costs will not be awarded unless they are found to be not reasonably incident to the connect of a respondent's business. <u>Stanislaus</u>, <u>supra</u>, 9 NRC at 702.

Under 10 CFR § 2.740 and § 2.740b, the presiding officer of a proceeding will rule upon motions to compel discovery which set forth the questions contained in the interrogatories, the responses of the party upon whom they were served, and arguments in support of the motion to compel discovery. An evasive or incomplete answer or response to an interrogatory shall be treated as a failure to answer or respond. Houston Lighting & Power Company (South Texas Project, Units 1 and 2), LBP-79-5, 9 NRC 193, 194-195 (1979).

Specific objections must be made to the alleged inadequacy of discrete responses. South Texas, supra, 9 NRC at 195.

A discovering party is entitled to direct answers or objections to each and every interrogatory posed. Objections should be plain enough and specific enough so that it can be understood in what way the interrogatories are claimed to be objectionable. General objections are insufficier. The burden of persuasion is on the objecting party to show that the interrogatory should not be answered, that the information called for is privileged, not relevant, or in some way not the proper subject of an interrogatory. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1944 (1982).

A motion to compel is required under the rules to set forth detailed bases for Board action, including arguments in support of the motion. 10 CFR § 2.740(f). This means that relief will only be granted against a party resisting further discovery when the movant gives particularized and persuasive reasons for it. Generalized claims that answers are evasive or that objections are unsubstantial will not suffice. The movant must address each interrogatory, including consideration of the objection to it, point by point. <u>Duke Power Co.</u> (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1950 (1982).

2.11.5.1 Compelling Discovery From ACRS and ACRS Consultants

Although 10 CFR § 2.720 does not explicitly cover consultants for advisory boards like the Advisory Committee on Reactor Safeguards (ACRS), it may fairly be read to include them where

they have served in that capacity. Therefore, a party seeking to subpoena consultants to the ACRS may do so but must show the existence of exceptional circumstances before the subpoenas will be issued. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant. Units 1 and 2), ALAB-519, 9 NRC 42, 42 n.2 (1979).

2.11.5.2 Sanctions for Failure to Comply with Discovery Orders

10 CFR § 2.707 authorizes the presiding officer to impose various sanctions on a party for its failure to, among other things, comply with a discovery order. <u>Duke Power Co.</u> (Catawba Nuclear Station, Units 1 and 2), LBP-83-56, 18 NRC 421, 433 (1983). Those sanctions include a finding of facts as to the matters regarding which the order was made in accordance with the claim of the party obtaining the order. Pursuant to 10 CFR § 2.707, the failure of a party to comply with a Board's discovery order constitutes a default for which a Board may make such orders in regard to the failure as are just. <u>Duke Power Co.</u> (Catawba Nuclear Station, Units 1 and 2), LBP-83-29A, 17 NRC 1121, 1122 (1983); <u>Kerr-McGee Chemical Corp.</u> (West Chicago Rare Earths Facility), <u>BP-86-4</u>, 23 NRC 75, 80 (1986).

A Licensing Board may dismiss the Contentions of an intervenor who has failed to respond to an applicant's discovery requests, particularly where the intervenor has failed to file a response to the applicant's motion for summary disposition. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 810 (1986). An intervenor's alleged poor preparation of a contention and a related motion for summary disposition, as distinguished from the intervenor's failure to respond at all to discovery requests, does not warrant the dismissal of the intervenor's contention. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-35, 30 NRC 677, 679 (1989), vacated and reversed on other grounds, ALAB-944, 33 NRC 81 (1991).

Pursuant to 10 CFR § 2.707, an intervenor can be dismissed from the proceeding for its failure to comply with discovery orders. Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298 (1977); Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813 (1975); Public Service Electric & Gas Co. (Atlantic Generating Station, Units 1 & 2), LBP-75-62, 2 NRC 702 (1975).

Intervenors were dismissed from a proceeding when the Board ostermined that: the intervenors had engaged in a willful, bad faith strategy to obstruct discovery; the intervenors' actions and omissions prejudiced the applicant and the integrity of the adjudicatory process; and the imposition of

lesser sanctions earlier in the proceeding had failed to correct the intervenors' actions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-24, 28 NRC 311, 375-77 (1988), rev'd in part and vacated in part, ALAB-902, 28 NRC 423 (1988), review denied and stay denied, CLI-88-11, 28 NRC 603 (1988). Where multiple Licensing Boards are presiding over different portions of an operating license p ceeding, an individual Licensing Board's authority to order the dismissal of a party applies only to the hearing over which it has jurisdiction, and does not extend to those portions of the proceeding pending before the other Licensing Boards. A party who seeks the dismissal of another party from the entire proceeding must request the sanction of dismissal from each of the Boards before which different parts of the proceeding are pending. Shoreham, supra, 28 NRC at 428-30, review denied and stay denied, CLI-88-11, 28 NRC 603 (1988). On directed certification from the Appeal Board of the intervenors' appeal of their dismissal as parties by the OL-3 Licensing Board (which issued LBP-88-24, supra), the Commission determined that the intervenors' conduct before the Licensing Board warranted their dismissal as parties from all proceedings pending before the Commission. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-2, 29 NRC 211, 231-32 (1989).

A licensee's motion for sanctions against an intervenor for failure to comply with discovery requests poses a three part consideration: (1) due process for the licensee; (2) due process for the intervenor; and (3) an overriding consideration of the public interest in a complete evidentiary record. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), LBP-80-17, 11 NRC 893, 897 (1980).

Counsel's allegations of certain problems as excuses for intervenor's failure to provide discovery did not justify reconsideration of the Board's imposition of anctions for such failure, where such allegations were expressly dealt with in the Board's order compelling discovery. Nor can an intervenor challenge the sanctions on the grounds that other NRC cases involved lesser sanctions, where the intervenor has willfully and deliberately refused to supply the evidentiary bases for its admitted contentions. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-82-5, 15 NRC 209, 213-214 (1982). See, however, ALAB-678, 15 NRC 1400 (1982), reversing the Byron Licensing Board's dismissal of intervenor for failure to comply with discovery orders on the ground that such a sanction was too severe in the circumstances.

The sanction of dismissal from an NRC licensing proceeding is to be reserved for the most severe instances of a participant's failure to meet its obligations. In selecting a sanction, Licensing Boards are to consider the relative

importance of the unmet obligation; its potential harm to other parties or the orderly conduct of the proceeding; whether its occurrence is an isolated incident or a part of a pattern of behavior; the importance of the safety or environmental concerns raised by the party and all of the circumstances. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400 (1982), citing, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1947 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-20A, 17 NRC 586, 590 (1983), citing, Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 392 (1983); Kerr-McGee Chemical Corp. (Kress Creek Decontamination), LBP-85-48, 22 NRC 843, 848-49 (1985); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 80-81 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-24, 28 NRC 311, 365-68 (1988); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1). CLI-89-2, 29 NRC 211, 223 (1989).

The refusal of any party to make its witnesses available to participate in the prehearing examinations is an abandonment of its right to present the subject witness and testimony. An intervenor's intentional waiver of both the right to cross-examine and the right to present witnesses amounts to an effective abandonment of their contention. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1935, 1936 (1982).

Although failure to comply with a Board order to respond to interrogatories may result in adverse findings of fact, the Board need not decide what adverse findings to adopt until action is necessary. When another procedure has been adopted requiring intervenors to shoulder the burden of guing forward on a motion for summary disposition, it may be appropriate to await intervenor's filing on summary disposition, before deciding whether or not to impose sanctions for failure to respond to interrogatories pursuant to a Board order. Sanctions only will be appropriate if failure to respond prejudices applicant in the preparation of its case. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-10, 15 NRC 341, 344 (1982).

Where an intervenor has failed to comply with discovery requests and orders, the Licensing Board may alter the usual order of presentation of evidence and require an intervenor that would normally follow a licensee, to proceed with its case first. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1245 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). See Northern States Power Co. (Tyrone Energy Park, Unit 1),

LBP-77-37, 5 NRC 1298, 1300-01 (1977), cited with approval in Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 328 (1980); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 188 (1978); 10 CFR § 2.731; 10 CFR Part 2, Appendix A, § V(d)(4); 5 U.S.C. § 556.

2.11.6 Appeals of Discovery Rulings

A Licensing Board order granting discovery against a third party is a final order and may be appealed; an order denying such discovery is interlocutory, and an appeal is not permitted. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-116, 6 AEC 258 (1973).

A discovery order entered against a nonparty is a final order and thus is appealable. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 686 n.1 (1979); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-764, 19 NRC 633, 636 n.1 (1984).

Where a nonparty desires to appeal a discovery order against him, the proper procedure is for such person to enter a special appearance before the Licensing Board and then appeal to the Appeal Board. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311, 3 NRC 85 (1976).

A party who seeks judicial review of an administrative subpoena must refuse to comply with the subpoena, be held in contempt by a trial court, and then appeal the finding of contempt to an appeals court. Once a party has complied with a subpoena to testify, the appeal from enforcement of the subpoena is moot. The appeals court will not consider a party's motion to seal the testimony against future use. Speculation about possible future uses of the testimony does not present a ripe issue for adjudication. Office of Thrift Supervision v. Dobbs, 931 F.2d 956, 957-959 (D.C. Cir. 1991).

To establish reversible error from the curtailment of discovery procedures, a party must demonstrate that such curtailment made it impossible to obtain crucial evidence. Implicit in such a showing is proof that more diligent discovery was impossible. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 869 (1975). The Appeal Board has refused to review a discovery ruling referred to it by a Licensing Board when the Board below did not explain why it believed Appeal Board involvement was necessary, where the losing party had not indicated that it was unduly burdened by the ruling and where the ruling was not novel. Consumers Power Company (Midland

Plant, Units 1 & 2), ALAB-438, 6 NRC 638 (1977). The aggrieved party must make a strong showing that the impact of the discovery order upon that party or upon the public interest is indeed "unusual." Id.

Questions about the scope of discovery concern matters which are particularly within a trial board's competence and appellate review of such rulings is usually best conducted at the end of case. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 321 (1980).

2.11.7 Discovery in High-Level Waste Licensing Proceedings

2.11.7.1 Pre-License Application Licensing Board

Pursuant to 10 CFR § 2.1010, a Pre-License Application Licensing Board is authorized to resolve questions concerning: access to the Licensing Support System (LSS); the entry of documentary material into the LSS; discovery requests; and the development and operation of the LSS.

2.11.7.2 Licensing Support System

The Licensing Support System (LSS) is an electronic information management system, established pursuant to Subpart J of 10 CFR Part 2, which will contain the documentary material generated by the participants in the high-level waste licensing proceeding as well as NRC orders and decisions related to the proceeding.

related to subject matter already before the Board, not minor, procedural matters. <u>Wisconsin Electric Power Co.</u> (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-12, 15 NRC 354, 356 (1982).

NRC regulations give an adjudicatory board the discretion to raise on its own motion any serious safety or environmental matter. See 10 CFR §§ 2.760a, 2.785(b)(2). This discretionary authority necessarily places on the board the burden of scrutinizing the record of an operating license proceeding to satisfy itself that no such matters exist. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983). See Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-511, 12 NRC 301, 309 (1980). An adjudicatory board's decision to exercise its sua sponte authority must be based on evidence contained in the record. A board may not engage in discovery in an attempt to obtain information upon which to establish the existence of a serious safety or environmental issue. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 7 (1986).

A Licensing Board may, under 10 CFR § 2.760a, raise and decide, <u>sua sponte</u>, a serious safety, environmental, or common defense and security matter, should it determine such a serious issue exists. The limitations imposed by regulation on a Board's review of a matter not in contest (and therefore not subject to the more intense scrutiny afforded by the adversarial process) do not override a Board's authority to invoke 10 CFR § 2.760a. The Commission may, however, on a case-by-case basis relieve the Boards of any obligation to pursue uncontested issues. <u>Louisiana Power and Light Co.</u> (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1112 and n.58 (1983), <u>citing</u>, <u>Virginia Electric and Power Co.</u> (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245, 248 n.7 (1978).

A Licensing Board has ruled that exercise of its <u>sua sponte</u> authority to examine certain serious issues is not dependent on either (1) the presence of any party to raise or pursue those issues in the proceeding, or (2) the particular stage of the proceeding. Thus, the Licensing Board determined that it could properly retain jurisdiction over an intervenor's admissible contentions even though the intervenor had been dismissed from the proceeding prior to the issuance of a notice of hearing. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-32, 32 NRC 181, 185-86 (1990), <u>overruled</u>, CLI-91-13, 34 NRC 185, 188-89 (1991). The Commission made clear that a Licensing Board does not have the authority to raise a <u>sua sponte</u> issue in an operating license or operating license amendment proceeding

where all parties in the proceeding have withdrawn or been dismissed. If the Board believes that serious safety issues remain to be addressed, it should refer those issues to the NRC Staff for review. <u>Turkey Point</u>, <u>supra</u>, 34 NRC at 188-89.

3.1.2.4 Expedited Proceedings; Timing of Rulings

Licensing Boards have broad discretion regarding the appropriate time for ruling on petitions and motions filed with them. Absent clear prejudice to the petitioner from a Licensing Board's deferral of a decision on a pending motion, an Appeal Board is constrained from taking any action since the standard of review of a Licensing Board's deferral of action is whether such deferral is a clear abuse of discretion. Detroit Edison Company (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426 (1977).

A Licensing Board has authority under 10 CFR § 2.711(a) to extend or lessen the times provided in the Rules for taking any action. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 13 (1980).

As a general matter, when expedition is necessary, the Commission's Rules of Practice are sufficiently flexible to permit it by ordering such steps as shortening, even drastically in some circumstances, the various time limits for the party's filings and limiting the time for, and type of, discovery. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982), citing, 10 CFR § 2.711; Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 251 (1986).

Procedures for expediting a proceeding, however, should not depart substantially from those set forth in the Rules of Practice, and steps to expedite a case are appropriate only upon a party's good cause showing that expedition is essential. Point Beach, supra, 16 NRC at 1263, citing, 10 CFR § 2.711.

Under extraordinary circumstances, it is appropriate for the Licensing Board to address questions to an applicant even before formal action has been completed concerning admission of an intervenor into a license amendment proceeding. These questions need not be considered sues requiring notification of the Commission. The Board may also authorize a variety of special filings in order to expedite a proceeding and may even grant petitioners the right to utilize discovery even before they are admitted as parties. However, special sensitivity must be shown to intervenor's procedural rights when the cause for haste in a proceeding was a voluntary

decision by the applicant concerning both the timing and content of its request for a license amendment. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-39, 14 NRC 819, 821, 824 (1981); LBP-81-55, 14 NRC 1017 (1981).

Under exceptional circumstances, Board questions may precede discovery by the parties. <u>Wisconsin Electric Power Co.</u> (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-44, 14 NRC 850, 851 (1981).

When time pressures cause special difficulties for intervenors, discovery against intervenors may be restricted in order to prevent interference with their preparation for a hearing. A presiding officer has discretionary power to authorize specially tailored proceedings in the interest of expedition. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-46, 14 NRC 862, 863 (1981).

When quick action is required on a license amendment, it is appropriate to interpret petitioner's safety concerns broadly and to admit a single broad contention that will permit wideranging discovery within the limited time without the need to decide repeated motions for late filing of new contentions. But the contentions must still relate to the license amendment which is requested. Petitioner may not challenge the safety of activities already permitted under the license. wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-45, 14 NRC 853, 860 (1981).

Though the Board may admit a single broad contention in the interest of expedition, its liberal policy towards admissions may be rescinded when the time pressure justifying it is relieved. However, issues already raised under the liberal policy are not retroactively affected by its rescission. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-19A, 15 NRC 623, 625 (1982).

In Consolidated Edison Co. of N.Y. (Indian Point, Unit No. 2); Power Authority of the State of New York (Indian Point, Unit No. 3), LBP-82-12A, 15 NRC 515 (1982), the intervention petitioner filed a motion requesting permission to observe the emergency planning exercise scheduled to be held two days later for the Indian Point Facility. The Licensing Board ruled that, although 10 CFR § 2 741 directs that a party first seek discovery of this sort from another party and that only after a 30-day opportunity to respond can the party apply to the Board for relief, in this case, strict adherence to the rule would not be required. Where, as here, the exigencies of the case do not permit a 30-day response period, procedural delicacy will not be allowed to frustrate the purpose of the

JULY 1992

hearing — especially where no party is seriously disadvantaged by expediting the action. <u>Indian Point</u>, 15 NRC at 518. Furthermore where the issue of adequacy of emergency planning was clearly an issue to be fully investigated and the observations of the potential intervenors the next day would be useful to the Board in its deliberations, the Board would deny licensee's request for stay and certification to the Commission, since to grant these motions would render the issue moot. <u>Consolidated Edison Co. of N.Y.</u> (Indian Point, Unit No. 2); <u>Power Authority of the State of N.Y.</u> (Indian Point, Unit No. 3), LBP-82-12B, 15 NRC 523, 525 (1982).

3.1.2.5 Licensing Board's Relationship with the NRC Staff

A Licensing Board may not delegate its obligation to decide issues in controversy to the Staff. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-298, 2 NRC 730, 737 (1975); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-84-2, 19 NRC 36, 210 (1984), (rev'd on other grounds, ALAB-793, 20 NRC 1591, 1527 [1984]), citing, Perry, supra, 2 NRC at 737.

The rule against delegation applies even to issues a Licensing Board raises on its own motion in an operating license proceeding. Byron, supra, 19 NRC at 211, citing, Consolidated Edison Co. of New York (Indian Point Nuclear Generating Unit 3), CLI-74-28, 8 AEC 7, 8-9 (1974). The rule against delegation applies, in particular, to quality assurance issues. Byron, supra, 19 NRC at 212, citing. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1973). However, where there is nothing remaining to be adjudicated on a quality assurance issue, the adequacy of a 100 percent reinspection of a contractor's work may be delegated to the Staff to consider post-hearing. Byron, supra, 19 NRC at 216-17.

On the other hand, with respect to emergency planning, the Licensing Board will accept predictive findings and post-hearing verification by Staff of the formulation and implementation of aspects of emergency plans. Byron, supra, 19 NRC at 212, 251-52, citing, Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 C 1076, 1103-04 (1983); Public Service Co. of New Hampsnire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 569, 594 (1989), rev'd in part on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd, ALAB-947, 33 NRC 299, 318, 346, 347, 348-349, 361-362 (1991).

In a construction permit proceeding, the Licensing Board has a duty to assure that the NRC Staff's review was adequate even as to matters which are uncontested. <u>Gulf States Utilities</u> <u>Co.</u> (River Bend Station, Units 1 & 2). ALAB-444, 6 NRC 760,

774 (1977). In this vein, a more recent case reiterating the rule that a Licensing Board may not delegate its obligation to decide significant issues to the NRC Staff is <u>Public Service</u> <u>Co. of Indiana, Inc.</u> (Marble Hill Nuclear Generating Station, Units I and 2), ALAB-461, 7 NRC 313, 318 (1978).

A Licensing Board does not have the power, under 10 CFR § 2.718 or any other regulation, to direct the Staff in the performance of its independent responsibilities. New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 279-80 (1978); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1263 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). See Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 721-22 (1989), aff'd on other grounds, CLI-90-5, 31 NRC 337 (1990).

Whether a Board may modify an order or action of the Staff depends on the relationship of the order to the subject matter of a pending proceeding. If closely related, a Staff order may not be issued, or is subject to a stay until resolution of the contested issue. If far removed from the subject matter of a pending proceeding, a Staff order should not be considered by the Board. Finally, there are matters which are properly the subject of independent Staff action, but which bear enough relationship to the subject matter of a pending proceeding that review by the Licensing Board is also appropriate. Nuclear Fuel Services Inc. and N.Y. State Energy Research and Development Authority (Western New York Nuclear Service Center), LBP-82-36, 15 NRC 1075, 1082 (1982), citing, Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 229-230 (1979).

Issues relating to NRC Staff compliance with and implementation of a Licensing Board order, rather than the order itself, should be presented to the Licensing Board in the first instance, rather than to the Appeal Board. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-684, 16 NRC 162, 165 (1982).

The docketing and review activities of the Staff are not under the supervision of the Licensing Board. Only in the most unusual circumstances should a Licensing Board interfere in the review activities of the Staff. Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), LBP-79-23, 10 NRC 220, 223-24 (1979).

The Staff produces, among other documents, the Safety Evaluation Report (SER) and the Draft and Final Environmental Statements (DES and FES). The studies and analyses which result in these reports are made independently by the Staff, and Licensing Boards have no rule or authority in their preparation. The Board does not have any supervisory

authority over that part of the application review process that has been entrusted to the Staff. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 48-49 (1983), citing, New England Power Co. (NEP Units 1 and 2), LBP-78-9, 7 NRC 271 (1978). See Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 206-07 (1978).

The decision whether to approve a plan for construction during the period in which certain design engineering and construction management, and possibly construction responsibilities, are being transferred from one contractor to another is initially within the province of the NRC Staff. But because of the safety significance of the work to be performed, and its clear bearing on whether, or on what terms, a project should be licensed, and on the resolution of certain existing contentions, consideration of the adequacy of, and controls to be exercised by, the applicants and NRC Staff over such work falls well within the jurisdiction of the Licensing Board. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-81-54, 14 NRC 918, 919-2C (1981).

Adjudicatory boards do not possess the authority to direct the holding of hearings following the issuance of a construction permit, nor have boards been delegated the authority to direct the Staff in the performance of its administrative functions. Adjudicatory boards concerned about the conduct of the Staff's functions should bring the matter to the Commission's attention or certify the matter to the Commission. As part of its inherent supervisory authority, the Commission has the authority to direct the Staff's performance of administrative functions, even over matters in adjudication. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-80-12, 11 NRC 514, 516-17 (1980). Ordinarily, Licensing Boards should not decide whether a given action significantly affects the environment without the record support provided by the Staff's environmental review. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 330 (1981).

Where the Licensing Board finds that the Staff cannot demonstrate a reasonable cause for its delay in submitting environmental statements, the Board may issue a ruling noting the unjustified failure to meet a publication schedule and then proceed to hear other matters or suspend proceedings until the Staff files the necessary documents. The Board, sua sponte or on motion of one of the parties, may refer the ruling to the Appeal Board. If the Appeal Board affirms, it would certify the matter to the Commission. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 207 (1978).

A Licensing Board should not call upon independent consultants to supplement an adjudicatory record except in that most extraordinary situation in which it is demonstrated that the Board cannot otherwise reach an informed decision on the issue involved. Part 2 of 10 CFR and Appendix A both give the Staff a dominant role in assessing the radiological health and safety aspects of facilities involved in licensing proceedings. Before an adjudicatory board resorts to outside experts of their own, they should give the NRC Staff every opportunity to explain, correct and supplement its testimony. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1146, 1156 (1981), review declined, CLI-82-10, 15 NRC 1377 (1982).

Applying the criteria of <u>Summer</u>, <u>supra</u>, 14 NRC at 1156, 1163, a Licensing Board determined that it had the authority to call an expert witness to focus on matters the Staff had apparently ignored in a motion for summary disposition of a health effects contention. <u>Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency</u> (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-7, 19 NRC 432, 442-43 (1984), <u>reconsid.</u> on other grounds, LBP-84-15, 19 NRC 837, 838 (1984).

After an order authorizing the issuance of a construction permit has become final agency action, and prior to the commencement of any adjudicatory proceeding on any operating license application, the exclusive regulatory power with regard to the facility lies with the Staff. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-381, 5 NRC 582 (1977). Under such circumstances, an adjudicatory board has no authority with regard to the facility or the Staff's regulation of it. In the same vein, after a fullterm, full power operating license has been issued and the order authorizing it has become final agency action, no further jurisdiction over the license lies with any adjudicatory board. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-451, 6 NRC 889, 891 n.3 (1977); <u>Duquesne Light</u> Co. (Beaver Valley Power Station, Unit 1), ALAB-408, 5 NRC 1383, 1386 (1977); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386, aff'd, ALAB-470, 7 NRC 473 (1978).

For a Licensing Board to accept unsupported NRC Staff statements would be to abrogate its ultimate responsibility and would be substituting the Staff's judgment for its own. On ultimate issues of fact, the Board must see the evidence from which to reach its own independent conclusions. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-114, 16 NRC 1909, 1916 (1982).

Should a Staff review demonstrate the need for corrective action, the decision on the adequacy of such a corrective

action is one that the Licensing Board may not delegate. Case law suggests that even in cases where a Board resolves an issue in an applicant's favor leaving the Staff to perform what is believed to be a confirmatory review, the Staff should inform the Board should it discover that corrective action is warranted. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 520 n.21 (1983).

3.1.2.6 Licensing Board's Relationship with Other Ay...cies

The requirements of State law are for State bodies to determine, and are beyond the jurisdiction of NRC adjudicatory bodies. Northern States Power Company (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 748 (1977). In this case, the Wisconsin Public Service Commission decided that some of the applicants were "foreign corporations" and could not construct the Tyrone facility. Although the Appeal Board would not question the State's ruling, it remanded the case to reconsider financial and technical qualifications in light of the changes in legal relationships of the co-applicants that resulted from the State determination. See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 899 (1985).

In the absence of a controlling contrary judicial precedent, the Commission will defer to a State Attorney General's interpretation of State law concerning the designation of representatives of a State participating in an NRC proceeding as an interested State. <u>Public Service Co. of New Hampshire</u> (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 148 (1987).

The Commission lacks the authority to disqualify a State official or an entire State agency based on an assertion that they have prejudged fundamental issues in a proceeding involving the transfer of jurisdiction to a State to regulate nuclear waste products. A party must pursue such due process claims under State law. State of Illinois (Section 274 Agreement), CLI-88-6, 28 NRC 75, 88 (1988).

A Licensing Board does not have jurisdiction in a construction permit proceeding under the Atomic Energy Act to review the decision of the Rural Electrification Administration to guarantee a construction loan to a part owner of the facility being reviewed. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 267-68 (1978).

It would be improper for a Licensing Board to entertain a collateral attack upon any action or inaction of sister Federal agencies on a matter over which the Commission is

totally devoid of any jurisdiction. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-82-117A, 16 NRC 1964, 1991 (1982). Thus, a Licensing Board refused to review whether FEMA complied with its own agency regulations in performing its emergency planning responsibilities. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 499 (1986). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-89-1, 29 NRC 5, 18-19 (1989).

As an independent regulatory agency, the Commission does not consider itself legally bound by substantive regulations of the Council on Environmental Quality. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 284 n.5 (1987); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 461 (1987), remanded on other grounds, Sierra Club v. NRC, 862 F.2d 222, 228-29 (9th Cir. 1988).

Although the Commission will take cognizance of activities before other legal tribunals when the facts so warrant, it should not delay its licensing proceedings or withhold a license merely because some other legal tribunal mighi conceivably take future action which may later impact upon the operation of a nuclear facility. Palo Verde, supra, 16 NRC at 1991, citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-14, 7 NRC 952, 958 n.5 (1978); Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928, 930 (1974); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-171, 7 AEC 37, 39 (1974); and Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 748 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 900 (1985); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-46, 22 NRC 830, 832 & n.9 (1985), citing, Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 884-85 (1984); Kerr-McGee Chemical Corp. (Kress Creek Decontamination), LBP-85-48, 22 NRC 843, 847 (1985).

3.1.2.7 Conduct of Hearing by Licensing Board

The Atomic Energy Act does not itself specify the nature of the hearings required to be held pursuant to Section 189(a), 42 U.S.C. § 2239; its reference to a hearing neither distinguishes between rulemaking and adjudication nor states explicitly whether either must be conducted through formal on-the-record proceedings. However, the Commission has invariably distinguished between the two, and has provided formal hearings in licensing cases, as contrasted with informal hearings in rulemaking proceedings confined to written submissions and non-record interviews. Long Island

Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-107, 16 NRC 1667, 1673-74 (1982), citing, Siegel v. Atomic Energy Commission, 400 F.2d 778, 785 (D.C. Cir. 1968); Citizens For a Safe Environment v. Atomic Energy Commission, 489 F.2d 1018, 1021 (3rd Cir. 1974).

The presiding officer has the duty to conduct a fair and impartial hearing, to maintain order and to take appropriate action to avoid delay. Specific powers of the presiding officer are set forth in 10 CFR § 2.718. While the Licensing Board has broad discretion as to the manner in which a hearing is conducted, any actions pursuant to that discretion must be supported by a record that indicates that such action was based on a consideration of discretionary factors. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 355 (1978).

A Licensing Board has considerable flexibility in regulating the course of a hearing and designating the order of procedure. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 727 (1985), citing, 10 CFR §§ 2.718(e), 2.731. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1245-46 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). Although the Commission's Rules of Practice set forth a general schedule for the filing of proposed findings, a Licensing Board is authorized to alter that schedule or to dispense with it entirely. Limerick, supra, 22 NRC at 727, citing, 10 CFR § 2.754(a).

Pursuant to 10 CFR § 2.718, the Licensing Board has the duty to conduct a fair and impartial hearing under the law, which includes the responsibility to impose upon all parties to a proceeding the obligation to disclose all potential conflicts of interest. Fundamental fairness clearly requires disclosure of potential conflicts so as to enable the Board to determine the materiality of such information. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-73, 16 NRC 974, 979 (1982).

A Board may refer a potential conflict of interest matter to the NRC General Counsel, who is responsible for interpreting the NRC's conflict of interest rules. 10 CFR § 0.735-27. Once the matter has been handled in accordance with NRC internal procedures, a Board will not review independently either the General Counsel's determination on the matter or the judgment on whether any punitive measures are required. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 583-584 (1985).

While a Licensing Board should endeavor to conduct a licensing proceeding in a manner that takes account of special circumstances faced by any participant, the fact that a party may

possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1261 n.29 (1982), citing, Statement of Policy on Conduct of Licensing Proceedings, CLI-81 7, 13 NRC 452, 454 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 730 (1985); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Uni 1), LBP-86-14, 23 NRC 553, 558 (1986).

The procedures set forth in the Rules of Practice are the only ones that should be used (absent explicit Commission instructions in a particular case) in any licensing proceeding. Point Beach, supra, 16 NRC at 1263, citing, 10 CFR § 2.718; 10 CFR Part 2, Appendix A.

A Boa d must use its powers to assure that the hearing is focused upon the matters in controversy and that the hearing process is conducted as expeditiously as possible, consistent with the development of an adequate decisional record. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1152 (1984), citing, 10 CFR Par. 2, Appendix A, § V. A Board may limit cross-examination, redirect a party's presentation of its case, restrict the introduction of reports and other material into evidence, and require the submittal of all or part of the evidence in written form as long as the parties are not thereby prejudiced. Shoreham, supra, 20 NRC at 1151-1154, 1178.

The scope of cross-examination and the parties that may engage in it in particular circumstances are matters of Licensing Board discretion. <u>Public Service Co. of Indiana.</u> Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 316 (1978).

A Commission-ordered discretionary proceeding before a Licensing Board held to resolve issues designated by the Commission, although adjudicatory in form, was not an "on-the-record" proceeding within the meaning of the Atomic Energy Act. Therefore, in admitting and formulating contentions and subissues and determining order of presentation, the Board would not be bound by 10 CFR Part 2. As to all other matters, 10 CFR Part 2 would control. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2), Power Authority of the State of N.Y. (Indian Point, Unit 3), CLI-81-1, 13 NRC 1, 5 n.4 (1981), clarified, CLI-81-23, 14 NRC 610, 611 (1981).

In order that a proper record is compiled on all matters in controversy, as well as sua sponte issues raised by it, a hearing board has the right and responsibility to take an active role in the examination of witnesses. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear

Station, Unit 1), ALAB-642, 13 NRC 881, 893 (1981); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802. 21 NRC 490, 498-499 (1985). Although a Board may exercise broad discretion in determining the extent of its direct participation in the hearing, the Board should avoid excessive involvement which could prejudice any of the parties. Perry, supra, 21 NRC at 499. This does not mean that a Licensing Board should remain mute during a hearing and ignore deficiencies in the testimony. A Board must satisfy itself that the conclusions expressed by expert witnesses on significant safety or environmental questions have a solid foundation. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 741 (1985), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1156 (1981), review declined, CLI-82-10, 15 NRC 1377 (1982).

The presiding officer in a materials licensing proceeding is authorized to submit written questions to the applicant in order to develop a complete hearing record. However, such authority may not be exercised until a notice of hearing has been published and the hearing file has been created. Rockwell International Corp. (Rocketdyne Division), LBP-89-29, 30 NRC 299, 302-303 nn. 5, 10 (1989), citing, 10 CFR § 2.1233(a) and 54 Fed. Reg. 8269 (February 28, 1989). Upon discretionary interlocutory review, the Appeal Board clarified the role of the presiding officer under the 1J CFR Part 2, Subpart L informal adjudication procedures. Although the presiding officer is given sustantial discretion and an enhanced role as a technical fact finder, the authority to control the development of the hearing record may be exercised only after: (1) a determination of whether the petitioners have the requisite standing and interests to intervene, 10 CFR § 2.1205(g); (2) the preparation of the hearing file by the NRC Staff, 10 CFR § 2.1231(a), (b); and (3) the parties' submittal of their initial evidentiary presentations, 10 CFR § 2.1233(a). Only after the issues have been defined by the parties is it then appropriate for the presiding officer to submit written questions to the parties. Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 717-18 (1989), aff'd, CLI-90-5, 31 NRC 337, 339 (1990). A presiding officer has denied intervenors leave to respond to an NRC Staff response to questions which the presiding officer had addressed to all the parties where the intervenors failed to describe sufficiently the alleged deficiencies in the Staff response Curators of the University of Missouri, LBP-91-14, 33 NRC 265, 266 (1991). The presiding officer may encourage the parties to reach a settlement. However, the presiding officer may not participate in any private and confidential settlement negotiations among the parties. Any settlement conference conducted by the presiding officer pursuant to 10 CFR § 2.1209(c) must be open to the public, absent compelling

HEARINGS 30

circumstances. <u>Rockwell</u>, <u>supra</u>, 30 NRC at 720-21, <u>aff'd</u>, CLI-90-5, 31 NRC 337, 339-340 (1990).

The presiding officer in an informal adjudicatory proceeding has the discretion to allow or require oral presentations by any party where it is necessary to create an adequate record for decision. Curators of the University of Missouri, LBP-91-31, 34 NRC 29, 110-112, 127 & n.194 (1991), citing, 10 CFR § 2.1235(a), clarified, LBP-91-34, 34 NRC 159 (1991).

The presiding officer in a Subpart L informal adjudicatory proceeding, who was concerned about an incomplete hearing file, oromic one Stati to include in the hearing file any NRC report (including inspection reports and findings of violation) and any correspondence between the NRC and the licensee during the previous 10 years which the intervenors could reasonably believe to be relevant to any of their admitted areas of concern. Curators of the University of Missouri LBP-90-22, 31 NRC 592, 593 (1990), citing, 10 CFR § 2.1231(b). See Curators of the University of Missouri, LBP-90-33, 32 NRC 245, 250 (1990) (only NRC reports or correspondence with the licensee must be included in the hearing record). The presiding officer further directed the Staff to serve all such relevant documents on the parties, since there was no local public document room and the burden on the Staff to provide a copy of publicly available documents to the intervenors' attorney was minuscule. Curators of the University of Missouri, LBP-90-27, 32 NRC 40, 42-43 (1990).

The Commission has issued a <u>Statement of Policy on the Conduct of Licensing Proceedings</u>, CLI-81-8, 13 NRC 452 (1981), which provides guidance to Licensing Boards on the timely completion of proceedings while ensuring a full and fair record. Specific areas addressed include: scheduling of proceedings; consolidation of intervenors; negotiations by parties; discovery; settlement conferences; timely rulings; summary disposition; devices to expedite party presentations, such as pre-filed testimony outlines; round-table expert witness testimony; filing of proposed findings of fact and conclusions of law; and scheduling to allow prompt issuance of an initial decision in cases where construction has been completed.

The Commission also outlined examples of sanctions a Licensing Board may impose on a participant in a proceeding who fails to meet its obligations. A Board can warn the offending party that its conduct will not be tolerated in the future, refuse to consider a filing by that party, deny the right to cross-examine or present evidence, dismiss one or more of its contentions, impose sanctions on its counsel, or in severe cases dismiss the party from the proceeding. In selecting a sanction, a Board should consider the relative importance of the unmet obligation, potential for harm to other parties or the orderly course of the proceedings, whether the occurrence

is part of a pattern of behavior, the importance of any safety or environmental concerns raised by the party, and all of the circumstances (13 NRC 452 at 454). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982), citing, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981).

Consistency with the Commission's <u>Statement of Policy on Conduct of Licensing Proceedings</u> requires that in general delay be avoided, and specifically that a Board obtain Commission guidance when it becomes apparent that such guidance will be necessary. <u>Long Island Lighting Co.</u> (Shoreham Nuclear Power Station, Unit 1), LBP-83-21, 17 NRC 593, 604 (1983).

Pursuant to 10 CFR § 2.718, Boards may issue a wide variety of procedural orders that are neither expressly authorized nor prohibited by the rules. They may permit intervenors to contend that allegadly proprietary submissions should be released to the public. They may also authorize discovery or an evidentiary hearing that is not relevant to the contentions but is relevant to an important pending procedural issue, such as the trustworthiness of a party to receive allegedly proprietary material. However, discovery and hearings not related to contentions are of limited availability. They may be granted, on motion, if it can be shown that the procedure sought would serve a sufficiently important purpose to justify the associated delay and cost. Wisconsin Electric Power Co. (Point Beach Muclear Plant, Units 1 and 2), LBP-82-2, 15 NRC 48, 53 (1982).

The Commission has inherent supervisory power over the conduct of adjudicatory proceedings, including the authority to provide guidance on the admissibility of contentions before Licensing Boards. Consolidated Edison Co. of New York (Indian Point, Unit 2); Power Authority of the State of New York (Indian Point, Unit 3), CLI-82-15, 16 NRC 27, 34 (1982), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-517 (1977). See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 74 (1991), reconsid. denied on other grounds, CLI-91-8, 33 NRC 461 (1991).

3.1.3 Quorum Requirements for Licensing Board Hearing

In <u>Commonwealth Edison Co.</u> (Zion Station, Units 1 & 2), ALAB-222, 8 AEC 229 (1974), the Appeal Board attempted to establish elaborate rules to be followed before a Licensing Board may sit with a quorum only, despite the fact that 10 CFR § 2.721(d) requires only a chairman and one technical member to be present. The Appeal Board's ruling in ALAB-222 was reviewed by the Commission in CLI-74-35, 8 AEC 374 (1974). There, the Commission held that hearings by quorum are

permitted according to the terms of 10 CFR § 2.721(d) and that inflexible guidelines for invoking the quorum rule are inappropriate. At the same time, the Commission indicated that quorum hearings should be avoided wherever practicable and that absence of a Licensing Board member must be explained on the record (8 AEC 374 at 376).

3.1.4 Disqualification of a Licensing Board Member

3.1.4.1 Motion to Disqualify Adjudicatory Board Member

The rules governing motions for disqualification or recusal are generally the same for the administrative judiciary as for the judicial branch itself, and the Commission has followed that practice. Suffolk County and State of New York Motion for Disqualification of Chief Administrative Judge Cotter (Shoreham Nuclear Power Station, Unit 1), LBP-84-29A, 20 NRC 385, 386 (1984), citing, Houston Lighting and Power Co. (South Texas Project, Units 1 and 2). CLI-82-9, 15 NRC 1363, 1366 (1982).

The general requirements for motions to disqualify are discussed in <u>Duquesne Light Co.</u> (Beaver Valley Power Station, Units 1 & 2), ALAB-172, 7 AEC 42 (1974). Based on that discussion and on cases dealing with related matters:

- (1) all disqualification motions must be timely filed. Commonwealth Edison Co. (LaSalle County Nuclear Power Station, Units 1 & 2), CLI-73-8, 6 AEC 169 (1973); Consumers Power Co. (Midiand Plant, Units 1 & 2), ALAB-101, 6 AEC 60 (1973). In particular, any question of bias of a Licensing Board member must be raised at the earliest possible time or it is waived. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 384-386 (1974); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 247 (1974); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1198 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-751, 18 NRC 1313, 1315 (1983), reconsideration denied, ALAB-757, 18 NRC 1356 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-777, 20 NRC 21, 32 (1984). The posture of a proceeding may be considered in evaluating the timeliness of the filing of a motion for disqualification. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-20, 20 NRC 1061, 1081-1082 (1984); <u>Seabrook</u> (ALAB-757), <u>supra</u>, 18 NRC at 1361.
- (2) a disqualification motion must be accompanied by an affidavit establishing the basis for the charge, even if

founded on matters of public record. Detroit Edison Co. (Greenwood Energy Center), ALAB- 5, 8 AEC 379 (1974); Shoreham, supra, 20 NRC at 23, n.1; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-85-15, 22 NRC 184, 185 n.3 (1985).

(3) a disqualification motion, as with all other motions, must be served on all parties or their attorneys. 10 CFR §§ 2.701(b), 2.730(a).

Disqualification of a Licensing Board member, either on his own motion or on motion of a party, is addressed in 10 CFR § 2.704. Strict compliance with Section 2.704(c) is required. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALA 1-630, 13 NRC 84, 86 (1981). A motion t. disqualify a member of a Licensing Board is determined by the individual Board member rather than by the full Licensing Board. Public Service Electric and Gas Co. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 21 : 26 (1984); Public Service Co. of New Hampshire (Seabrook Stat on, Units 1 and 2), ALAB-748, 18 NRC 1184, 1186 n.1 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-6, 11 NRC 411 (1980). In those cases where a party's motion for disqualification of a Foard member is denied and the Board member does not recuse himself, Section 2.704(c) explicitly requires that the Licensing Board refer the matter to the Appeal Board or the Commission. Allens Creek, supra, 13 NRC at 86; Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 301 n.3 (1978); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1198 (1983).

The Appeal Board has stressed that a party moving for disqualification of a Licensing Board member has a manifest duty to be most particular in establishing the foundation for its charge as well as to adhere scrupulously to the affidavit requirement of 10 CFR § 2.704(c). Dairyland Power Cooperative (La Crosse Boiling Water Reactor), ALAB-497, 8 NRC 312, 313 (1978). See also Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-672, 15 NRC 677, 680 (1982).

Nevertheless, as to the affidavit requirement, the Appeal Board has held that the movant's failure to file a supporting affidavit is not crucial where the motion to disqualify is founded on a fact to which the Licensing Board itself had called attention and is particularly narrow thereby obviating the need to reduce the likelihood of an irresponsible attack on the Board member in question through use of an affidavit. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 301 n.3 (1978).

An intervenor's status as a party to a proceeding does not of itself give i* standing to move for disqualification of a Licensing Board member on another group's behalf. Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 32-33 (1979); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-748, 18 NRC 1184, 1187 (1983). However, a party requesting disqualification may attempt to establish by reference to a Board member's overall conduct that a pervasive climate of prejudice exists in which the party cannot obtain a fair hearing. A party may also attempt to demonstrate a pattern of bias by a Board member toward a class of participants of which it is a member. Seabrock, supra, 18 NRC at 1187-1188. See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1199 n.12 (1983).

A challenged member of an Appeal Board must first be given an opportunity to disqualify himself, before the Commission will act. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-9, 11 NRC 436 (1980).

3.1.4.2 Grounds for Disqualification of Adjudicatory Board Member

The aforementioned rules (3.1.4.1) with respect to motions to disqualify apply, of course, where the motion is based on the assertion that a Board member is biased. Although a Board member or the entire Board will be disqualified if bias is shown, the mere fact that a Board issued a large number of unfavorable or even erroneous rulings with respect to a particular party is not evidence of bias against that party. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 246 (1974); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-5, 21 NRC 566, 569 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 721, 726 n.60 (1985). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-29, 28 NRC 637, 641 (1988), aff'd, ALAB-907, 28 NRC 620 (1988). Rulings and findings made in the course of a proceeding are not in themselves sufficient reasons to believe that a tribunal is biased for or against a party. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-644, 13 NRC 903, 923 (1981).

Licensing Boards are capable of fairly judging a matter on a full record, even where the Commission has expressed tentative views. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4-5 (1980).

Standing alone, the failure of an adjudicatory tribunal to decide questions before it with suitable promptness

scarcely allows an inference that the tribunal (or a member thereof) harbors a personal prejudice against one litigant or another. Puget Sound Power and Light Company (Skagit Nuclear Power Project: Units 1 and 2), ALAB-556, 10 NRC 30, 34 (1979).

The disqualification of a Licensing Board member may not be obtained on the ground that he or she committed error in the course of the proceeding at bar or some earlier proceeding.

Dairyland Power Cooperative (La Crosse Boiling Water Reactor), ALAB-614, 12 NRC 347, 348-49 (1980).

In the absence of bias, an Appeal Board member who participated as an adjudicator in a construction permit proceeding for a facility is not required to disqualify himself from participating as an adjudicator in the operating license proceeding for the same facility. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-11, 11 NRC 511 (1980).

An administrative trier of fact is subject to disqualification if:

- he has a direct, personal, substantial pecuniary interest in a result;
- (2) he has a personal bias against a participant;
- (3) he has served in a prosecutive or investigative role with regard to the same facts as are in issue;
- (4) he has prejudged factual as distinguished from legal or policy - issues; or
- (5) he has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues.

Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 301 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-777, 20 NRC 21, 34 (1984), citing, Public Service Electric and Gas Co. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 20 (1984), quoting Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 65 (1973).

The fact that a member of an adjudicatory tribunal may have a crystalized point of view on questions of law or policy is not a basis for his or her disqualification. Shoreham, supra, 20 NRC at 34, citing, Midland, supra, 6 AEC at 66; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-29, 28 NRC 637, 641 (1988), aff'd, ALAB-907, 28 NRC 620 (1988).

In its decision in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1365-67 (1982), the Commission made clear that Licensing Board members are governed by the same disqualification standards that apply to Federal judges. Hope Creek, supra, 19 NRC at 20. The current statutory foundation for the disqualification standards is found in 28 U.S.C., Sections 144 and 455. Section 144 requires a Federal judge to step aside if a party to the proceeding files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against that party or in favor of an adverse party. Hope Creek, supra, 19 NRC at 20. Section 45. a) imposes an objective standard which is whether a reasonable person knowing all the circumstances would be led to the conclusion that the judge's impartiality might reasonably be questioned. Hope Creek, supra, 19 NRC at 21-22.

Under 28 U.S.C. 3 455(b)(2), a judge must disqualify himself in circumstances where, inter alia, he served in private practice as a lawyer in the "matter in controversy." In accord with 28 U.S.C. § 455(e), disqualification in such circumstances may not be waived. Hope Creek, supra, 19 NRC at 21.

In applying the disqualification standards under 28 U.S.C. § 455(b)(2), the Appeal Board concluded that, in the instance of an adjudicator versed in a scientific discipline rather than in the law, disqualification is required if he previously provided technical services to one of the parties in connection with the "matter in controversy." Hope Creek, supra, 19 NRC at 23. To determine whether the construction permit proceeding and the operating license proceeding for the same facility should be deemed the same "matter" for 28 U.S.C. § 455(b)(2) purposes, the Appeal Board adopted the "wholly unrelated" test, and found the two to be sufficiently related that the Licensing Board judge should have recused himself. Hope Creek, supra, 19 NRC at 24-25.

An administrative trier of fact is subject to disqualification for the appearance of bias or prejudgment of the factual issues as well as for actual bias or prejudgment. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-672, 15 NRC 677, 680 (1982), rev'd on other grounds, CLI-82-9, 15 NRC 1363, 1364-1365 (1982); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-5, 21 NRC 566, 568 (1985).

Disqualifying bias or prejudice of a trial judge must generally stem from an extra-judicial source even under the objective standard for recusal which requires a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned. Preliminary assessments, made on the record, during the course of an adjudicatory proceeding,

JULY 1992

based solely upon application of the decision-maker's judgment to material properly before him in the proceeding, do not compel disqualification as a matter of law. Houston Lighting and Power Co. (South Texas Project, Units 1 and ?), CLI-82-9, 15 NRC 1363, 1364-1365 (1982), citing, United States v. Grinnell Corp., 384 U.S. 563, 583 (1966); Commonwealth Edison Co. (La Salle County Nuclear Power Station, Units 1 and 2), CLI-73-8. 6 AEC 169, 170 (1973); In Re International Business Machines Corporation, 618 F.2d 923, 929 (2d Cir. 1980); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-748, 18 NRC 1184, 1187 (1983). See also Public Service Co. of New Hampshire (Seabrook Station, Units ! and 2), ALAB-749, 18 NRC 1195, 1197 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-751, 18 NRC 1313, 1315 (1983), reconsideration denied, ALAB-757, 18 NRC 1356 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units I and 2), ALAB-819, 22 NRC 681, 721 (1985).

The fact that a Board member's actions are erroneous, superfluous, or inappropriate does not, without more, demonstrate an extrajudicial bias. Matters are extrajudicial when they do not relate to a Board member's official duties in a case. Rulings, conduct, or remarks of a Board member in response to matters which arise in administrative proceedings are not extrajudicial. Seabrook (ALAB-749), supra, 18 NRC at 1200. See also Seabrook (ALAB-748), supra, 18 NRC at 1188; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-29, 28 NRC 637, 640-41 (1988), aff'd, ALAB-907, 28 NRC 620, 624 (1988).

A judge will not be disqualified on the basis of: occasional use of strong language toward a party or in expressing views on matters arising from the proceeding; or actions which may be controversial or may provoke strong reactions by parties in the proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-5, 21 NRC 566, 569 (1985); Limerick, supra, 22 NRC at 721; Long Island Lighting Co. (Streham Nuclear Power Station, Unit 1), LBP-88-29, 28 NRC 63...41 (1988), aff'd, ALAB-907, 28 NRC 620, 624 (1988).

A letter from a Board judge expressing his opinions to a judge presiding over a related criminal case did not reflect extrajudicial bias since the contents of the letter were based solely on the record developed during the NRC proceeding. The factor to consider is the source of the information, not the forum in which it is communicated. Three Mile Island, supra, 21 NRC at 569-570. Such a letter does not violate Canon 3A(6) of the Code of Judicial Conduct which prohibits a judge from commenting publicly about a pending or impending proceeding in any court. Canon 3A(6) applies to general public comment, not the transmittal of specific information by a judge to another court. Three Mile Island, supra, 21 NRC at 571. Such a letter also does not violate Canon 2B of the

Code of Judicial Conduct which prohibits a judge from lending the prestige of his office to advance the private interests of others and from voluntarily testifying as a character witness. Canon 2B seeks to prevent a judge's testimony from having an undue influence in a trial. Ihree Mile Island, suppress, 21 NRC at 570.

Membership in a national professional organization does not perforce disqualify a person from adjudicating a matter to which a local chapter of the organization is a party. Sheffield, supra, 8 NRC at 302.

3.1.4.3 Improperly Influencing an Adjudicatory Board Decision

Where a Licensing Board has been subjected to an attempt to improperly influence the content or timing of its decision, the Board is duty-bound to call attention to that fact promptly on its own initiative. On the other hand, a Licensing Board which has not been subjected to attempts at improper influence need not investigate allegations that such attempts were contemplated or promised. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 102 (1977).

3.1.5 Resignation of a Licensing Board Member

The Administrative Procedure Act requirement that the official who presides at the reception of evidence must make the recommendation or initial decision (5 U.S.C. § 554(d)) includes an exception for the circumstance in which that official becomes "unavailable to the agency." when a Licensing Board member resigns from the Commission, he becomes "unavailable" (10 CFR § 2.704(d)). Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 101 (1977). Resignation of a Board member during a proceeding is not, of itself, grounds for declaring a mistrial and starting the proceedings anew. Id. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33 (1977) was affirmed generally and on the point cited herein in New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978).

"Unavailability" of a Licensing Board member is dealt with generally in 10 CFR § 2.704(d).

3.2 Export Licensing Hearings

3.2.1 Scope of Export Licensing Hearings

The export licensing process is an inappropriate forum to consider generic safety questions posed by nuclear power plants. Under the Atomic Energy Act, as amended by the Nuclear Non-Proliferation Act of 1978, the Commission, in

making its export licensing determinations, will consider non-proliferation and safeguards concerns, and not foreign health and safety matters. Westinghouse Electric Corp. (Export to South Korea), CLI-80-30, 12 NRC 253, 260-61 (1980); General Electric Co. (Exports to Taiwan), CLI-81-2, 13 NRC 67, 71 (1981).

3.3 Hearing Scheduling Matters

3.3.1 Scheduling of Hearings

An ASLB may not schedule a hearing for a time when it is known that a technical member will be unavailable for more than one half of one day unless there is no reasonable alternative to such scheduling. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-222, 8 AEC 229, 238 (1974).

Otherwise, an ASLB has general authority to regulate the course of a licensing proceeding and may schedule hearings on specific issues pending related developments on other issues. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-371, 5 NRC 409 (1977). In deciding whether early hearings should be held on specific issues, the Board should consider:

- the like ishood that early findings would retain their validity;
- (2) the advantage to the public interest and to the litigants in having early, though possibly, inconclusive, resolution of certain issues;
- (3) the extent to which early hearings on contain issues might occasion prejudice to one or more litigants, particularly in the event that such issues were later reopened because of supervening developments.

Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539 (1975); accord Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671 (1975).

As a general rule, scheduling is a matter of Licensing Board discretion which will not be interfered with absent a "truly exc ptional situation". Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-295, 2 NRC 668 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-293, 2 NRC 660 (1975).

Where the Licensing Board finds that the Staff cannot demonstrate a reasonable cause for its delay in submitting environmental statements, the Board may issue a ruling noting

the unjustified failure to meet a publication schedule and then proceed to hear other matters or suspend proceedings until the Staff files the necessary documents. The Board, sua sponte or on motion of one of the parties, may refer the ruling to the Appeal Board. If the Appeal Board affirms, it would certify the matter to the Commission. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 207 (1978).

While a hearing is required on a construction permit application, operating license hearings can only be triggered by petitions to intervene, or a Commission finding that such a hearing would be in the public interest. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 26 (1980), modified, CLI-80-12, 11 NRC 514 (1980). Licensing Boards have no independent authority to initiate adjudicatory proceedings without prior action of some other component of the Commission. 10 CFR § 2.104(a) does not provide authority to a Licensing Board considering a construction permit application to order a hearing on the yet to be filed operating license application. Shearon Harris, supra, ALAB-577, 11 NRC 18, ?'-28 (1980), modified, CLI-80-12, 11 NRC 514 (1980). Section 2.104(a) of the Commission's Rules of Practice contemplates determination of a reed for a hearing in the public interest on an operating license, only after application for such a license is made. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 27-28 (1980); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233 (1980), modified, CL1-80-12, 11 NRC 514 (1980).

Generally speaking, Licensing Boards determine scheduling matters on the basis of representations of counsel about projected completion dates, availability of necessary information, and adequate opportunities for a fair and thorough hearing. The Board would take a har r look at an applicant's projected completion date if it could only be met by a greatly accelerated schedule, with minimal opportunities for discovery and the exercise of other procedural rights. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-83-8A, 17 NRC 282, 286-87 (1983).

An Appeal Board will overturn a Licensing Board's denial of a request for a schedule change only on finding that the Board abused its discretion by setting a schedule that deprives a party of its right to procedural due process. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 391 (1983), citing, Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1260 (1982), quoting, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 188 (1978); Cleveland Electric Illuminating

Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 95 (1986).

3.3.1.1 Public Interest Requirements re Hearing Schedule

In matters of scheduling, the paramount consideration is the public interest. The public interest is usually served by as rapid a decision as is possible consistent with everyone's opportunity to be heard. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539 (1975).

To fulfill its obligation under the Administrative Procedure Act to decide cases within a reasonable time, the Commission established expedited procedures for the conduct of the 1988 Shoreham emergency planning exercise proceeding in order to minimize the delays resulting from the Commission's usual procedures, while still preserving the rights of the parties. Long Island Lightics Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-9, 28 NRC 567, 569-70 (1988), citing, Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984).

Findings under 10 CFR § 2.104(a) on a need for a public hearing on an application for an operating license in the public interest cannot be made until after such application is filed. Such finding must be based on the application and all information then available. While the Commission can determine that a hearing on an operating license is needed in the public interest, a Licensing Board could not. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant. Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 26-28 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

3.3.1.2 Convenience of Litigants re Hearing Schedule

Although the convenience of litigants is entitled to recognition, it cannot be dispositive on questions of scheduling.

Allied General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671, 684 685 (1975);

Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539 (1975).

Nevertheless, ASLB action in keeping to its schedule despite intervenors' assertions that they were unable to prepare for cross-examination or to attend the hearing because of a need to prepare briefs in a related matter in the U.S. Court of Appeals has been held to be an error requiring reopening of the hearing. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-249, 8 AEC 980 (1974).

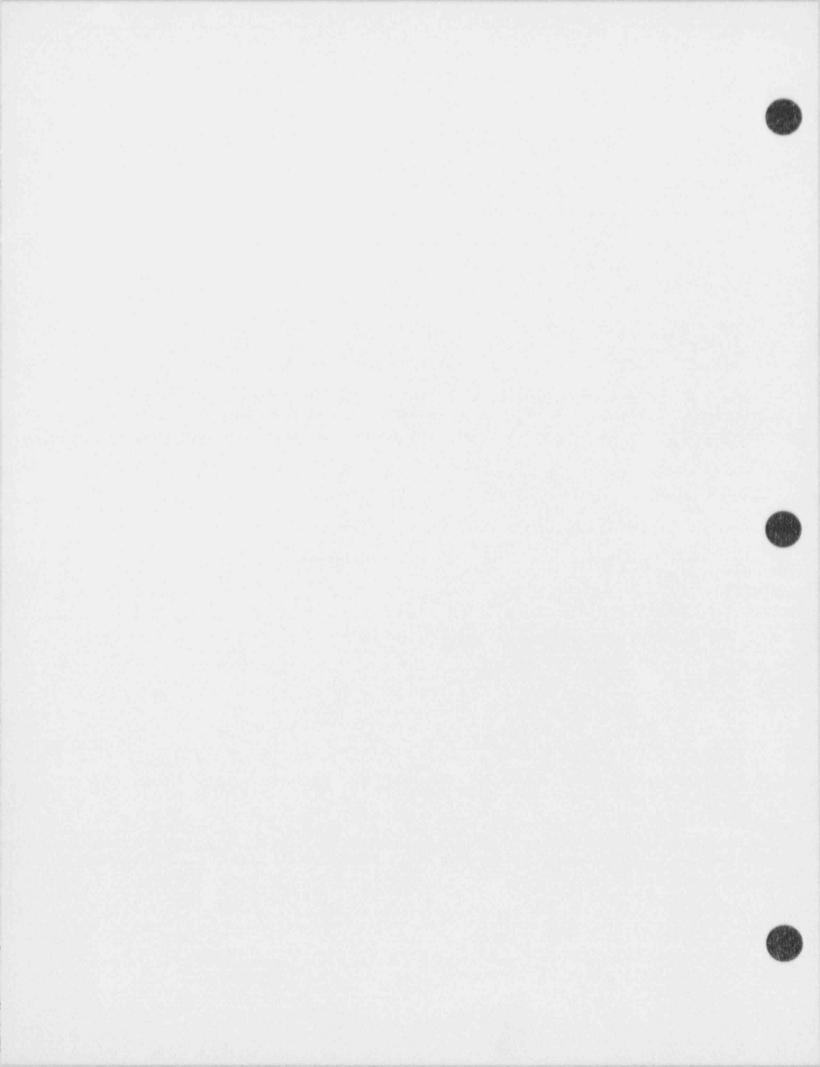
3.3.1.3 Adjourned Hearings

(RESERVED)

TABLE OF CONTENTS

POST HEARING MATTERS

| 4.0 | POST HEARING MATTERS | PH | 1 |
|--|--|----------------------------|---------------------------|
| 4.1 | Settlements and Stipulations | РН | 1 |
| 4.2 4.2.1 4.2.2 | Proposed Findings Intervenor's Right to File Proposed Findings Failure to File Proposed Findings | PH PH PH | 2 |
| 4.3.1 | Initial Decisions Reconsideration of Initial Decision | PH PH | |
| 4.4 4.4.1 4.4.1.2 4.4.2 4.4.3 4.4.4 | Reopening Hearings Motions to Reopen Hearing Time for Filing Motion to Reopen Hearing Contents of Motion to Reopen Hearing (Reserved) Grounds for Reopening Hearing (SEE ALSO 3.13.3) Reopening Construction Permit Hearings to Address New Generic Issues Discovery to Obtain Information to Support Reopening of Hearing | PH PH PH PH PH | 9 12 14 14 21 |
| 4.5 | Motions to Reconsider | PH | 22 |
| 4.6 | Sua Sponte Review by the Appeal Board | PH | 23 |
| 4.7 | Motions for Post-Judgment Relief | PH | 27 |
| | | | |



Consumers Power Co. (Midland Plant. Units 1 & 2), ALAB-235, 8 AEC 645, 646 (1974). (See also 4.5)

A presiding officer in a materials licensing proceeding retains jurisdiction to rule on a timely motion for reconsideration of his or her final initial decision even if one of the parties has filed an appeal. Curators of the University of Missouri, LBP-91-34, 34 NRC 159, 160-61 (1991).

An authorized, timely-filed petition for reconsideration before the trial tribunal may work to toll the time period under 10 CFR § 2.762(a) for filing an appeal. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-659, 14 NRC 983, 985 (1981).

A motion for reconsideration should not include new arguments or evidence unless a party demonstrates that its new material relates to a Board concern that could not reasonably have been anticipated. <u>Texas Utilities Electric Co.</u> (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 517-18 (1984).

4.4 Reopening Hearings

Hearings may be reopened, in appropriate situations, either upon motion of any party or sua sponte. Vernort Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1973). Sua sponte reopening is required when a Board becomes aware. from any source, of a significant unresolved safety issue, Vermont Yankee, supra, or cf possible major changes in facts material to the resolution of major environmental issues. Commonwealth Edison Co. (LaSalle County Nuclear Station, Units 1 & 2), ALAB-153, 6 AEC 821 (1973). Where factual disclosures to the Appeal Board reveal a need for further development of an evidentiary record, it may order that the record be reopened for the taking of supplementary evidence. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 352 (1978). For reopening the record, the new evidence to be presented need not always be so significant that it would alter the Board's findings or conclusions when the taking of new evidence can be accomplished with little or no burden upon the parties. To exclude otherwise competent evidence because the Board's conclusions may be unchanged would not always satisfy the requirement that a record suitable for review be preserved (10 CFR § 2.756). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83, 85 (1978). An Appeal Board might be sympathetic to a motion to reopen a hearing if documents appended to an appellate brief constituted newly discovered evidence and tended to show that significant testimony in the record was false. Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3); (Perry Nuclear Power Plant, Units 1 and 2), ALAB-430, 6 NRC 457 (1977).

A motion to reopen a closed record is designed to consider additional evidence of a factual or technical nature, and is not the appropriate method for advising a Board of a nonevidentiary matter such as a state court decision. A Board may take official notice of such nonevidentiary matters. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515, 521 (1988).

New regulatory requirements may establish good cause for reopening a record or admitting new contentions on matters related to the new requirement. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226, 233 (1981).

Where a record is reopened for further development of the evidence, all parties are entitled to an opportunity to test the new evidence and participate fully in the resolution of the issues involved. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-335, 3 NRC 830 (1976). Permissible inquiry through cross-examination at a reopened hearing necessarily extends to every matter within the reach of the testimony submitted by the applicants and accepted by the Board. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 94 (1977).

A Licensing Board lacks the power to reopen a proceeding once final agency action has been taken, and it may not effectively "reopen" a proceeding by independently initiating a new adjudicatory proceeding. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-381, 5 NRC 582 (1977).

An Appeal Board, unlike other appellate tribunals, has the option of reopening the record and receiving new evidence itself, if necessary, obviating remand to a Licensing Board. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC 1324, 1327 (1982). See, e.g., Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 878-879 (1980).

An Appeal Board has no jurisdiction to consider a motion to reopen the record in a proceeding where the Appeal Board has issued its final decision and a party has already filed a petition for Commission review of the decision. The Appeal Board will refer the motion to reopen the record to the Commission for consideration. <a href="Philadel-phi

The Appeal Board dismissed for want of jurisdiction a motion to reopen hearings in a proceeding in which the Appeal Board had issued a final decision, followed by the Commission's election not to review that decision. The Commission's decision represented the agency's final action, thus ending the Appeal Board's authority over the case. The Appeal Board referred the matter to the Director of Nuclear Reactor Regulation because, under the circumstances, he had the discretionary authority to grant the relief sought subject to Commission review. Public Service Company of Indiana, Inc. (Marble

Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261, 262 (1979). See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1329-1330 (1983).

The fact that certain issues remain to be litigated does not absolve an intervener from having to meet the standards for reopening the completed hearing on all other radiological health and safety issues in order to raise a new non-emergency planning contention. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1138 (1983).

4.4.1 Motions to Reopen Hearing

A motion to reopen the hearing can be filed by any party to the proceeding. The motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claims. 10 CFR § 2.734(b); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-38, 30 NRC 725, 734 (1989), aff'd on other grounds, ALAB-949, 33 NRC 484 (1991). In addition, the movant is also free to rely on, for example, Staff-applicant correspondence to establish the existence of a newly discovered issue. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1973). A movant may also rely upon documents generated by the applicant or the NRC Staff in connection with the construction and regulatory oversigh' of the facility. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 17 & n.7 (1985), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981).

As is well settled, the proponent of a motion to reopen the record has a heavy burden to bear. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-359, 4 NRC 619, 620 (1976); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 180 (1983); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-84-3, 19 NRC 282, 283 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-312, 22 NRC 5, 14 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 798 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 962 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 NRC 1, 3 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 73 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other

grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-936, 32 NRC 75, 82 & n.18 (1990).

Where a motion to reopen relates to a previously uncontested issue, the moving party must satisfy both the standards for admitting late-filed contentions, 10 CFR § 2.714(a), and the criteria established by case law for reopening the record. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1714-15 (1982), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361 (1981); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1325 n.3 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 & n.4 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-35-42, 22 NRC 795, 798 & n.2 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 17 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-6, 23 NRC 130, 133 n.1 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 76 and n.6 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 21 & n.13, 34 (1990), aff'd, ALAB-936, 32 NRC 75 (1990).

The new material in support of a motion to reopen must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 CFR 2.714(b) for admissible contentions. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366 (1984), aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986). The supporting information must be more than mere allegations; it must be tantamount to evidence which would materially affect the previous decision. <u>Id.; Florida Power and Light Co.</u> (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 963 (1987). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 74 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). To satisfy this requirement, it must possess the attributes set forth in 10 CFR § 2.743(c) which defines admissible evidence as "relevant, material, and reliable." Id. at 1366-67; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986). Embodied in this requirement is the idea that evidence presented in affidavit form must be given by competent individuals with

knowledge of the facts or by experts in the disciplines appropriate to the issues raised. <u>Id.</u> at 1367 n.18; <u>Louisiana Power and Light Co.</u> (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14, 50 n.58 (1985); <u>Turkey Point</u>, <u>supra</u>, 25 NRC at 962; <u>Public Service Co. of New Hampshire</u> (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 431-32 (1989).

Even though a matter is timely raised and involves significant safety considerations, no reopening of the evidentiary hearing will be required if the affidavits submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the licensing proceeding. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 109 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 73 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991).

Exhibits which are illegible, unintelligible, undated or outdated, or unidentified as to their source have no probative value and do not support a motion to reopen. In order to comply with the requirement for "relevant, material, and reliable" evidence, a movant should cite to specific portions of the exhibits and explain the points or purposes which the exhibits serve. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 21 n.16, 42-43 (1985), citing, Diablo Canyon, ALAB-775, supra, 19 NRC at 1366-67.

A draft document does not provide particularly useful support for a motion to reopen. A draft is a working document which may reasonably undergo several revisions before it is finalized to reflect the actual intended position of the preparer. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 43 n.47 (1985).

Where a motion to reopen is related to a litigated issue, the effect of the new evidence on the outcome of that issue can be examined before or after a decision. To the extent a motion to reopen is not related to a litigated issue, then the outcome to be judged is not that of a particular issue, but that of the action which may be permitted by the outcome of the licensing proceedings. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1142 (1983), citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

4.4.1.1 Time for Filing Motion to Reopen Hearing

A motion to reopen may be filed and the Licensing Board may entertain it at any time prior to issuance of the full initial decision. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-86, 5 AEC 376 (1972). Where a motion to reopen was mailed before the Licensing Board rendered the final decision but was received by the Board after the decision, the Board denied the motion on grounds that it lacked jurisdiction to take any action. The Appeal Board implied that this may be incorrect (referring to 10 CFR § 2.712(d)(3) -- now, 10 CFR § 2.712(e)(3) -- concerning service by mail), but did not reach the jurisdictional question since the motion was properly denied on the merits. Northern States Power Company (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 374 n.4 (1978).

Point Beach, supra, does not establish an ironclad rule with respect to timing of the motion. In deciding whether to reopen, the Licensing Board will consider both the timing of the motion and the safety significance of the matter which has been raised. The motion will be denied if it is untimely and the matter raised is insignificant. The motion may be denied, even if timely, if the matter raised is not grave or significant. If the matter is of great significance to public or plant safety, the motion could be granted even if it was not made in a timely manner. As such, the controlling consideration is the seriousness of the issue raised. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); Vermont Yankee, ALAB-126, 6 AEC 393 (1973); Vermont Yankee, ALAB-124, 6 AEC 365 (1973). See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 19 (1986) (most important factor to consider is the safety significance of the issue raised); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-834, 23 NRC 263, 264 (1986). When timeliness is a factor, it is to be judged from the date of discovery of the new issue.

An untimely motion to reopen the record may be granted, but the movant has the increased burden of demonstrating that the motion raises an exceptionally grave issue rather than just a significant issue. Public Service Co. of New Hampshire (Scabrook Station, Units 1 and 2), ALAB-886, 27 NRC 74, 76, 78 (1988), citing, 10 CFR § 2.734(a)(1). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-927, 31 NRC 137, 139 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 446 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990).

A party cannot justify the untimely filing of a reopening motion based upon a particular event before one Licensing Board on the ground that a reopening motion based on the same event was timely filed and pending before a second Licensing Board which was considering related issues. Each Licensing Board only has jurisdiction to resolve those issues which have been specifically delegated to it. Seabrook, supra, 31 NRC at 140.

A Board will reject as untimely a motion to reopen which is based on information which has been available to a party for one to two years. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 201 (1985); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 445-46 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990).

For a reopening motion to be timely presented, the movant must show that the issue sought to be raised could not have been raised earlier. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366 (1984), aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 202 (1985). See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1764-65 (1982). A party cannot justify its tardiness in filing a motion to reopen by noting that the Board was no longer receiving evidence on the issue when the new information on that issue became available. Three Mile Island, supra, 22 NRC at 201-02.

A party's opportunity to gain access to information is a significant factor in a Board's determination of whether a motion based on such information is timely filed. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1723 (1985), citing, Cleveland Flectric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-52, 18 NRC 256, 258 (1983). See also Diablo Canyon, supra, 19 NRC at 1369.

A motion to reoper the record in order to admit a new contention must be filed promptly after the relevant information needed to frame the contention becomes available.

<u>Public Service Co. of New Hampshire</u> (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 487 (1990).

A matter may be of such gravity that a motion to reopen may be granted notwithstanding that it might have been presented earlier. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 188 n.17 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985), citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear

Power Station), ALA&-138, 6 AEC 520, 523 (1973); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1723 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-45, 22 NRC 819, 822, 826 (1985).

The <u>Vermont Yankee</u> tests for reopening the evidentiary record are only partially applicable where reopening the record is the Board's <u>sua sponte</u> action. The Board has broader responsibilities than dr adversary parties, and the timeliness test of <u>Vermont Yankee</u> does not apply to the Board with the same force as it does to parties. <u>Carolina Power & Light Co.</u> (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83, 85 (1978).

Where jurisdiction terminated on all but a few issues, a Board may not entertain new issues unrelated to those over which it retains jurisdiction, even where there are supervening developments. The Board has no jurisdiction to consider such matters. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 225-226 (1980). Once an appeal has been filed, jurisdiction over the appealed issues passes to the appellate tribunal and motions to reopen on the appealed issues are properly entertained by the appellate tribunal. Metropolitan Edison Co. (Three Mile Island Nuclear Station, it 1), ALAB-699, 16 NRC 1324, 1326-27 (1982).

4.4.1.2 Contents of Motion to Reopen Hearing

(RESERVED)

4.4.2 Grounds for Reopening Hearing

A decision as to whether to reopen a hearing will be made volume basis of the motion and the filings in opposition thereto, all of which amount to a "mini record." Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 523 (1973), reconsid. den., ALAB-141, 6 AEC 576. The hearing must be reopened whenever a "significant", unresolved safety question is involved. Vermont Yankee, ALAB-138, supra: Vermont Yankee, ALAB-124, 6 AEC 358, 365 n.10 (1973). The same "significance test" applies when an environmental issue is involved. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404 (1975); Commonwealth Edison Co. (LaSalle County Nuclear Station, Units 1 & 2), ALAB-153, 6 AEC 821 (1973). (See also 3.13.3).

Matters to be considered in determining whether to reopen an evidentiary record at the request of a party, as set forth in <u>Vermont Yankee Nuclear Power Corp.</u> (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520 (1973), are whether the matters sought to be addressed on the reopened record could have been raised earlier, whether

such matters require further evidence for their resolution, and what the seriousness or gravity of such matters is. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83 (1978). As a general proposition, a hearing should not be reopened merely because some detail involving plant construction or operation has been changed. Rather, to reopen the record at the request of a party, it must usually be established that a different result would have been reached initially had the material to be introduced on reopening been considered. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974); <u>Duke Power Co.</u> (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 465 (1982); Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1365-66 (1984), aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986). In fact, an Appeal Board has stated that, after a decision has been rendered, a dissatisfied litigant who seeks to persuade an adjudicatory tribunal to reopen the record "because some new circumstance has arisen, some new trend has been observed or some new fact discovered" has a difficult burden to bear. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-359, 4 NRC 619, 620 (1976). At the same time, new regulatory requirements may establish good cause for reopening a record or admitting new contentions on matters related to the new requirement. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226, 233 (1981).

Unlike applicable standards with respect to allowing a new, timely filed contention, the Licensing Board can give some consideration to the substance of the information sought to be added to the record on a motion to reopen. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1299 n.15 (1984), citing, Vermont Yankee, ALAB-138, supra, 6 AEC at 523-24.

Where a motion to reopen an evidentiary hearing is filed after the initial decision, the standard is that the motion must establish that a different result would have been reached had the respective information been considered initially. Where the record has been closed but a motion was filed before the initial decision, the standard is whether the outcome of the proceeding might be affected. Commonweal h Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 108 (1983).

In certain instances the record may be reopened, even though the new evidence to be received might not be so

significant as to alter the original findings or conclusions, where the new evidence can be received with little or no burden upon the parties. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83, 85 (1978). Reopening has also been ordered where the changed circumstances involved a hotly contested issue. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-74-39, 8 AEC 631 (1974). Moreover, considerations of fairness and of affording a party a proper opportunity to ventilate the issues sometimes dictate that a hearing be reopened. For example, where a Licensing Board maintained its hearing schedule despite an intervenor's assertion that he was unable to attend the hearing and prepare for cross-examination, the Appeal Board held that the hearing must be reopened to allow the intervenor to conduct crossexamination of certain witnesses. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-249, 8 AEC 980 (1974).

The proponent of a motion to reopen the record bears a heavy burden. Normally, the motion must be timely and addressed to a significant issue. If an initial decision has been rendered on the issue, it must appear that reopening the record may materially alter the result. Where a motion to reopen the record is untimely without good cause, the movant must demonstrate not only that the issue is significant, but also that the public interest demands that the issue be further explored. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 21 (1978); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 n.4 (1982), citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973). See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 364-365 (1981); Kansas Gas and Electric Co. and Kansas City Power and Light Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089-90 (1984).

The criteria for reopening the record govern each issue for which reopening is sought; the fortuitous circumstance that a proceeding has been or will be reopened on other issues is not significant. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 22 (1978); Housian Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1720 (1985).

In order to reopen a licensing proceeding, an intervenor must show a change in material fact which warrants litigation anew. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-79-10, 10 NRC 675, 577 (1979).

Whether to reopen a rec .d in order to consider new evidence turns on the appraisal of several factors: (1) Is the motion timely? (2) Does it address significant safety or environmental issues? (3) Might a different result have been reached had the newly proffered material been considered initially? Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1327 (1982); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2031-32 (1982); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1065 n.7 (1983); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 108 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 180 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 578 n.2 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1199 n.5 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 13 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 200 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 798 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-45, 22 NRC 819, 822 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 4-5 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-6, 23 NRC 130, 133 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 235 (1986), aff'd sub nom. Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-834, 23 NRC 263, 264 (1986); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 670 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-18, 24 NRC 501, 505-06 (1986), citing, 10 CFR § 2.734; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 76 and n.6 (1987); Long Island

Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-87-5, 25 NRC 884, 885-86 (1987), reconsid. denied, CLI-88-3, 28 NRC 1 (1988); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 962 (1987); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 149-50 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-883, 27 NRC 43, 49 (1988), yacated in part on other grounds, CLI-88-8, 28 NRC 419 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 71 n.17 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271, 283 n.8, 284, 292 (1989), aff'd, ALAB-940, 32 NRC 225, 241-44 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 21 & n.10 (1990), aff'd, ALAB-936, 32 NRC 75 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 443 n.47 (1990), aff'd in part on other grainds, ALAB-934, 32 NRC 1 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 486 n.3 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 221 (1990).

A party seeking to reopen must show that the issue it now seeks to raise could not have been raised earlier. Fermi, supra, 17 NRC at 1065.

A motion to reopen an administrative record may rest on evidence that came into existence after the hearing closed. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 n.6 (1980).

A Licensing Board has held that the most important factor to consider is whether the newly proffered material would alter the result reached earlier. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 672 (1986).

To justify the granting of a motion to reopen, the moving papers must be strong enough, in light of any opposing filings, to avoid summary disposition. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-84, 16 NRC 1183, 1186 (1982), citing, Vermont Yankee Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

The fact that the NRC's Office of Investigations is investigating allegations of falsification of records and harassment of QA/QC personnel is insufficient, by itself, to support a

motion to reopen. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5-6 (1986).

Evidence of a continuing effort to improve reactor safety does not necessarily warrant reopening a record. <u>Diablo Canyon</u>, <u>supra</u>, 11 NRC at 887.

Intervenors failed to raise a significant safety issue when they did not present sufficient evidence to show that an applicant's program and continuing compliance with an NRC Staff-prescribed enhanced surveillance program would not provide the requisite assurance of plant safety. The intervenors' request for harsher measures than the NRC Staff had considered necessary, without presenting any new information that the Staff had failed to consider, is insufficient to raise a significant safety issue. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 487-88 (1990).

Differing analyses by experts of factual information already in the record do not normally constitute the type of information for which reopening of the record would be warranted. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 799 (1985), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 994-95 (1981).

Repetition of arguments previously presented does not present a basis for reconsideration. Nuclear Engineering Company. Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). Nor do generalized assertions to the effect that "more evidence is needed." Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 63 (1981).

Newspaper allegations of quality assurance deficiencies, unaccompanied by evidence, ordinarily are not sufficient grounds for reopening an evidentiary record. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-84-3, 19 NRC 282, 286 (1984). See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 n.2 (1986).

Generalized complaints that an alleged ex parte communication to a board compromised and tainted the board's decisionmaking process are insufficient to support a motion to reopen. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-840, 24 NRC 54, 61 (1986), vacated, CLI-86-18, 24 NRC 501 (1986) (the Appeal Board lacked jurisdiction to rule on the motion to reopen).

A movant should provide any available material to support a motion to reopen the record rather than rely on "bare allegations or simple submission of new contentions." Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981); Louisiana Power and Light Co. (Waterford Steam E. ectric Station, Unit 3), ALAB-803, 21 NRC 575, 577 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89, 93-94 (1989) (a movant's willingness to provide unspecified, additional information at some unknown date in the future is insufficient). Undocumented newspaper articles on subjects with no apparent connection to the facility in question do not provide a legitimate basis on which to reopen a record. Waterford, supra, 18 NRC at 1330; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089-1090 (1984). The propone * of a motion to reopen a hearing bears the responsibility for establishing that the standards for reopening are met. The movant is not entitled to engage in discovery in order to support a motion to reopen. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985). An adjudicatory board will review a motion to reopen on the basis of the available information. The board has no duty to search for evidence which will support a party's motion to reopen. Thus, unless the movant has submitted information which raises a serious safety issue, a board may not seek to obtain information relevant to a motion to reopen pursuant to either its <u>sua sponte</u> authority or the Commission's Policy Statement on Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36,032 (Sept. 13, 1984). Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6-7 (1986).

A motion to reopen the record based on alleged deficiencies in an applicant's construction quality assurance program must establish either that uncorrected construction errors endanger safe plant operation, or that there has been a breakdown of the quality assurance program sufficient to raise legitimate doubt as to whether the plant can be operated safely. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344-1345 (1983), citing, Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 15 (1985). See Public Service Co. of New Hampshire (Seabrook Stat'on, Units 1 and 2), ALAB-940, 32 NRC 225, 243-44 (1990). This standard also applies to an applicant's design quality

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assurance program. Pacific Gas and Electr Canyon Nuclear Power Plant, Units 1 and 2) NRC 1361, 1366 (1984), aff'd sub. nom. San Luis Lers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984, Con reh'g en banc, 789 F.2d 26 (1986).

The untimely listing of "historical examples" of alleged construction QA deficiencies is insufficient to warrant reopening of the record on the issue of management character and competence. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 15 (1985), citing, Diablo Canyon, ALAB-775, supra, 19 NRC at 1369-70.

Long range forecasts of future electric power demands are especially uncertain as they are affected by trends in usage, increasing rates, demographic changes, industrial growth or decline, and the general state of economy. These factors exist even beyond the uncertainty that inheres to demand forecasts: assumptions on continued use from historical data, range of years considered, the area considered, and extrapolations from usage in residential, commercial, and industrial sectors. The general rule applicable to cases involving differences or changes in demand forecasts is stated in Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 352-69 (1975). Accordingly, a possible one-year slip in construction schedule was clearly within the margin of uncertainty, and intervenors had failed to present information of the type or substance likely to have an effect on the need-for-power issue such as to warrant relitigation. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), CLI-79-5, 9 NRC 607, 609-10 (1979).

Speculation about the future effects of budget cuts or employment freezes does not present a significant safety issue which must be aidressed. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 223 (1990).

4.4.3 Reofaning Construction Permit Hearings to Address New Generic Issues

Construction permit hearings should not be reopened upon discovery of a generic safety concern where such generic concern can be properly addressed and considered at the operating license stage. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404 (1975).

4.4.4 Discovery to Obtain Information to Support Reopening of Hearing

The Appeal Board has held that, though the period for discovery may have long since terminated, a party may obtain discovery in order to support a motion to reopen a hearing provided that party demonstrates with particularity that discovery would enable it to produce the needed materials. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 524 (1973). This Appeal Board ruling is substantially undercut by a recent Commission decision in which the Commission noted that the burden is on the movant to establish prior to reopening that the standards for reopening are met and "the movant is not entitled to engage in discovery in order to support a motion to reopen." Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985). See also Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 235-36 & n.1 (1986), aff'd sub nom. on other grounds, Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 672-673 n.33 (1986); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 963 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-879, 26 NRC 410, 422 (1987).

4.5 Motions to Reconsider

When a Board has reached a determination of a motion in the course of an on-the-record hearing, it need not reconsider that determination in response to an untimely motion but it may, in its discretion, decide to reconsider on a showing that it has made an egregious error. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-6, 15 NRC 281, 283 (1982).

A petitioner lacks standing to seek reconsideration of a decision unless the petitioner was a party to the proceeding when the decision was issued. <u>Texas Utilities Electric Co.</u> (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-89-6, 29 NRC 348, 354 (1989).

In certain instances, for example, where a party attempts to appear an interlocutory ruling, a Licensing Board can properly treat the appeal as a motion to the Licensing Board itself to reconsider its ruling. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-370, 5 NRC 131 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1653 (1982).

The Appeal Board has indicated that a motion to it to reconsider a prior decision will be denied where the Appeal Board is left with the

conviction that what confronts it is not in reality an elaboration upon, or refinement of, arguments previously advanced, but instead is an entirely new thesis. <u>Tennessee Valley Authority</u> (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-418, 6 NRC 1, 2 (1977).

A party may not raise, in a petition for reconsideration, a matter which was not contested before the Licensing Board or on appeal. Iennessee Valley Authority (Hartsville Plant, Units 1A, 2A, 1B, 2B), ALAB-467, 7 NRC 459, 462 (1978). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241-42 (1989). In the same vein, a matter which was raised at the inception of a proceeding but was never pursued before the Licensing Board or the Appeal Board cannot be raised on a motion for reconsideration of the Appeal Board's decision. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-477, 7 NRC 766, 768 (1978).

Motions to reconsider an order should be associated with requests for reevaluation in light of elaboration on or refinement of arguments previously advanced; they are not the occasion for advancing an entirely new thesis. <u>Central Electric Power Cooperative</u>, <u>Inc.</u> (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787, 790 (1981).

Where a party petitioning the Court of Appeals for review of a decision of the agency also petitions the agency to reconsider its decision and the Federal court stays its review pending the agency's disposition of the motion to reconsider, the Hobbs Act does not preclude the agency's reconsideration of the case. <u>Public Service Co. of Indiana</u> (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 259 (1978).

Repetition of arguments previously presented does not present a basis for reconsideration. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Leve: Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5-6 (1980). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 NRC 1, 2 (1988).

4.6 Sua Sponte Review by the Appeal Board

Sua sponte review of a Licensing Board's decision by an Appeal Board is a long-standing Commission-approved practice that is undertaken in all cases, regardless of their nature or whether exceptions have been filed. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1). ALAB-696, 16 NRC 1245, 1262 (1982), citing, Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), ALAB-689, 16 NRC 887, 890 (1982); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-859, 25 NRC 23, 27 (1987).

The Appeal Board has the power to conduct a <u>de novo</u> review of the record <u>sua sponte</u> to make its own independent findings. <u>Wisconsin Electric Power Co.</u> (Point Beach Nuclear Power Station), ALAB-73, 5

AEC 297, 298 (1972). In uncontested and/or unappealed cases, the Appeal Board will always conduct a <u>sua sponte</u> review of safety and environmental issues. <u>See</u>, <u>e.g.</u>, <u>Sacramento Municipal Utility District</u> (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981), <u>citing</u>, <u>Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-571, 10 NRC 687 (1979). <u>See also Cincinnati Gas and Electric Co.</u> (William W. Zimmer Nuclear Station), ALAB-79, 5 AEC 342 (1972); <u>Detroit Edison Co.</u> (Enrico Fermi Atomic Power Plant), ALAB-77, 5 AEC 315 (1972); <u>Offshore Power Systems</u> (Manufacturing 'icense for Floating Nuclear Power Plants), ALAB-689, 16 NRC 887, 890 (1982); <u>Consumers Power Co.</u> (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 908 (1982); <u>Louisiana Power and Light Co.</u> (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1111 (1983); <u>Commonwealth Edison Co.</u> (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1624 (1984).</u>

In the absence of an appeal, the customary practice of an Appeal Board is to conduct a <u>sua sponte</u> review of an authorization of licensing action. However, an Appeal Board will not conduct a <u>sua sponte</u> review of a proceeding that was dismissed when the parties settled the issues. Thus, an Appeal Board will decline to conduct a <u>sua sponte</u> review of a license amendment proceeding where the parties agreed to proposed findings of fact and conclusions of law, and where the Licensing Board raised no significant safety or environmental issues on its own motion. <u>Portland General Electric Co.</u> (Trojan Nuclear Plant), ALAB-796, 21 NRC 4, 5 (1985). An Appeal Board may conduct a <u>sua sponte</u> review of a proceeding where all the intervenors have been dismissed as parties as a sanction. <u>Long Island Lighting Co.</u> (Shoreham Nuclear Power Station, Unit 1), ALAB-911, 29 NRC 247, 250-51 (1989).

An Appeal Board may undertake <u>sua sponte</u> review either during the course of Licensing Board proceedings or after an initial decision has been issued. 10 CFR § 2.785; <u>Public Service Company of Indiana</u> (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-374, 5 NRC 417 (1977).

An Appeal Board may undertake <u>sua sponte</u> review of a Licensing Board decision concerned with the integrity of the hearing process. <u>Consumers Power Co.</u> (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 908 (1982).

It is not the Appeal Board's function in a <u>sua sponte</u> review of a Licensing Board decision to undertake a detailed scrutiny of the entire record. Rather, the Appeal Board usually addresses only those portions of the Licensing Board's opinion that it believes deserve clarification or correction. Further, absence of Appeal Board comment on a particular Licensing Board statement should not be construed as either agreement or disagreement with it. <u>Mid'and</u>, <u>supra</u>, 16 NRC at 908-909.

Upon review <u>sua sponte</u> of a Licensing Board's initial decision authorizing facility operation, the Appeal Board will consider

8 4.6 operational problems coming to light as a result of facility operation during the period of review only where the problems are extraordinary and have a bearing on whether an operating license should have been issued. <u>Duquesne Light Co.</u> (Beaver Valley Power Station, Unit 1), ALAB-408, 5 NRC 1383, 1386 (1977). In any event, the following matters will not be reviewed sua sponte absent extraordinary circumstances: (1) Procedural irregularities. Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 1), ALAB-231, 8 AEC 633, 634 (1974); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1262 (1982). (2) Rulings on contentions. Washington Public Power Supply System (Nuclear Projects No. 1 & No. 4), ALAB-265, 1 NRC 374, 375 n.1 (1975); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-242, 8 AEC 847, 848-849 (1974). (3) Purely economic issues posed in an antitrust proceeding. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-258, 1 NRC 45, 48 n.6 (1975); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 908 (1982), citing, Waterford, supra, 1 NRC at 48 n.6; Washington Public Power Supply System, supra, 1 NRC at 375 n.1; Pilgrim, supra, 8 AEC at 633-634. (4) A proceeding which has been dismissed upon settlement of the issues by the parties. <u>Trojan</u>, supra, ALAB-796, 21 NRC 4, 5 (1985).An Appeal Board will not be established to conduct sua sponte review of a Licensing Board decision upholding the NRC Staff's suspension. revocation, failure to renew, or other termination of a reactor operator's license. Maurice P. Acosta, Jr. (Reactor Operator License for San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-923, 30 NRC 261, 263 (1989). Appeal Board review will be routinely undertaken of any final disposition of a licensing proceeding founded upon substantive determinations of significant safety or environmental issues. Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 303-304 (1980). The Appeal Board, on sua sponte review, has the authority to reject or modify the findings of the Licensing Board. Monticello, supra, 12 NRC at 304. As for the standards for an Appeal Board's reversal of a Licensing Board's findings of fact, see Section 5.7.3. A case, when properly before the Appeal Board on sua sponte review, is not confined to those issues on which the Licensing Board made substantive findings. Issues not raised by parties may be considered. However, in operating license proceedings such issues may JULY 1992 POST HEARING MATTERS 25

be considered only when serious safety, environmental or common defense and security matters exist. Monticello, supra, 12 NRC at 309.

In the course of its review of an initial decision in a construction permit proceeding, an Appeal Board is free to raise <u>sua sponte</u> issues which were neither presented to nor considered by the Licensing Board. <u>Virginia Electric and Power Co.</u> (North Anna Nuclear Power Station, Units 1 & 2), ALAB-551, 9 NRC 704, 707 (1979).

If the Appeal Board determines <u>sua sponte</u> more information is needed, it may take evidence to develop the record. <u>Virginia Electric & Power Co.</u> (North Anna Nuclear Power Station, Units 1 & 2), ALAB-578, 11 NRC 189 (1980).

The Appeal Board, in lieu of remand, may undertake the conduct of hearings in the interests of expedition. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 231 (1980).

In a special proceeding not specifically addressed by Commission regulations, the Appeal Board has the authority to review the entire record of a proceeding sua sponte, independently of the parties' position. The absence of an appeal does not deprive the Appeal Board of the right to review an issue that was contested before a Licensing Board. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-685, 16 NRC 449, 451, 452 (1982), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245, 247 (1978; Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 n.6 (1981).

The Appeal Board's authority to review the entire record must be distinguished from its power in operating license application proceedings to consider serious safety, environmental, and common defense and security matters not otherwise placed in issue by the parties and those cases not involving operating license applications where Commission approval is sought before pursuing new safety questions not previously put in controversy or otherwise raised in an adjudicatory context. Three Mile Island, supra, 16 NRC at 452 n.5.

An immediate effectiveness review is not a substitute for the usual sua sponte review. Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), ALAB-689, 16 NRC 887, 890 (1982).

In no instance has the Appeal Board's conduct of a <u>sua sponte</u> review served (or been construed) to revoke, suspend, or defer issuance of a license. Only the finality of the Licensing Board's underlying decision is deferred pending Appeal Board review; the effectiveness of the decision is not stayed. <u>Manufacturing License</u>, <u>supra</u>, 16 NRC at 891.

If the Appeal Board's sua sponte review uncovers problems in a Licensing Board's decition or a record that may require corrective action adverse to a party's interest, the consistent practice is to give the party ample opportunity to address the matter as appropriate. Manufacturing License, supra, 16 NRC at 891 n.8, citing, Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981); Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 309-313 (1980).

NRC regulations give an adjudicatory board the discretion to raise on its own motion any serious safety or environmental matter. See 10 CFR § 2.785(b)(2). This discretionary authority necessarily places on the board the burden of scrutinizing the record of an operating license proceeding to satisfy itself that no such matters exist.

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 307 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983). See Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 309 (1980).

4.7 Motions for Post-Judgment Relief

Post-judgment motions for relief are not favored by the regulations governing Commission review of Appeal Board decisions (10 CFR § 2.786(b)(7)) and will not normally be granted absent a showing of "extraordinary circumstances." Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-15, 8 NRC 1, 2 (1978).

Although termed a "motion for reformation", an applicant's motion which seeks a major revision of the text of a Commission order, including the deletion of the Commission's rationale for denying the applicant's petition for review of an Appeal Board decision, is in reality a motion for reconsideration of a Commission order. The Commission's regulations make it clear that such motions for reconsideration will not be entertained. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-21, 24 NRC 681, 682-83 (1986), citing, 10 CFR § 2.786(b)(7).

| 6.0 | GENERAL MATTERS | GM | 1 |
|---------|--|-----|----|
| 6.1 | Amendments to Existing Licenses and/or Construction | | |
| | Permits | GM | 1 |
| 6.1.1 | Staff Review of Proposed Amendments (Reserved) | GM | 1 |
| 6.1.2 | Amendments to Research Reactor Licenses (Reserved) | GM | 1 |
| 6.1.3 | Matters to be Considered in License Amendment Proceedings (Reserved) | GM | 1 |
| 6.1.3.1 | Specific Matters Considered in License Amendment | | |
| | Proceedings | GM | |
| 6.1.4 | He no Coquirements for License/Permit Amendments | GM | |
| 6.1.4.1 | Not . r Hearing on License/Permit Amendments (Reserved) | GM | |
| 6.1.4.2 | Intervention on License/Permit Amendments | GM | 4 |
| 6.1.4.3 | Summary Lisposition Procedures on License/Permit | | |
| | Amendments | GM | 4 |
| 6.1.4.4 | Maiters Considered in Hearings on License Amendments | GM | |
| 6.1.5 | Primary Jurisdiction in Appeal Board to Consider | 244 | |
| | License Amendment in Special Hearing | GM | |
| 6.1.6 | Facility Changes Without License Amendments | GM | 7 |
| 6.2 | Amendments to License/Permit Applications | GM | 7 |
| 6.3 | Antitrust Considerations | GM | 8 |
| 6.3.1 | Consideration of Antitrust Matters After the | | |
| | Construction Permit Stage | GM | 10 |
| 6.3.2 | Intervention in Antitrust Proceedings | | 13 |
| 6.3.3 | Discovery in Ancitrust Proceedings | | 14 |
| 6.3.3.1 | | | 14 |
| 0.3.3.1 | Discovery Cutoff Dates for Antitrust Proceedings | um | 14 |
| 6.4 | Attorney Conduct | GM | 15 |
| 6.4.1 | Practice Before Licensing/Appeal Boards | GM | 15 |
| 6.4.1.1 | Professional Decorum Before Licensing/Appeal Boards | | 16 |
| 6.4.2 | Disciplinary Matters re Attorneys | | 17 |
| 6.4.2.1 | Jurisdiction of Special Board re Attorney Discipline | | 18 |
| | | 311 | 10 |
| 6.4.2.2 | Procedures in Special Disqualification Hearings re | 014 | 10 |
| | Attorney Conduct | | 18 |
| 6.4.2.3 | Conflict of Interest | GM | 19 |
| 6.5 | Communications Between Staff/Applicant/Other Parties/ | | |
| | Adjudicatory Bodies | GM | 20 |
| 6.5.1 | Ex Parte Communications Rule | GM | 20 |
| 6.5.2 | Telephone Conference Calls | GM | |
| 6.5.3 | Staff-Applicant Communications | | 22 |
| 6.5.3.1 | Staff Review of Application | | 22 |
| | | | |
| 6.5.3.2 | Staff-Applicant Correspondence | uM | 23 |

| 6.5.4 6.5.4.1 | Notice of Relevant Significant Developments Duty to Inform Adjudicatory Board of Significant | GM | 23 |
|--|---|----------------|----------------------------|
| | Developments | GM | 23 |
| 6.6 | Early Site Review Procedures | GM | 26 |
| 6.6.1 | Scope of Early Site Review | GM | 27 |
| 6.7 6.7.1 6.7.2 | Endangered Species Act Required Findings re Endangered Species Act Degree of Proof Needed re Endangered Species Act | GM | 27 27 28 |
| 6.8 | Financial Qualifications | GM | 28 |
| 6.9 6.9.1 6.9.2 6.9.2.1 | Generic Issues Consideration of Generic Issues in Licensing Proceedings Effect of Unresolved Generic Issues Effect of Unresolved Generic Issues in Construction | GM GM | 31 31 34 |
| 6.9.2.2 | Permit Proceedings Effect of Unresolved Generic Issues in Operating License Proceedings | | 34 |
| 6.10 6.10.1 6.10.1.1 6.10.1.2 | Inspection and Enforcement Enforcement Actions Civil Penalties Enforcement Proceedings (Formerly Show Cause Proceedings) (SEE 6.24) | GM GM | 35 36 38 39 |
| 6.11 | Masters in NRC Proceed' igs | GM | 39 |
| 6 12 | Material False Statements in Applications (SEE 1.5.2) | GM | 40 |
| 6.13 | Materials Licenses | GM | 40 |
| 6.14 6.14.1 6.14.2 6.14.2.1 6.14.3 | Motions in NRC Proceedings Form of Motion Responses to Motions Time for Filing Responses to Motions Licensing Board Actions on Motions | GM GM GM | 43 44 44 44 44 |
| 6.15 6.15.1 6.15.1.1 6.15.1.2 6.15.2 | NEPA Considerations Environmental Impact Statements (EIS) Need to Prepare an EIS Scope of EIS Role of EIS | GM GM GM | 45 48 49 53 54 |

| 6.15.3 | Circumstances Requiring Redrafting of Final | CM | 55 |
|------------|--|-----|----|
| 6.15.3.1 | Environmental Statement (FES) Effect of Failure to Comment on Draft Environmental | GM | 22 |
| | Statement (DES) | GM | 58 |
| 6.15.3.2 | Stays Pending Remand for Inadequate EIS | | 5. |
| | | | 59 |
| 6.15.4 | Alternatives | | 62 |
| 6.15.4.1 | Obviously Superior Standard for Site Selection | GIT | 02 |
| 6.15.4.2 | Standards for Conducting Cost-Benefit Analysis | CH | |
| | Related to Alternatives | | 63 |
| 6.15.5 | Need for Facility | | 64 |
| €.15.6 | Cost-Benefit Analysis Under NEPA | GM | 65 |
| 6.15.6.1 | Consideration of Specific Costs Under NEPA | GM | 67 |
| 6.15.6.1.1 | Cost of Withdrawing Tarmland from Production | GM | 68 |
| | (SEE 3.7.3.5.1) | | |
| 1.15.6.1.2 | Socioeconomic Costs as Affected by Increased Employment and Taxes from Proposed Facility | GM | 68 |
| 15.7 | Consideration of Class 9 Accidents in an Environmental | | |
| | Impact Statement | GM | 68 |
| 15.8 | Power of NRC Under NEPA | | 70 |
| | | | 72 |
| 15.8.1 | Powers in General (Under NEPA) | | |
| .15.8.2 | Transmission Line Routing | | 74 |
| 6.15.8.3 | Pre-LWA Activities/Offsite Activities | | 74 |
| 6.15.8.4 | Relationship to EPA with Regard to Cooling Systems | | 74 |
| 6.15.8.5 | NRC Power Under NEPA with Regard to FWPCA | | 75 |
| 6.15.9 | Spent Fuel Pool Proceedings | GM | 76 |
| 6.16 | NDC C12ff | CM | 77 |
| | NRC Staff | | |
| 6.16.1 | Staff Role in Licensing Proceedings | | 77 |
| 6.16.1.1 | Staff emands on Applicant or Licensee | | 82 |
| 6.16.1.2 | Staff Litnesses | GM | 83 |
| 6.16.1.3 | Post Houring Resolution of Outstanding Matters by the Staff | CM | 83 |
| 0 10 0 | | | |
| 6.16.2 | Status of Staff Regulatory Guides | | 86 |
| 6.16.3 | Status of Staff Position and Working Papers | | 88 |
| 6.16.4 | Status of Standard Review Plan | | 89 |
| 6.16.5 | Conduct of NRC Employees (Reserved) | GM | 89 |
| 6.17 | Orders of Licensing and Appeal Boards | GM | 89 |
| 6.17.1 | Compliance with Board Orders | GM | 89 |
| 6.18 | Precedent and Adherence to Past Agency Practice | GM | 90 |
| 6.19 | Pre-Permit Activities | GM | 91 |
| 6.19.1 | Pre-LWA Activity | | 93 |
| | | | 94 |
| 6.19.2 | Limited Work Authorization | | |
| 6.19.2.1 | LWA Status Fending Remand Proceedings | 6M | 95 |

| 6.20 6.20.1 6.20.2 6.20.3 6.20.4 6.20.5 | Regulations Compliance with Regulations Commission Policy Statements Regulatory Guides Challenges to Regulations Agency's Interpretation of its Own Regulations | GM GM GM GM GM | 96 96 96 |
|--|--|--|---|
| 6.21 6.21.1 | Rulemaking Rulemaking Distinguished from General Policy | | 102 |
| 6.1 2 | Statements Generic Issues and Rulemaking | | 103 |
| 6.22 | Research Reactors | GM | 104 |
| 6.23 6.23.1 6.23.2 6.23.3 6.23.3.1 | Disclosure of Information to the Public Freedom of Information Act Disclosure Privacy Act Disclosure (Reserved) Disclosure of Proprietary Information Protecting Information Where Disclosure is Sought in an Adjudicatory Proceeding Security Plan Information Under 10 CFR § 2.790(d) | GM GM GM | 104 105 107 107 108 110 |
| 6.24 6.24.1.1 6.24.1.2 6.24.1.3 6.24.2 6.24.3 6.24.4 6.24.5 6.24.6 6.24.7 6.24.8 | Enforcement Proceedings (Formerly Show Cause Proceedings) Petition for Enforcement Order Grounds for Enforcement Order Burden of Proof for Enforcement Order Issues in Enforcement Proceedings Standards for Issuing an Enforcement Order Review of Decision on Request for Enforcement Order Notice/Hearing on Enforcement Order to Licensee/Permittee Burden of Proof in Enforcement Proceedings Consolidation of Petitioners in Enforcement Proceedings Necessity of Hearing in Enforcement Proceedings Intervention in Enforcement Proceedings | GM GM GM GM GM GM GM | 110 114 114 115 115 116 118 119 119 |
| 6.25 | Summary Disposition Procedures (SEE 3.5) | GM | 120 |
| 6.26 | Suspension, Revocation or Modification of License | GM | 120 |
| 6.27 | Technical Specifications | GM | 121 |
| 6.28 | Jermination of Facility Licenses | GM | 122 |
| 6.29.1 6.29.2 | Procedures in Other Types of Hearings Military or Foreign Affairs Functions Export Licensing (SEE ALSO 3.4.6) | GN | 1 122 1 122 1 122 |
| 6.29.2.1 6.29.2.2 6.29.3 | Jurisdiction of Commission re Export Licensing Export License Criteria High-Level Waste Licensing | G. | 1 122 1 123 1 123 |

Generic discussions of general health and safety problems and responsibilities of the Commission not arising from or directly related to matters in adjudication are not ex parte. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-3, 17 NRC 72, 74 (1983), citing, 10 CFR § 2.780(d).

Regarding a prohibition on ex parte contacts, the ex parte rule is not properly invoked where in an enforcement matter the licensee is complying with Staff's order and has not sought a hearing, nor is a petition for an enforcement action sufficient to invoke the provisions of 10 CFR § 2.780. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-83-4, 17 NRC 75, 76 (1933). See Yankee Atomic Electric Co. (Yankee Rowe Nuclear Power Station), CLI-91-11, 34 NRC 3, 6 (1991). The Commission retains the power, pursuant to 10 CFR § 2.206(c), to consult with the NRC Staff on a formal or informal basis regarding the institution of enforcement proceedings. Yankee Rowe, supra, 34 NRC at 6-7.

The Staff's communication of the results of its reviews, through public filings served on all parties and the adjudicatory boards, does not constitute an <u>ex parte</u> communication. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 197 n.39 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

In determining whether the submission of an <u>ex parte</u> communication has so tainted the decisionmaking process as to require vacating a Board's decision, the Commission has evaluated the following factors: the gravity of the <u>ex parte</u> communication; whether the contacts could have influenced the agency's decision; whether the party making the contacts benefited from the Board's final decision; whether the contents of the communication were known to the other parties to the proceeding; and whether vacating the Board's decision would serve a useful purpose. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-18, 24 NRC 501, 506 (1986), citing, Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority, 685 F.2d 547, 564-565 (D.C. Cir. 1982).

6.5.2 Telephone Conference Calls

A conference call between an adjudicatory board and some but not all of the parties should be avoided except in the case of the most dire necessity. Such calls must be avoided even where no substantive matters are to be discussed and the rule precluding ex parte communications is, therefore, not technically violated. Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-313, 3 NRC 94 (1976).

In general, where substantive matters are to be considered in the conference call, all parties must be on the line. For example, when a prehearing conference is conducted via telephone, the Licensing Board must insure that representatives of all parties concerned are on the line unless that representation has been waived. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-334, 3 NRC 809 (1976). Promptly after any prehearing conference carried on via telephone during which rulings governing the conduct of future proceedings have been made, Licensing Boards must draft and enter written orders confirming those rulings. Id.; 10 CFR § 2.752(c).

Where a party informs an adjudicatory board that it is not interested in a matter to be discussed in a conference call between the board and the other litigants, that party cannot later complain that it was not consulted or included in the conference call. <u>Public Service Co. of Indiana</u> (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 269 n.63 (1978).

6.5.3 Staff-Applicant Communications

6.5.3.1 Staff Review of Application

A prospective applicant may confer informally with the Staff prior to filing its application. 10 CFR §§ 2.101(a)(1), 2.102(a).

A Licensing Board has held that the Staff may continue to confer privately with the applicant even after a hearing has been noticed. In addition, the Board ruled that, while a Licensing Board has supervisory authority over Staff actions that are part of the hearing process, it has no jurisdiction to supervise the Staff's review process and, as such, cannot order the Staff and applicant to hold their private discussions in the vicinity of the site or to provide transcripts of such discussions. Northeast Nuclear Energy Co (Montague Nuclear Power Station, Units 1 & 2), LBP-75-19, I NRC 436 (1975).

With certain exceptions, all meetings conducted by the NRC technical Staff as part of its review of a particular domestic license or permit application, including applications for amendments to a license or permit, are to be open to attendance by all parties or petitioners for leave to intervene in the case. See Domestic License Applications, Open Meetings and Statement of NRC Staff Policy. 43 Fed. Reg. 28058 (June 28, 1978).

In the absence of a demonstration that meetings were deliberately being scheduled with a view to limiting the ability of intervenors' representatives to attend, the imposition of hard and fast rules on scheduling and meeting location would needlessly impair the Staff's ability to obtain information. The Staff should regard the intervenors' opportunity to attend as one of the factors to be taken into account in making its decisions on the location of such meetings. Fairness demands that all parties be informed of the scheduling of such meetings at the same time. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2); Power Authority of the State of N.Y. (Indian Point, Unit 3), CLI-82-41, 16 NRC 1721, 1722-23 (1982).

6.5.3.2 Staff-Applicant Correspondence

All Staff-applicant correspondence is required to be served on all parties to a proceeding d such service must be continued through the entire j cial review process, at least with respect to those polices participating in the review and those issues which are the subject of the review. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-184, 7 AEC 229, 237 n.9 (1974); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 183 (1974). Note that this requirement of service on all parties of documents exchanged between applicant and Staff in the review process does not arise from 10 CFR § 2.701(b) which separately requires that all documents offered for filing in adjudications be served on all parties. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2112 (1982).

6.5.4 Notice of Relevant Significant Developments

6.5.4.1 Duty to Inform Adjudicatory Board of Significant Developments

The NRC Staff has an obligation to lay all relevant materials before the Board to enable it to adequately dispose of the issues before it. Consolidated Edison Co. of N.Y. (Indian Point Station, Units 1, 2 & 3), CLI-77-2, 5 NRC 13 (1977); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1091 n.18 (1983), citing, Indian Point, supra, 5 NRC at 15. See generally Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387 (1982); Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671, 680 (1975). Moreover, the Staff is obligated to make every effort promptly to report newly discovered important information or significant developments related to a proceeding to the presiding Licensing Board and the parties. The Staff's obligation to report applies materials licensing proceedings in which the Staff has "a continuing duty to keep the he ring file up to date", 10 CFR § 2.1231(c). Curators of the University of Missouri, LBP-90-34, 32 NRC 253, 254-55 (1990).

This duty to report arises immediately upon the Staff's discovery of the information, and the Staff is not to delay in reporting until it has completed its own evaluation of the matter. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480, 491 n.11 (1976). This same obligation extends to all parties, each of whom has an affirmative cuty to keep Boards advised of significant changes and developments relevant to the proceeding. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404, 408 (1975); <u>Duke Power Co.</u> (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 625-626 (1973); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1357 (1984); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-14, 23 NRC 553, 560 (1986); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 623-625 (1986). See Curators of the University of Missouri, LBP-90-34, 32 NRC 253, 255-57 (1990).

Parties in Commission proceedings have an absolute obligation to alert adjudicatory bodies in a timely fashion of material changes in evidence regarding: (1) new information that is relevant and material to the matter being adjudicated; (2) modifications and rescissions of important evidentiary submissions; and (3) outdated or incorrect information on which the Board may rely. Sim'arly, internal Staff procedures must ensure that Staff counsel be fully appraised of new developments. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387, 1388, 1394 (1982), citing, <u>Duke Power Co.</u> (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 406 n.26 (1976); <u>Georgia</u> Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 411 (1975); and Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625 (1973); Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), ALAB-752, 18 NRC 1318, 1320 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 656 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 884 n.163 (1984).

However, the Commission has recently discussed the conflict between the Staff's duty to disclose information to the boards and other parties, and the need to protect such information. The Commission noted that, pursuant to its Policy Statement on Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Req. 36,032 (Sept. 13, 1984), the Staff or the Office of Investigations could provide to a board, or a board could request, for ex parte in camera presentation, information concerning an inspector or investigation when the information is material and relevant to any issue in controversy in the proceeding. The Commission held that the Appeal Board did not have the authority to request information from the Office of

Investigations for use in reviewing a motion to reopen where the motion to reopen concerned previously uncontested issues and not "issues in controversy in a proceeding". Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 7 (1986). See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-829, 23 NRC 55, 58 & n.1 (1986).

All parties, including the Staff, are obliged to bring any significant new information to the boards' attention.

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 197 n.39 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985), citing, Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387, 1394 (1982); Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1210 n.11 (1983).

Parties and counsel must adhere to the highest standards in disclosing all relevant factual information to the Licensing Board. Material facts must be affirmatively disclosed. If counsel have any doubt whether they have a duty to disclose certain facts, they must disclose. An externality such as a threatened lawsuit does not relieve a party of its duty to disclose relevant information and its other duties to the Board. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-81-63, 14 NRC 1768, 1778, 1795 (1981); Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1210 n.11 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1092 n.8 (1984); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 624 n.9 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986).

If a licensee or applicant has a reasonable doubt concerning the materiality of information in relation to its Board notification obligation or duties under Section 186 of the Atomic Energy Act, 42 U.S.C. § 2236a, the information should be disclosed for the Board to decide its true worth.

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1358 (1984), citing, McGuire, supra, 6 AEC at 625 n.15; and Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 914 (1982), review declined, CLI-83-2, 17 NRC 69 (1983); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-6, 21 NRC 447, 461 (1985); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-14, 23 NRC 553, 560 (1986).

Before submitting information to the Board pursuant to its notification obligations, a licensee or applicant is entitled to a reasonable period of time for internal review of the

documents under consideration. However, an obvious exception exists for information that could have an immediate effect on matters currently being pursued at hearing, or that disclose possible serious safety or environmental problems requiring immediate attention. An applicant or licensee is obliged to report the latter to the NRC Staff without delay in accordance with numerous regulatory requirements. See, e.g., 10 CFR § 50.72. Three Mile Island, supra, 19 NRC at 1359 n.8.

The routine submittal of informational copies of technical materials to a Board is not sufficient to fulfill a party's obligation to notify the Board of material changes in significant matters relevant to the proceeding. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-53, 20 NRC 1531, 1539 n.23 (1984).

If a Board notification is to serve its intended purpose, it must contain an exposition adequate to allow a ready appreciation of (1) the precise nature of the addressed issue and (2) the extent to which the issue might have a bearing upon the particular facility before the Board. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1114 n.59 (1983), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 710 (1979); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1092 n.8 (1984).

The untimely provision of significant information is an important measure of a licensee's character, particularly if it is found to constitute a material false statement.

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 198 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

An applicant's failure to notify a board of significant information may reflect a deficiency in character or competence if such failure is a deliberate breach of a clearly defined duty, a pattern of conduct to that effect, or an indication of bad faith. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 625-626 (1986).

6.6 Early Site Review Procedures

Part 2 of the Commission's regulations has been amended to provide for adjudicatory early site reviews. See 10 CFR § 2.101(a-1). §§ 2.600-2.606. The early site review procedures, which differ from those set forth in Subpart A of 10 CFR Part 52 and Appendix Q to 10 CFR Part 52 (formerly, 10 CFR Part 50), allow for the early issuance of a partial initial decision on site suitability matters.

Early site review regulations provide for a detailed review of site suitability matters by the Staff, an adjudicatory hearing directed toward the site suitability issues proposed by the applicant, and the issuance by a Licensing Board of an early partial decision on site suitability issues. A partial decision on site suitability is not a sufficient basis for the issuance of a construction permit or for a limited work authorization. Neither of these steps can be taken without further action, which includes the full review required by Section 102(2) of the National Environmental Policy Act of 1969, as amended (NEPA), and by 10 CFR Part 51, which implements NEPA. Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), LBP-79-23, 10 NRC 220, 223 (1979).

The early partial decision on site suitability does not authorize the applicant to do anything; it does provide applicant with information of value to applicant in its decision to either abandon the site or proceed with plans for the design, construction, and operation of a specific nuclear power plant at that site. Implementation of any such plans is dependent upon further review by the Staff and approval by a Licensing Board. Fulton, supra.

6.6.1 Scope of Early Site Review

The early site review is not a "major Federal action significantly affecting the human environment" such as would require a full NEPA review of the entire proposed project. Commonwealth Edison Company (Carrol County Site), ALAB-601, 12 NRC 18, 25 (1980).

The scope of the early site review is properly limited to the issues specified in the notice of hearing subject to the limits of NEPA, Section 102(2)(c), 42 U.S.C § 4332(2)(c). Carrol County Site, supra, 12 NRC at 26.

6.7 Endangered Species Act

6.7.1 Required Findings re Endangered Species Act

Under Section 7 of the Endangered Species Act, Federal agencies, in consultation with the Department of Interior, are to take such action as necessary to insure that actions authorized by them do not "jeopardize the continued existence of such endangered species." Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 360 (1978). The Federa' agency is to obtain input from the Department of Interior and then make its decision. A Licensing Board may not approve relevant action until Interior has been consulted. Approval by a Licensing Board which is conditioned on later approval by the Department of Interior does not fulfill the requirements of the Endangered Species Act. "To give advance approval to whatever Interior might decide is to abdicate the Commission's duty under the Act to make its own fully informed decision." Id. 7 NRC at 363-364.

A Licensing Board's finding with regard to the Endangered Species Act aspects of a construction permit application should not be restricted to a consideration of the particular points raised by contentions. Once informed that an endangered species lives in the vicinity of the proposed plant, the Licensing Board is obligated to examine all possible adverse effects upon the species which might result from construction or operation of the plant and to make findings with respect to them. Hartsville, supra, 7 NRC at 361. In this vein, releases from the plant which will not produce significant adverse effects on endangered species clearly "will not jeopardize their continued existence." The Act does not require a finding that there will not be any adverse effects. "Insignificant effects are not proscribed by the Statute." Hartsville, supra, 7 NRC at 360. Likewise, if there are no significant adverse effects on an endangered species, there will be no "harm" to the species under Section 9 of the Act. Id. at 366-367, n.114.

6.7.2 Degree of Proof Needed re Endangered Species Act

The finding that the proposed action will not jeopardize the continued existence of an endangered species must be established by a preponderance of the evidence rather chan by clear and convincing proof. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 360 (1978).

6.8 Financial Qualifications

Section 182(a) of the Atomic Energy Act of 1954 does not impose any financial qualifications requirement on license applicants; it merely authorizes the Commission to impose such financial requirements as it may deem appropriate. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 8, 9 (1978). The relevant implementing regulation is 10 CFR § 50.33(f) which is amplified by Appendix C to 10 CFR Part 50. Id.

The "reasonable assurance" requirement set forth in the regulation was adopted to assure that financial conditions did not compromise the applicant's clear self-interest in safety. It contemplates actual inquiry into the applicant's financial qualifications. It is not enough that the applicant is a regulated public utility. A "reasonable assurance" means that the applicant must have a reasonable financing plan in light of relevant circumstances. However, given the history of the present rule and the relatively modest implementing requirements in Appendix C, it does not mean a demonstration of near certainty that an applicant will never be pressed for funds during the course of construction. Seabrook, supra, 7 NRC at 18. See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 18 & n.39 (1988),

citing, Coalition for the Environment v. NRC, 795 F.2d 169 (D.C. Cir. 1986).

Recent amendments to 10 CFR § 50.33(f) have modified the requirements for financial qualifications review for electri utilities. Effective March 31, 1982, the Commission eliminated entirely the requirements for financial qualifications review for, inter alia, electric utilities applying for construction permits and operating licenses. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 594 (1982), citing, 47 Fed. Reg. 13750 (March 31, 1982); Illinois Power Co. (Clinton Power Station, Unit No. 1), LBP-82-103, 16 NRC 1603, 1618 (1982), citing, 10 CFR § 2.104(c)(4); 47 Fed. Reg. 13753 (March 31, 1982); Houston Lighting and Power Co. (South Texas Project, Units I and 2), LBP-87-37, 18 NRC 52, 56 (1983). However, the March 31, 1982 amendment was successfully challenged in court and was remanded to the Commission. Georgia Power Co. (Vogtle Nuclear Plant, Units 1 and 2), LBP-84-35, 20 NRC 887, 895 (1984), citing, New England Coalition on Nuclear Pollution v. NRC, 727 F.2d 1127 (D.C. Cir. 1984). On September 12, 1984, the Commission issued new amendments to 10 CFR § 50.33(f) which:

- reinstated financial qualifications review for electric utilities which apply for facility construction permits; and
- 2) eliminated financial qualifications review for electric utilities which apply for operating licenses, if the utility is a regulated public utility or is authorized to set its own rates.

See 49 Fed. Req. 35747 (September 12, 1984), as corrected, 49 Fed. Req. 36631 (September 19, 1984); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-784, 20 NRC 845, 847 (1984); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 84 & n.126 (1985).

In its statement of considerations accompanying the 1984 enactment of the revised financial qualification review requirements, the Commission discussed the special circumstances which might justify a waiver, pursuant to 10 CFR § 2.758(b), of the exemption from financial qualifications review for an electric utility operating license applicant. 49 Fed. Reg. 35747, 35751 (September 12, 1984). Among the possible special circumstances for which a waiver may be appropriate are: (1) a showing that the local public utility commission will not allow the electric utility to recover the costs of operating the facility through its rates; and (2) a showing of a nexus between the safe operation of a facility and the electric utility's financial condition. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 17, 21-22 (1988). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-10, 29 NRC 297, 302-03 (1989), aff'd in part and rev'd in part, ALAB-920, 30 NRC 121, 133-35 (1989). The 1984

financial qualifications rulemaking proceeding did not limit the special circumstances that could serve as grounds for waiver under 10 CFR § 2.758. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 596 (1988), reconsid. denied, CLI-89-3, 29 NRC 234 (1989).

The special circumstances which may justify a waiver under 10 CFR § 2.758 are present only if the petition properly pleads one or more facts, not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the proceeding leading to the rule sought to be waived. Also, the special circ istances must be such as to undercut the rationale for the rule sought to be waived. Seabrook, CLI-88-10, supra, 28 NRC at 596-97, reconsid. denied, CLI-89-3, 29 NRC 234 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-10, 29 NRC 297, 300, 301 (1989), aff'd in part and rev'd in part, ALAB-920, 30 NRC 121, 133 (1989). An anti-CWIP (construction work in progress) law which prohibits a public utility from recovering plant construction costs through rate increases until the plant is in commercial operation is not a special circumstance which justifies a waiver of the exemption from financial qualifications review for public utility operating license applicants. The potential delay in recovering such costs was considered by the Commission during rulemaking and was found not to undercut the rationale of the rule that ratemakers would authorize sufficient rates to assure adequate funding for safe full power operation of the plant. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231, 240-41 (1989).

A waiver petition under 10 CFR § 2.758 should not be certified unless the petition indicates that a waiver is necessary to address, on the merits, a significant safety problem related to the rule sought to be waived. Seabrook, CLI-88-10, supra, 28 NRC at 597, reconsid. denied, CLI-89-3, 29 NRC 234 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-920, 30 NRC 121, 133-35 (1989).

In order to obtain a waiver, pursuant to 10 CFR § 2.758(b), of the financial qualifications review exemption in a low-power operating license proceeding, a petitioner must establish that the electric utility has insufficient funds to cover the costs of safe low-power operation of its facility. Seabrook, supra, 28 NRC at 18-19.

Unusual and compelling circumstances are needed to warrant a waiver of the financial qualifications rule. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52, 57 (1983). Implicit in the "compelling circumstances" standard is the need to show the existence of at least a "significant" safety issue. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 239 (1989).

Matters involving decommissioning funding are considered under the Commission's decommissioning rule, issued on June 27, 1988, and not

as a part of the financial qualifications review under 10 CFR § 50.33(f). The decommissioning rule requires an applicant to provide reasonable assurance that, at the time of termination of operations, it will have available adequate funds for the decommissioning of its facility in a safe and timely manner. 53 Fed. Req. 24,018, 24,037 (June 27, 1988). The Commission applied the decommissioning rule to the unusual circumstances in the Seabrook operating license proceeding, and directed the applicant to provide, before low-power operation could be authorized, reasonable assurance that adequate funding for decommissioning will be available in the event that low-power operation has occurred and a full-power license is not granted. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-7, 28 NRC 271, 272-73 (1988). In a subsequent decision, the Commission held that the decommissioning rule is directed to the safe and timely decommissioning of a reactor after a lengthy period of full-power operation, and thus is not directly applicable to the hypothetical situation addressed in CLI-88-7, supra -- the denial of a full-power operating license following lowpower operation. However, due to the unusual circumstances in the Seabrook operating license proceeding, the Commission in CLI-C8-7, supra, did apply the safety concern underlying the decommissioning rule requiring the availability of adequate funds for safe and timely decommissioning. The Commission did not require the applicants to provide a final decommissioning plan containing precise and detailed information. Given the hypothetical situation, the applicants were required to provide only reasonable estimates of decommissioning costs and a reasonable assurance of availability of funding. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 584-86 (1988), reconsid. denied, CLI-89-3, 29 NRC 234 (1989), second motion for reconsideration denied, CLI-89-7, 29 NRC 395 (1989).

6.9 Generic Issues

A generic issue may be defined as one which is applicable to the industry as a whole (e.g., GESMO) or to all reactors or facilities or to all reactors or facilities of a certain type. Current regulations do not deal specifically with generic issues or the manner in which they are to be aduressed.

6.9.1 Consideration of Generic Issues in Licensing Proceedings

As a general rule, a true generic issue should not be considered in individual licensing proceedings but should be handled in rulemaking. See, e.g., Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-128, 6 AEC 399, 400, 401 (1973); Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-99, 6 AEC 53, 55-56 (1973). The Commission had indicated at least that generic safety questions should be resolved in rulemaking proceedings whenever possible. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 814-815, clarified, CLI-74-43, 8 AEC 826 (1974). An appellate

court has indicated that generic proceedings "are a more efficient forum in which to develop issues without needless repetition and potential for delay." Natural Resources

Defense Council v. NRC, 547 F.2d 633 (D.C. Cir. 1976), rev'd and remanded, 435 U.S. 519 (1978), on remand, 685 F.2d 459 (D.C. Cir. 1982), rev'd, 462 U.S. 87 (1983). To the same effect, see Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-380, 5 NRC 572 (1977). Nevertheless, it appears that generic issues may properly be considered in individual adjudicatory proceedings in certain circumstances.

For example, an Appeal Board has held the Licensing Boards should not accept, in individual licensing cases, any contentions which are or are about to become the subject of general rulemaking but apparently may accept so-called generic issues" which are not (or are not about to become) the subjects of rulemaking. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79 (1974); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-8, 23 NRC 182, 185-86 (1986). Moreover, if an issue is already the subject of regulations, the publication of new proposed rules does not necessarily suspend the difectiveness of the existing rules. Contentions under these circumstances need not be dismissed unless the Commission has specifically directed that they be dismissed during pendency of the rulemaking procedure. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-1A, 15 NRC 43, 45 (1982); South Texas, supra, 23 NRC at 186. The basic criterion is safety and whether there is a substantial safety reason for litigating the generic issue as the rulemaking progresses. In some cases, such litigation probably should be allowed if it appears that the facility in question may be licensed to operate before the rulemaking can be completed. In such a case, litigation may be necessary as a predicate for required safety findings. In other cases, however, it may become apparent that the rulemaking will be completed well before the facility can be licensed to operate. In that kind of case there would normally be no safety justification for litigating the generic issues, and strong resource management reasons not to litigate. <u>Duke Power Co.</u> (Catawba Nuclear Station, Units 1 and 2), LBP-82-107A, 16 NRC 1791, 1809 (1982).

In an operating license proceeding, where a hearing is to be held to consider other issues, Licensing Boards are enjoined, in the absence of issues raised by a party, to determine whether the Staff's resolution of various generic safety issues applicable to the reactor in question is "'at least plausible and...if proven to be of substance...adequate to justify operation.'" Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 311 (1979). See Houston Lighting and Power Co.

(South Texas Project, Units 1 and 2), LBP-86-5, 23 NRC 89, 90 (1986).

A Licensing Board must refrain from scrutinizing the substance of particular explanations in the Safety Evaluation Report (SER) justifying operation of a plant prior to the resolution of an unresolved generic safety issue. The Board should only look to see whether the generic issue has been taken into account in a manner that is at least plausible and that, if proven to be of substance, would be adequate to justify operation. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1559 (1982), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245 (1978).

As a matter of policy, most evidentiary hearings in NRC proceedings are conducted in the general vicinity of the site of the facility involved. In generic matters, however, when the hearing encompasses distinct, geographically separated facilities and no relationship exists between the highly technical questions to be heard and the particular features of those facilities or their sites, the governing consideration in determining the place of hearing should be the convenience of the participants in the hearing. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-566, 10 NRC 527, 530-31 (1979).

A Licensing Board does not have to apply the same degree of scrutiny to uncontested generic unresolved safety issues as is applied to issues subject to the adversarial process. A Licensing Board is required to examine the Staff's presentation in the SER on such uncontested issues to determine whether a basis is provided to permit operation of the facility pending resolution of those issues. A Licensing Board need not make formal findings of fact on these matters as if they were contested issues, but it is required to determine that the relevant generic unresolved safety issues do not raise a "serious safety, environmental, or common defense and security matter" such as to require exercise of the Board's authority under 10 CFR § 2.760a to raise and decide such issues sua sponte. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 465 (1983), citing, Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1110-13 (1983).

- 6.9.2 Effect of Unresolved Generic Issues
- 6.9.2.1 Effect of Unresolved Generic Issues in Construction Permit Proceedings

The existence of an unresolved generic safety question does not necessarily require withholding of construction permits since the Commission has available to it the provisions of 10 CFR § 50.109 for backfitting and the procedures of 10 CFR Part 2, Subpart B for imposing new requirements or conditions. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404 (1975).

While unresolved generic issues might not preclude issuance of a construction permit, those generic issues applicable to the facility in question must be considered and information must be presented on whether (1) the problem has already been resolved for the reactor under study, (2) there is a reasonable basis for concluding that a satisfactory solution will be obtained before the reactor is put into operation, or (3) the problem will have no safety implications until after several years of reactor operation, and if there is no resolution by then, alternate means will be available to assure that continued operation, if permitted, will not pose an undue risk. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 775 (1977). See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NRC 601, 614 (1982).

6.9.2.2 Effect of Unresolved Generic Issues in Operating License Proceedings

An unresolved safety issue cannot be disregarded in individual licensing proceedings merely because the issue also has generic applicability; rather, for an applicant to succeed, there must be some explanation why construction or operation can proceed althour an overall solution has not been found. Where issuance of an operating license is involved, the justification for allowing operation may be more difficult to come by than would be the case where a construction permit is involved. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-491, 8 NRC 245, 248 (1978).

Explanations of why an operating license should be issued despite the existence of unresolved generic safety issues should appear in the Safety Evaluation Report. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-491, 8 NRC 245, 249 (1978).

Where generic unresolved safety issues are involved in an operating license proceeding, for an application to succeed there must be some explanation why the operation can proceed even though an overall solution has not been found. Long

Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 472 (1983), affirmed, ALAB-788, 20 NRC 1102, 1135 n.187 (1984). A plant will be allowed to operate pending resolution of the unresolved issues when there is reasonable assurance that the facility can be operated without undue risk to the health and safety of the public. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 472 (1983), affirmed, ALAB-788, 20 NRC 1102, 1135 n.187 (1984).

6.10 Inspection and Enforcement

The Commission has both the duty and the authority to make such investigations and inspections as it deems necessary to protect the public health and safety. <u>Union Electric Co.</u> (Callaway Plant, Units 1 & 2), LBP-78-31, 8 NRC 366, 374 (1978).

Because the atomic energy industry is a pervasively regulated industry, lawful inspections of licensee's activities are within the warrantless search exception for a "closely regulated industry" delineated by the Supreme Court in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Union Electric Co. (Callaway Plant, Units 1 & 2), LBP-78-31, 8 NRC 366, 377 (1978). In addition, a licensee's submission to all applicable NRC regulations constitutes advance consent to lawful inspections, and therefore, no warrant is required for such inspections. Callaway, supra, 8 NRC at 377.

Proposed investigation of the discharge by a licensee's contractor of a worker who reported alleged construction problems to the Commission was within the Commission's statutory and regulatory authority to assure public health and safety. Union Electric Co. (Callaway Plant, Units 1 & 2), LBP-78-31, 8 NRC 366, 376 (1978). The Commission should not defer such an inquiry into the discharge of a worker under a proper exercise of its authority to investigate safety related matters merely because such investigation may touch on matters that are the subject of a grievance proceeding between the licensee and the worker. Callaway, supra, 8 NRC at 378.

Refusal by a licensee and contractor to permit a lawful Staff investic tion deemed necessary to assure public health and safety is serious enough to warrant the drastic remedy of permit suspension pending submission to investigation, since the refusal interferes with the Commission's duty to assure public health and safety. Callaway, supra, 8 NRC at 378.

Inspections of licensed activities during company-scheduled working hours are reasonable <u>per se</u>. Commission inspections may not be limited to "office hours." <u>In re Radiation Technology, Inc.</u>, ALAB-567, 10 NRC 533, 540 (1979).

A search warrant is not needed for inspections of licensed activities. Id. at 538-540.

The Executive Director of Operations is authorized by the Commission to issue subpoenas pursuant to Section 161c of the Atomic Energy Act where necessary or appropriate for the conduct of inspections or investigations. Houston Lighting and Power Co. (South Texas Project, 'Inits 1 and 2), CLI-87-8, 26 NRC 6, 9 (1987).

The NRC Staff's Office of Inspection and Enforcement does inspect construction activities and reports. Where weaknesses or errors which substantially affect safety are detected, the Staff requires the applicant to take appropriate action. Deliberate or careless failure of applicants to adhere to the program is the basis for the imposition of penalties. Illinois Power Co. (Clinton Power Station, Unit No. 1), LBP-82-103, 16 NRC 1603, 1614 (1982).

6.10.1 Enforcement Actions

"[A] licensee may not avoid responsibility for violations because its employees or agents failed to comply with the Commission's rules, regulations or license conditions." Pittsburgh-Des Moines Steel Company, ALJ-78-3, 8 NRC 649, 651 (1978).

The Director of Inspection and Enforcement, subject to requirements that he give licensees written notice of specific violations and consider their responses in deciding whether penalties are warranted, may prefer charges, may demand the payment of penalties, and may agree to compromise penalty cases without formal litigation. Additionally, the Director may consult with his Staff privately about the course to be taken. In re Radiation Technology, Inc., ALAB-567, 10 NRC 533, 537 (1979).

The ability of the Director of Inspection and Enforcement to proceed against a licensee by issuing an order imposing civil penalties is not a denial of due process because the licensee was not able to cross-examine the Director to determine he had not been improperly influenced by Staff. The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective. In re Radiation Technology, Inc., ALAB-567, 10 NRC 533, 536-538 (1979).

A licensee is normally afforded the opportunity to challenge an enforcement action in a public hearing prior to the time an enforcement action takes effect. Consumers Power Co. (Midland Planí, Units 1 and 2), CLI-73-38, 6 AEC 1082, 1083 (1973); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1123 (1985). However, the Commission is empowered to make a shutdown order immediately effective where such action is required by the public health, safety, or public interest. Three Mile Island, supra, 21 NRC

at 1123-24 n.2. See 10 CFR § 2.202(a)(5), implementing 5 U.S.C. § 558(c).

The Commission is obligated under the law to lift the effectiveness of an immediately effective shutdown order once the concerns which brought about the order have been adequately resolved. Three Mile Island, supra, 21 NRC at 1124. See, e.g., Pan American Airways v. C.A.B., 684 F.2d 31 (D.C. Cir. 1982); Northwest Airlines v. C.A.B., 539 F.2d 846 (D.C. Cir. 1976); Air Line Pilots Ass'n., International v. C.A.B., 458 F.2d 846 (D.C. Cir. 1972), cert. denied, 420 U.S. 972 (1975). This holds true even where Licensing and Appeal Boards' deliberations and decisions as to resumption of operations are pending, provided the issues before the Board do not implicate the public health and safety. Three Mile Island, supra, 21 NRC at 1149.

Where a Board attaches license conditions in an enforcement proceeding, such action does not convert the enforcement proceeding into a license amendment proceeding. Once the Commission establishes a formal adjudicatory hearing in an enforcement case, it need not grant separate hearings on any license conditions that are imposed as a direct consequence of that enforcement hearing. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1148 (1985).

Under 10 CFR § 2.202, the NRC Staff is empowered to issue an order to show cause why enforcement action should not be taken when it believes that modification or suspension of a license, or other such enforcement action, is warranted. Under 10 CFR § 2.206, members of the public may request the NRC Staff to issue such an order to show cause. Consolidated Edison Co. of New York (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, Unit 3), CLI-83-18, 17 NRC 1006, 1009 (1983).

Allegations about financial difficulties at an operating facility are not by themselves a sufficient basis for action to restrict operations. On the other hand, allegations that defects in safety practices have in fact occurred or are imminent would form a possible basis for enforcement action, whether or not the root cruse of the fault was financial. Maine Yankee Atomic Power o. (Maine Yankee Atomic Power Station), CLI-83-21, 18 NRc 157, 159-60 (1983).

A Director does not abuse his or her discretion by refusing to take enforcement action based on mere speculation that financial pressures might in some unspecified way undermine the safety of a facility's operation. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-83-21, 18 NRC 157, 160 (1983).

6.10.1.1 Civil Penalties

Section 234 of the Atomic Energy Act directs the Commission to afford an opportunity for a hearing to a licensee to whom a notice has been given of an alleged violation. <u>Pittsburgh-Des Moines Steel Company</u>, ALJ-78-3, 8 NRC 649, 653 (1978).

The Commission established detailed procedures and considerations to be undertaken in the assessment of civil penalties by: (1) notice of proposed rulemakin '36 Fed. Reg. 19122, Aug. 26, 1971), and (2) amendment or the Rules of Practice to include the factors which will determine the assessment of civil penalties. (35 Fed. Reg. 16894, Dec. 17, 1970). These two formal actions fulfill the legal requirements for standards utilized in civil penalty proceedings. Radiation Technology, Inc., ALJ-78-4, 8 NRC 655, 663 (1978). See also Pittsburgh-Des Moines Steel Company, ALJ-78-3, 8 NRC 649, 653 (1978).

Under Section 234 of the Atomic Energy Act, 42 U.S.C. § 2282(b), and 10 CFR § 2.205 of the Commission's regulations, a person subject to imposition of a civil penalty must first be given written notice of: (1) the specific statutory, regulatory or license violations; (2) the date, facts, and nature of the act or omission with which the person is charged; and (3) the proposed penalty. The person subject to the fine must then be given an opportunity to show in writing why the penalty should not be imposed. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1', CLI-82-31, 16 NRC 1236, 1238 (1982).

When a hearing is requested to challenge the imposition of civil penalties, the officer presiding at the hearing, not the Director of Inspection and Enforcement, uecides on the basis of the record whether the charges are sustained and whether civil penalties are warranted. <u>In re Radiation Technology</u>, <u>Inc.</u>, ALAB-507, 10 NRC 533, 536 (1979).

Civil penalties are not invalidated by the absence of a formally promulgated schedule of fees when the penalties imposed are within statutory limits and in accord with general criteria published by the Commission. Radiation Technology, supra, 10 NRC at 541.

A civil penalty may be imposed on a licensee even though there is no evidence of (1) malfeasance, misfeasance, or nonfeasance by the licensee, or (2) a failure by the licensee to take prompt corrective action. In such circumstances, a civil penalty may be considered proper if it might have the effect of deterring future violations of regulatory requirements or license conditions by the licensee, other licensees, or their employees. It was not matter that the imposition of the civil penalty may be viewed as punctive. In re Atlantic

Research Corp., CLI-80-7, 11 NRC 413 (1980), vacating, ALAB-542, 9 NRC 611 (1979).

An adjudicatory hearing in a civil penalty proceeding is essentially a trial <u>de novo</u>. The penalty assessed by the I&E Director constitutes the upper bound of the penalty which may be imposed after the hearing but the Administrative Law Judge may substitute his own judgment for that of the Director. <u>In re Atlantic Research Corporation</u>, ALAB-594, 11 NRC 841, 849 (1980).

6.10.1.2 Enforcement Proceedings (Formerly Show Cause Proceedings)
(See 6.24)

6.11 Masters in NRC Proceedings

For a discussion of the role of a "master" in NRC proceedings, see Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 759 (1975) and Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-290, 2 NRC 401 (1975). In ALAB-300, the Appeal Board ruled that parties to an NRC proceeding may voluntarily agree among themselves to have a master of their own choosing make certain discovery rulings by which they will abide. In effect, the master's rulings were like stipulations among the parties. The question as to whether the Licensing and Appeal Boards ret and jurisdiction to review the master's discovery rulings was not raised in this case. Consequently, the Appeal Board did not reach a decision as to that issue. Davis-Besse, sugra, 2 NRC at 768.

More recently, 10 CFR Part 2 has been amended to provide for the use of special assistants to Licensing Boards. Specifically, special assistants may be appointed to take evidence and prepare a record. With the consent of all parties, the special assistant may take evidence, and prepare a report that becomes a part of the record, subject to appeal to the Licensing Board. 10 CFR § 2.722.

It is within the discretion of the Special Master to hold information confidential if to do so would increase the likelihood of a fair and impartial hearing. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-81-50, 14 NRC 888, 894 (1981).

A Special Master's conclusions are considered as informed advice to the Licensing Board; however, the Board must independently arrive at its own factual conclusions. Where judgment is material to a particular conclusion, the Board must rely on its own collegial consensus. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-82-56, 16 NRC 281, 289 (1982). Pursuant to 10 CFR § 2.722(a)(3), the regulations under which a Special Master may be appointed in NRC proceedings specify that Special Masters' reports are advisory only. The Board alone is authorized by statute, regulation and the notice of hearing to render the initial decision in proceedings. The decision must be rendered upon the Board's own

understanding of the reliable, probative and substantial evidence of the record. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-82-56, 16 NRC 281, 288 (1982).

Where the Special Master's conclusions are materially affected by a witness' demeanor, the Licensing Board must give especially careful consideration to whether or not other more objective witness credibility standards are consistent with the Special Master's conclusions. However, the Licensing Board may afford weight to the Special Master's reported direct observations of a witness' demeanor. Three Mile Island, supra, 16 NRC at 289.

6.12 Material False Statements in Applications

(See 1.5.2)

6.13 Materials Licenses

The production, processing and sale of uranium and uranium ore are controlled by the Atomic Energy Act of 1954, as amended. Homestake Mining Co. v. Mid-Continent Exploration Co., 282 f.2d 787, 791 (10th Cir. 1960). Natural uranium and ores bearing it in sufficient concentration constitute "source material" and, when enriched for fabrication into nuclear fuel, become "special nuclear material" within the meaning of the Act. (42 U.S.C. §§ 2014(z) and (aa), 2071, 2091.) Both are 177. sly subject to Commission regulation (42 U.S.C. §§ 2073, 2093). 10 CFR Parts 40 and 70 specifically provide for the domestic licensing of source and special nuclear material respectively.

In this regard, the NRC has granted a general license to acquire title to nuclear fuel without first obtaining a specific license. Thus, persons may obtain title and own uranium fuel and are free to contract to receive title to such fuel without an NRC license or specific NRC regulatory control. Rochester Gas & Electric Corporation (Sterling Power Project, Nuclear Unit No. 1), ALAB-507, 8 NRC 551, 554-55 (1978). It is only when a person seeks to reduce its contractual ownership to actual ession that regulatory requirements on possession and use m. See met and a specific materials license must be obtained. Sterling, supra, 8 NRC at 555.

In the case of materials licenses, the Commission has the legal latitude under Section 189a of the Atomic Energy Act to use informal procedures (instead of the formal trial-type hearing specified in Section 554 of the A.P.A.) to fully apprise it of the concerns of a party challenging the licensing action and to provide an adequate record for determining their validity. Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 253 (1982), aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983); Rockwell International (Energy Systems Group Special Nuclear Materials License No. SNM-21), CLI-83-15, 17 NRC 1001, 1002 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and

2), ALAB-765, 19 NRC 645, 651 (1984). The informal hearing procedures applicable to materials licensing proceedings are specified in 10 CFR Part 2, Subpart L (§ 2.1201 - § 2.1263). 54 feet-Req. 8269 (February 28, 1989). However, the consistent agency practice is for Licensing Boards, already presiding at operating license hearings, to act on requests to raise Part 70 issues involving the same facility. Limerick, suppart, 19 NRC at 651-52; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 48 (1984).

While informal procedures may be followed, persons seeking to challenge the materials licensing action still may be required to establish standing under existing agency precedents regarding 10 CFR § 2.714(d). Energy Systems, supra, 17 NRC at 1003. In the absence of a valid petition to intervene under 10 CFR § 2.714, there is no authority to hold a hearing. Rockwell International Corp. (Energy Systems Group Special Nuclear Materials License No. SNM-21), LBP-83-65, 18 NRC 774, 777-78 (1983). A petition to intervene in a materials licensing proceeding must: (1) establish the petitioner's standing or interest in the proceeding; (2) provide a brief statement of how the petitioner's interest plausibly may be affected by the outcome of the proceeding; and (3) a concise statement of the petitioner's areas of concern sufficient to establish that the issues sought to be raised are germane to the proceeding. Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 143, 145-146, 147-148 (1989), citing, 10 CFR § 2.1205(d). See Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-25, 30 NRC 187, 189 (1989). A petitioner's statement of concerns must provide the presiding officer with the minimal information needed to ensure that the issues sought to be litigated are germane to the proceeding. Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 47 (1990); Curators of the University of Missouri, LBP-90-18, 31 NRC 559, 568 (1990); Sequoyah Fuels Corporation, LBP-91-5, 33 NRC 163, 166-67 (1991). A petitioner may raise only substantive concerns about the licensing activity and not procedural concerns about the adequacy of the hearing process. Pathfinder, supra, 31 NRC at 50, 51.

A petition to intervene in a materials licensing proceeding must be filed within 30 days after the petitioner receives actual notice of a pending application or an agency action granting an application. 10 CFR § 2.1205(c)(2)(i). Actual notice does not require notice of the legal right to challenge the application or of the period of time within which a challenge must be filed. Nuclear Metals, Inc., LBP-91-27, 33 NRC 548, 549, 550 (1991). A petitioner still may be admitted to the proceeding if the Commission or presiding officer determines that the delay in f ing the petition is excusable. 10 CFR § 2.1205(k)(1)(i). The existence of negotiations between the applicant and the petitioner to resolve the issues does not excuse the petitioner's failure to file a timely petition. Nuclear Metals, supra, 33 NRC at 549, 550-51.

For an informal hearing on the Staff's denial of an application for a materials license amendment, the presiding officer requested the applicant to prepare a statement, using as guidance the formal procedural requirements for contentions specified in 10 CFR § 2.714(a), of each particular claim of error and, with reasonable specificity, the basis for each claim. Radiology Ultrasound Nuclear Consultants, P.A. (Strontium-90 Applicator), LBP-86-35, 24 NRC 557, 558 (1986). Subsequent to the informal hearing, the Commission directed the presiding officer to consider the applicant's tardy responses to questions posed by the presiding officer during the informal hearing in order to determine if the information submitted by the applicant satisfied the formal substantive criteria specified in 10 CFR § 2.734 for recpening the record. Radiology Ultrasound Nuclear Consultants, P.A. (Strontium-90 Applicator), LBP-88-3, 27 NRC 220, 222-23 (1988).

Noiwithstanding the absence of a hearing on an application for a materials license, the Commission's regulations require the Staff to make a number of findings concerning the applicant and its ability to protect the public health and safety before the issuance of the license. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 48 (1984). See 10 CFR §§ 70.23, 70.31. Cf. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895-96 (1981) (analagous to the regulatory scheme for the issuance of operating licenses under 10 CFR § 50.57), aff'd sub nom. Fairfield United Action v. NRC, 679 F.2d 261 (D.C. Cir. 1982).

A materials licensee may not unilaterally terminate its license where continuing health and safety concerns remain. A license to receive, process, and transport radioactive waste to authorized land birial sites imposes a continuing obligation on the licensee to monitor and maintain the burial sites. The requirement of State ownership of land burial sites is intended to provide for the ultimate, long term maintenance of the sites, not to shift the licensee's continuing responsibility for the waste material to the States. U.S. Ecology. Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), LBP-87-5, 25 NRC 98, 110-11 (1987), vacated, ALAB-866, 25 NRC 897 (1987).

A 10 CFR Part 70 materials license is an "order" which under 10 CFR § 2.717(b) may be "modified" by a Licensing Board delegated authority to consider a 10 CFR Part 50 operating license. Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 228 (1979).

Final orders on motions pertaining to Part 70 materials licenses issued during an operating license hearing are appealable upon issuance. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-16, 19 NRC 857, 876 (1984), aff'd, ALAB-765, 19 NRC 645, 648 n.1 (1984).

A separate environmental impact statement is not required for a Special Nuclear Material (SNM) license to receive new fuel at a new facility. When an environmental impact statement has been done for an operating license application, including the delivery of fuel, there is no need for each component to be analyzed separately on the assumption that a plant may never be licensed to operate. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-38, 18 NRC 61, 65 (1983).

There is no reason to believe that the granting of a Special Nuclear Material (SNM) license should be deferred until after the applicant shows its compliance with local laws. <u>Cleveland Electric Illuminating Co.</u> (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-38, 18 NRC 61, 65 (1983).

An amendment to a Part 70 application gives rise to the same rights and duties as the original application. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 48 (1984).

6.14 Motions in NRC Proceedings

Provisions with regard to motions in general in NRC proceedings are set forth in 10 CFR § 2.730. Motion practice before the Commission involves only a motion and an answer; movants who do not seek leave to file a reply are expressly denied the right to do so. 10 CFR § 2.730(c). Detroit Edison Co. (Enrico Fermi Atomic Planc, Unit 2), ALAB-469, 7 NRC 470, 471 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71 (1981).

A moving party has no right of reply to answers in NRC proceedings except as permitted by the presiding officer. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-72, 16 NRC 968, 971 (1982), citing, 10 CFR § 2.730; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 469 (1991).

Although the Rules of Practice do not explicitly provide for the filing of either objections to contentions or motions to dismiss them, each presiding board must fashior a fair procedure for dealing with such objections to petitions as are filed. The cardinal rule of fairness is that each side must be heard. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979).

Prior to entertaining any suggestions that a contention not be admitted, the proponent of the contention must be given some chance to be heard in response. The intervenors must be heard in response because they cannot be required to have anticipated in the contentions themselves the possible arguments their opponents might raise as grounds for dismissing them. Contentions and challenges to contentions in NRC licensing proceedings are analogous to complaints

and motions to dismiss in Federal court. Allens Creek, supra, 10 NRC at 525.

6.14.1 Form of Motion

The requirements with regard to the form and content of motions are set forth in 10 CFR § 2.730(b).

The Appeal Board expects the caption of every filing in which immediate affirmative relief is requested to reference that fact explicitly by adverting to the relief sought and including the word "motion." The movant will not be heard to assert that it has been prejudiced by the Board's failure to take timely action on the motion in the absence of such a reference. Duke Power Company (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-457, 7 NRC 70, 71 (1978).

6.14.2 Responses to Motions

6.14.2.1 Time for Filing Responses to Motions

Unless specific time limits for responses to motions are expressly set out in specific regulations or are established by the presiding adjudicatory board, the time within which responses to motions must be filed is set forth in 10 CFR § 2.730.

If a document requiring a response within a certain time after service is served incompletely (e.g., only part of the document is mailed), 10 CFR § 2.712 would indicate that the time for response does not begin to run since implicit in that rule is that documents mailed are complete, otherwise service is not effective. Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-235, 8 AEC 645, 649 n.7 (1974) (dictum).

6.14.3 Licensing Board Actions on Motions

Although an intervenor may have failed, without good cause, to timely respond to an applicant's motion to terminate the proceeding, a Board may grant the intervenor an opportunity to respond to the applicant's supplement to the motion to terminate. Public Service Co. of Indiana and Wabash Valley Power Association (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-86-16, 23 NRC 789, 790 (1986).

If a Licensing Board decides to defer indefinitely a ruling on a motion of some importance, "considerations of simple fairness require that all parties be told of that fact."

Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-417, 5 NRC 1442, 1444 (1977).

When an applicant for an operating license files a motion for authority to conduct low-power testing in a proceeding where

the evidentiary record is closed but the Licensing Board has not yet issued an initial decision finally disposing of all contested issues, the Board is obligated to issue a decision on all outstanding issues (i.e., contentions previously litigated) relevant to low-power testing before authorizing such testing. See 10 CFR § 50.57(c). Such a motion, however, does not automatically present an opportunity to file new contentions specifically aimed at low-power testing or any other phase of the operating license application. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 301 n.72 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-34, 24 NRC 549, 553 (1986), aff'd, ALAB-854, 24 NRC 783 (1986).

6.15 NEPA Considerations

NEPA expanded the Commission's regulatory jurisdiction beyond that conferred by the Atomic Energy Act or the Energy Reorganization Act. Detroit Edison Company (Greenwood Energy Center, Units 2 and 3), ALAB-247, 8 AEC 936 (1974). NEPA requires the Commission to consider environmental factors in granting, denying or conditioning a construction permit. It does not give the Commission the power to order an applicant to construct a plant at an alternate site or to order a different utility to construct a facility. Nevertheless, the fact that the Commission is not empowered to implement alternatives does not absolve it from its duty to consider them. Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Public Service Co. of New Yampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503 (1977).

NEPA does not establish minimal environmental standards; the environmental review mandated entails a balancing of costs and benefits rather than a measuring against absolute environmental standards. Public Service Co. of New Hampshire (Seabrock Station, Units 1 and 2), ALAB-422, 6 NRC 33, 43 (1977). Pursuant to NEPA, the NRP must make a finding as to the need for the facility or need-for-power in determining whether construction of the facility should be authorized. "Need-for-power" is a shorthand expression for the "benefit" side of the cost-benefit balance NEPA mandata. A nuclear plant's principal "benefit" is the electric power it g nerates. Hence, absent some "need-for-power," justification for building a facility is problematical. Id. at 90.

NEPA requirements apply to license amendment proceedings as well as to confruction permit and operating license proceedings. In license amendment proceedings, however, a Licensing Board should not embark broadly upon a fresh assessment of the environmental issues which have already been thoroughly considered and which were decided in the initial decision. Rather, the Board's role in the environmental sphere will be imited to assuring itself that the ultimate NEPA conclusions read in the initial decision are not significantly affected by such new developments. Detroit Edison Company (Enrico

Fermi Atomic Power Plant. Unit 2), LBP-78-11, 7 NRC 381, 393 (1978), citing, Georgia Power Company (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 415 (1975).

NEPA does not mandate that environmental issues considered in the construction permit proceedings be considered again in the operating license hearing, absent new information. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1459 (1982). With regard to license amendments, it has been held that the grant of a license amendment to increase the storage capacity of a spent fuel pool is not a major Commission action significantly affecting the quality of the human environment, and therefore, no EIS is required. Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit 1), LBP-80-27, 12 NRC 435, 456 (1980); Portland General Electric Company (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 264-268 (1979).

"[i]he Commission is under a dual obligation: to pursue the objectives of the Atomic Energy Act and those of the National invironmental Policy Act. 'The two statutes and the regulations promulgated under each must be viewed in pari materia.' Tennessee Yailey Authority (Phipps Bend Nuclear Plant, Units 1 & 2), ALAB-505, 8 NRC 533, 539 (1978). (emphasis in original) In fulfilling its obligations under NEPA, the NRC may impose upon applicants and licensees conditions designed to minimize the adverse environmental effects of licensed activities. Such conditions may be imposed even on other Federal agencies, such as TVA, which seek NRC licenses, despite the language of Section 271 of the Atomic Energy Act (42 U.S.C. 2013) which states, in part, that nothing in the act "shall be construed to affect the authority of any Federal, State or local agency with respect to the generation, sale, or transmission of electric power through the use of nuclear facilities licensed by the Commission...." Phipps Bend, 8 NRC at 541-544. Unless it was explicitly made exclusive, the authority of other Federal, state or local agencies or government corporations to consider the environmental consequences of a proposed project does not preempt the NRC's authority to condition its permits and licenses pursuant to NEPA. For example, TVA's jurisdiction over environmental matters is not exclusive where TVA seeks a license from a Federal agency, such as NRC, which also has full NEPA responsibilities. Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), LBP-77-14, 5 NRC 494 (1977).

Pursuant to the Nuclear Waste Policy Act of 1982. the Department of Energy (DOE) has primary responsibility for evaluating the environmental impacts related to the development and operation of geologic repositories for high-level radioactive waste. In any proceeding for the issuance of a license for such a repository, the NRC will review and, to the extent practicable, adopt the environmental impact statement (EIS) submitted by DOE with its license application. The NRC will not adopt the EIS if: 1) the action which the NRC proposes to take is different from the action described in the DOE license application, and the difference may significantly affect the quality of the human environment; or 2) significant and substantial new

information or new considerations render the EIS inadequate. 10 CFR § 51.109(c). To the extent that the NRC adopts the EIS prepared by DOE, it has fulfilled all of its NEPA responsibilities. 10 CFR § 51.109(d); 54 Fed. Reg. 27864, 27371 (July 3, 1989).

NEPA directs all Federal agencies to comply with its requirements "to the fullest extent possible." (42 U.S.C. § 4332.) The leading authorities teach that an agency is excused from those NEPA duties only "when a clear and unavoidable conflict in statutory authority exists." Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), ANAB-506, 8 NRC 533, 545 (1978).

NEPA cannot logically impose requirements more stringent than those contained in the safety provisions of the Atomic Energy Act.

Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 696 n.10 (1985), citing, Public Service Electric and Gas Co. (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 39 (1979).

While the authority of other Federal or local agencies to der the environmental effects of a project does not preempt the dai's authority with regard to NEPA, the NRC, in conducting its New analysis, may give considerable weight to action taken by another competent and responsible government authority in enforcing an environmental statute. Public Service Company of Oklahoma (Black Fox Station, Units 1 & 2), LBP-78-28, 8 NRC 281, 282 (1978).

In contrast to safety questions, the environmental review at the operating license stage need not duplicate the construction permit review, 10 CFR § 51.21. To raise an issue in an operating license nearing concerning environmental matters which were considered at the construction permit stage, there needs to be a showing either that the issue had not previously been adequately considered or that significant new information has developed after the construction permit review. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 465 (1979).

Consideration by the NRC in its environmental review is not required for the parts of the water supply system which will be used only by a local government agency, however, cumulative impacts from the jointly utilized parts of the system will be considered. <a href="Philadel-philad

Insofar as environmental matters are concerned, under the National Environmental Policy Act (NEPA) there is no legal basis for refusing an operating license merely because some environmental uncertainties may exist. Where environmental effects are remote and speculative, agencies are not precluded from proceeding with a project even though all uncertainties are not removed. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117A, 16 NRC 1964, 1992 (1982), citing, State of Alaska v. Andrus, 580 F.2d 465, 473 (D.C. Cir. 1978), vacated in part, sub nom., Western Oil

and Gas Association v. Alaska, 439 U.S. 922 (1982); NRDC v. Morton, 458 F.2d 827, 835, 837-838 (D.C. Cir. 1972).

Environmental uncertainties raised by intervenors in NRC proceedings do not result in a <u>per se</u> denial of the license, but rather are subject to a rule of reason. <u>Arizona Public Service Co.</u> (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-82-117A, 16 NRC 1964, 195 (1982).

6.15.1 Environmental Impact Statements (EIS)

The activities for which environmental statements need be prepared and the procedures for preparation are covered generally in 10 CFR Part 51. For a discussion of the scope of an NRC/NEPA review when the project addressed by that review is also covered by a broader overall programmatic EIS prepared by another Federal agency, see USERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976).

Neither the Atomic Energy Act, NEPA, nor the Commission's regulations require that there be a hearing on an environmental impact statement. Public hearings are held on an EIS only if the Commission finds such hearings are required in the public interest. 10 CFR § 2.104. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 625 (1981), citing, Vermont Yankee Nuclear Power Corp. v. NRC, 435 U.S. 519 (1978).

Under the plain terms of NEPA, the environmental assessment of a particular proposed Federal action coming within the statutory reach may be confined to that action together with, inter alia, its unavoidable consequences. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 48 (1978).

The environmental review mandated by NEPA is subject to a rule of reason and as such need not include all theoretically possible environmental effects arising out of an action, but may be limited to effects which are shown to have some likelihood of occurring. This conclusion draws direct support from the judicial interpretation of the statutory command imposing the obligation to make reasonable forecasts of the future. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 48, 49 (1978).

An agency can fulfill its NEPA responsibilities in the preparation of an EIS if it:

1) reasonably defines the purpose of the proposed Federal action. The agency should consider Congressional intent and views as expressed by statute as well as the needs and goals of the applicants seeking agency approval;

eliminates those alternatives that would not achieve

the purpose as defined by the agency; and

3) discusses in reasonable detail the reasonable alternatives which would achieve the purpose of the proposed action.

Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195-198 (D.C. Cir. 1991).

Underlying scientific data and inferences drawn from NEPA through the exercise of expert scientific evaluation may be adopted by the NRC from the NEPA review done by another Federal agency. The NRC must exercise independent judgment with respect to conclusions about environmental impacts based on interpretation of such basic facts. Philadelphia Electric Co. (Limerick Generating Statica, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1467-1468 (1982), citing, Federal Trade Commission v. Texaco, 555 F.2d 862, 881 (D.C. Cir. 1977), cert. denied, 431 U.S. 974 (1977); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 868 n.65 (1984). However, to the extent possible, the NRC will adopt the environmental impact statement prepared by the Department of Energy to evaluate the environmental impact related to the development and operation of a geologic repository for high-level radioactive waste. 10 CFR § 51.109, 54 Fed. Reg. 27864, 27870-71 (July 3, 1989).

NEPA requires that a Federal agency make a "good faith" effort to predict reasonably foreseeable environmental impacts and that the agency apply a "rule of reason" after taking a "hard look" at potential environmental impacts. But an agency need not have complete information on all issues before proceeding. Public Service Company of Oklahoma (Black Fox Station, Units 1 & 2), LBP-78-26, 8 NRC 102, 141 (1978).

An adequate final environmental impact statement for a nuclear facility necessarily includes the lesser impacts attendant to low power testing of the facility and removes the need for a separate EIS focusing on questions such as the costs and benefits of low power testing. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 795 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

6.15.1.1 Need to Prepare an EIS

Federal agencies are required to prepare an environmental impact statement for every major Federal action significantly affecting the quality of the human environment. NEPA § 102(2)(C); 42 U.S.C § 4332(2)(C). An agency's decision not to exercise its statutory authority does not constitute a major Federal action. Cross-Sound Ferry Services, Inc. v. ICC, 934 F.2d 327, 334 (D.C. Cir. 1991), citing, Defenders of Wild'ife v. Andrus, 627 F.2d 1238, 1245-46 (D.C. Cir. 1980). See Long

Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 70 (1991), reconsid. denied, CLI-91-8, 33 NPC 461 (1991).

Although the determination as to whether to prepare an environmental impact statement falls initially upon tha Staff, that determination may be made an issue in an adjudicatory proceeding. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 120 (1979).

In the final analysis, the significance of the impact of the project -- in large part an evidentiary matter -- will determine whether a statement must be issued. Palisades, id.

In the case of licensing nuclear power plants, adverse impacts include the impacts of the nuclear fuel cycle. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1076 (1982), citing, Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 539 (1978).

The test of whether benefits of a proposed action outweigh its costs is distinct from the primary question of whether an environmental impact statement is needed because the action is a major Federal action significantly affecting the environment. Virginia Electric Power Co. (Surry Nuclear Power Station, Units 1 & 2), CLI-80-4, 11 NRC 405 (1980).

The Commission has consistently taken the position that individual fuel exports are not "major Federal actions." Westinghouse Electric Corp. (Exports to Philippines), CLI-80-15, 11 NRC 672 (1980).

The fact that risks of other actions or no action are greater than those of the proposed action does not show that risks of the proposed action are not significant so as to require an EIS. Where conflict in the scientific community makes determination of significance of environmental impact problematical, the preferable course is coprepare an environmental impact statement. Virginia Electric Power Co. (Surry Nuclear Power Station, Units 1 & 2), CLI-80-4, 11 NRC 405 (1980).

For an analysis of when an environmental assessment rather than an EIS is appropriate, <u>see Commonwealth Edison Company</u> (Zion Station, Units 1 & 2), LBP-80-7, 11 NRC 245, 249-50 (1980).

The NRC Staff is not required to prepare a complete environmental impact statement if, after performing an initial environmental assessment, it determines that the proposed action will have no significant environmental impact.

Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-790, 20 NRC 1450, 1452 n.5 (1984).

An operating license amendment to recapture the construction period and allow for operation for 40 full years is not an action which requires the preparation of an environmental impact statement or an environmental report. A construction period recapture amendment only requires the Staff to prepare an environmental assessment. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 97 (1990).

A separate environmental impact statement is not required for a Special Nuclear Material (SNM) license. When an environmental impact statement has been done for an operating license application, including the delivery of fuel, there is no need for each component to be analyzed separately on the assumption that a plant may never be licensed to operate. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-38, 18 NRC 61, 65 (1983).

A supplemental Environmental impact Statement (EIS) or an Environmental Impact Appraisal (EIA) does not have to be prepared prior to the granting of authorization for issuance of a low-power license. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 634 (1983).

The issuance of a possession-only license need not be preceded by the submission of any particular environmental information or accompanied by any NEPA review related to decommissioning Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CL1-91-1, 33 NRC 1, 6-7 (1991).

When the environmental effects of full-term, full-power operation have already been evaluated in an EIS, a licensing action for limited operation under a 10 CFR § 50.57(c) license that would result in lesser impacts need not be accompanied by an additional impact statement or an impact appraisal. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226 (1981), and ALAB-728, 17 NRC 777, 795 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983). The Commission authorized the issuance of a low power operating license for Limerick Unit 2, even though, pursuant to a federal court order, Limerick Ecology Action v. NRC, 869 F.2d 719 (3rd Cir. 1989), there was an ongoing Licensing Board proceeding to consider certain severe accident mitigation design alternatives. Since the existing EIS was valid except for the failure to consider the design alternatives, and low power operation presents a much lower risk of a severe accident than does full power operation, the Commission found that the existing EIS was sufficient to support the issuance of a low power license. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-89-10, 30 NRC 1, 5-6 (1989), reconsid. denied and stay denied, CLI-89-15, 30 NRC 96, 101-102 (1989).

It is well-established NEPA law that separate environmental statements are not required for intermediate, implementing steps such as the issuance of a low-power license where an EIS has been prepared for the entire proposed action and there have been no significant changed circumstances. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-9, 19 NRC 1323, 1326 (1984), on certification from, ALAB-769, 19 NRC 995 (1984). See Environmental Defense Fund, Inc. v. Andrus, 619 F.2d 1363, 1377 (1980).

The principle stated in the Shoreham and Diablo Canyon cases, supra, is applicable even where an applicant may begin lowpower operation and it is uncertain whether the applicant will ever receive a full-power license. In Shoreham, the fact that recent court decisions in effect supported the refusal by the State and local governments to participate in the development of emergency plans was determined not to be a significant change of circumstances which would require the preparation of a supplemental environmental impact statement to assess the costs and benefits of low-power operation. Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-85-12, 21 NRC 1587, 1589 (1985). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251, 258-59 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 418-19 (1989).

The NRC Staff is not required to prepare an environmental impact statement to evaluate the "resumed operation" of a facility or other alternatives to a licensee's decision not to operate its facility. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-90-8, 32 NRC 201, 207-208 (1990), reconsid. denied, CLI-91-2, 33 NRC 61 (1991), reconsid. denied, CLI-91-8, 33 NRC 461, 470 (1991); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-91-17, 33 NRC 379, 390 (1991); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-91-30, 34 NRC 23, 26, 27 (1991). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 159 (1991).

Environmental review of the storage of spent fuel in reactor facility storage pools for at least 30 years beyond the expiration of reactor operating licenses is not required based upon the Commission's generic determination that such storage will not result in significant environmental impacts.

Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-88-15, 27 NRC 576, 580 (1988), citing, 10 CFR § 51.23.

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

spent fuel pool would not cause any significant environmental impact. Consumers Power Co. (Big Rock Point Plant), LBP-82-78, 16 NRC 1107 (1982).

When a licensee seeks to withdraw an application to expand its existing low-level waste burial site, the granting of the request to withdraw does not amount to a major Federal action requiring a NEPA review. This is true even though, absent an expansion, the site will not have the capacity to accept additional low-level waste. Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 161-163 (1980).

It must at least be determined that there is significant new information before the need for a supplemental environmental statement can arise. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 49 (1983), citing, Warm Spring Task Force v. Gribble, 621 F.2d 1017, 1023-36 (9th Cir. 1981).

A supplemental environmental statement need not necessarily be prepared and circulated even if there is now information.

Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 49-50 (1983), citing, California v. Watt. 683 F.2d 1253, 1268 (9th Cir. 1982). See 40 CFR § 1502.9(c).

6.15.1.2 Scope of EIS

The scope of the environmental statement or appraisal must be at least as broad as the scope of the action being taken.

<u>Duke Power Company</u> (Oconee/McGuire), LBP-80-28, 12 NRC 459, 473 (1980).

An agency may authorize an individual, sufficiently distinct portion of an agency plan without awaiting the completion of a comprehensive environmental impact statement on the plan so long as the environmental treatment under NEPA of the individual portion is adequate and approval of the individual portion does not commit the agency to approval of other portions of the plan. Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 265 (1982), aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983); Peshlakai v. Duncan, 476 F. Supp. 1247, 1260 (D.D.C. 1979); and Conservation Law Foundation v. GSA, 427 F. Supp. 1369, 1374 (D.R.I. 1977).

In Vermont Yankee Nuclear Power Corp. v. Natural Resources

Defense Council, 435 U.S. 519, 551 (1978), the U.S. Supreme
Court embraced the doctrine that environmental impact
statements need not discuss the environmental effects of
alternatives which are "deemed only remote and speculative
possibilities." The same has been held with respect to remote

and speculative environmental impacts of the proposed project itself. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAG-650, 14 NRC 43 (1981); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75 (1981); Public Service Electric & Gas Company (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 38 (1979); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-705, 16 NRC 1733, 1744 (1982), citing, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council. 435 U.S. 519, 551 (1978), quoting NRDC v. Morton, 458 F.2d 827, 837-838 (D.C. Cir. 1972); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 696-97 & n.12 (1985). See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-877, 26 NRC 287, 293-94 (1987). Moot or farfetched alternatives need not be considered under NEPA. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-82-117A, 16 NRC 1964, 1992 (1982), citing, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978); Natural Resources Defense Council v. Morton, 458 F.2d 827, 837-838 (D.C. Cir. 1972); Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974).

The scope of a NEPA environmental review in connection with a facility license amendment is limited to a consideration of the extent to which the action under the amendment will lead to environmental impacts beyond those previously evaluated. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-81-14, 13 NRC 677, 684-685 (1981), citing, Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-635, 13 NRC 312 (1981).

When major Federal actions are involved, if related activities taken abroad have a significant effect within the U.S., those effects are within NEPA's ambit. However, remote and speculative possibilities need not be considered under NEPA. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-562, 10 NRC 437, 446 (1979).

6.15.2 Role of EIS

A NEPA analysis of the Government's proposed licensing of private activities is necessarily more narrow than a NEPA analysis of proposed activities which the Government will conduct itself. The former analysis should consider issues which could preclude issuance of the license or which could be affected by license conditions. Kleppe v. Sierra Club, 427 U.S. 390 (1976). It should focus on the proposal submitted by the private party rather than on broader concepts. It must consider other alternatives, however, even if the agency

itself is not empowered to order that those alternatives be undertaken. Were there no distinction in NEPA standards between those for approval of private actions and those for Federal actions, NEPA would, in effect, become directly applicable to private parties. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503 (1977).

The impact statement does not simply "accompany" an agency recommendation for action in the sense of having some independent significance in isolation from the deliberative process. Rather, the impact statement is an integral part of the Commission's decision. It forms as much a vital part of the NRC's decisional record as anything else, such that for reactor licensing, for example, the agency's decision would be fundamentally flawed without it. Public Service Company of Oklahoma (Black fox Station, Units 1 and 2), CLI-80-31. 12 NRC 264, 275 (1980).

Where an applicant has submitted a specific proposal, the statutory language of NEPA's Section 102(2)(C) only requires that an environmental impact statement be prepared in conjunction with that specific proposal, providing the Staff with a "specific action of the known dimensions" to evaluate. A single approval of a plan does not commit the agency to subsequent approvals; should contemplated actions later reach the stage of actual proposals, the environmental effects of the existing project can be considered when preparing the comprehensive statement on the cumulative impact of the proposals. Offshore Power Systems (Floating Nuclear Power Plants), LBP-79-15, Y NRC 653, 658-660 (1979).

6.15.3 Circumstances Requiring Redrafting of Final Environmental Statement (FES)

In certain instances, an FES may be so defective as to require redrafting, recirculation for comment and reissuance in final form. Possible defects which could render an FES inadequate are numerous and are set out in a long series of NEPA cases in the Federal Courts. <u>See</u>, <u>e.g.</u>, <u>Brooks v. Volpe</u>, 350 F. Supp. 269 (W.D. Wash. 1972) (FES inadequate when it suffers from a serious lack of detail and relies on conclusions and assumptions without reference to supporting objective data); Essex City Preservation Assn'n. v. Campbell, 536 F.2d 956, 961 (1st Cir. 1976) (new FES required when there is significant new information or a significant change in circumstances upon which original FES was based); NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (existence of unexamined but viable alternative could render FES inadequate). A new FES may be necessary when the current situation departs markedly from the positions espoused or information reflected in the FES. Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671

(1975); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-3, 21 NRC 244, 256 (1985).

Even though an FES may be inadequate in certain respects, ultimate NEPA judgments with respect to any facility are to be made on the basis of the entire record before the adjudicatory tribunal. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163 (1975). Previous regulations explicitly recognized that evidence presented at a hearing may cause a Licensing Board to arrive at conclusions different from those in an FES, in which event the FES is simply deemed amended pro tanto. Barnwell, supra, 2 NRC at 671: Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1571 n.20 (1982). Since findings and conclusions of the licensing tribunal are deemed to amend the FES where different therefrom, amendment and recirculation of the FES is not always necessary, particularly where the hearing will provide the public ventilation that recirculation of an amended FES would otherwise provide. Limerick, supra, 1 NRC at 163. Defects in an FES can be cured by the receipt of additional evidence subsequent to issuance of the FES. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 47 (1983). <u>See Ecology Action v. AEC</u>, 492 F.2d 998, 1000-02 (2nd fir. 1974); <u>Florida Power and Light</u> Co. (Turkey Point Nuclear Generating Station, Units 3 and 4), ALAB-660, 14 NRC 987, 1013-14 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-262, 1 NRC 163, 195-97 (1975)

Such modification of the FES by Staff testimony or the Licensing Board's decision does not normally require recirculation of the FES. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 372 (1975), unless the modifications are truly substantial. Barnwell, supra, 2 NRC at 671; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-31, 20 NRC 446, 553 (1984); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-3, 21 NRC 244, 252, 256 (1985).

Two Courts of Appeals have approved the Commission's rule that the FES is deemed modified by subsequent adjudicatory tribunal decisions. Citizens for Safe Power v. NRC, 524 F.2d 1291, 1294 n.5 (D.C. Cir. 1975); Ecology Action v. AEC, 492 F.2d 998, 1001-02 (2nd Cir. 1974); Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 29 n.43 (1978). See also New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 94 (1st Cir. 1978); Philadel-phia Electric Co. (Limerick Generating Station, Units 1 and 2), ALL 819, 22 NCC 681, 705-07 (1985), citing, 10 CFR § 51.1.2 (1985).

If the changes contained in an errata document for an FES do not reveal an obvious need for a modification of plant design or a change in the outcome of the cost-benefit analysis, the document need not be circulated or issued as a supplemental FES. Nor is it necessary to issue a supplemental FES when timely comments on the DES have not been adequately considered. The Licensing Board may merely effect the required amendment of the FES through its initial decision. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), LBP-77-21, 5 NRC 684 (1977); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 47 (1983).

The NRC Staff is not required to respond to comments identified in an intervenor's dismissed contention concerning the adequacy of the final environmental statement (FES), where the Staff has prepared and circulated for public comment a supplemental final environmental statement (SFES) which addresses and evaluates the matters raised by the comments on the FES. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-35, 30 NRC 677, 698 (1989), vacated and reversed on other grounds, ALAB-944, 33 NRC 81 (1991).

Similarly, there is no need for a supplemental impact statement and its circulation for public come here the changes in the proposed action which would be such a supplement mitigate the environmental impacts, although circulation of a supplement may well be appropriate or necessary where the change has significant aggravating environmental impacts. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 28-29 (1978).

NEPA does not require the staff of a Federal agency conducting a NEPA review to consider the record, as developed in collateral State proceedings, concerning the environmental effects of the proposed Federal action. Failure to review the State records prior to issuing an FES, therefore, is not grounds for requiring preparation and circulation of a supplemental FES. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), LBP-77-21, 5 NRC 684 (1977).

A proposed shift in ownership of a plant with no modification to the physical structure of the facility does not by itself cast doubt on the benefit to be derived from the plant such as to require redrafting and recirculating the FIS. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 184 (1978).

The Staff's environmental evaluation is not deficient merely because it contains only a limited discussion of facility decommissioning alternatives. There is little value in considering at the operating license stage what method of

decommissioning will be most desirable many years in the future in light of the knowledge which will have been accumulated by that time. <u>Vermont Yankee Nuclear Power Corp.</u> (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 178 n.32 (1974).

For a more recent case discussing recirculation of an FES, see Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 786 (1979).

6.15.3.1 Effect of Failure to Comment on Draft Environmental Statement (DES)

Where an intervenor received and took advantage of an opportunity to review and comment on a DES and where his comments did not involve the Staff's alternate site analysis and did not bring sufficient attention to that analysis to stimulate the Commission's consideration of it, the intervenor will not be permitted to raise and litigate, at a late stage in the hearings, the issue as to whether the Staff's alternate site analysis was adequate, although he may attack the conclusions reached in the FES. Public Service Compan. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-366, 5 NRC 39, 66-67 (1977), aff'd as modified. CLI-77-8, 5 NRC 503 (1977).

Since the public is afforded early opportunity to participate in the NEPA review process, imposition of a greater burden for justification for changes initiated by untimely comments is appropriate. <u>Public Service Company of New Hampshire</u> (Seabrook Station, Units 1 and 2), CLI-77-2, 5 NRC 503, 539 (1977).

Comments on a DES which fail to meet the standards of CEQ Guidelines (An CFR § 1500.9(e)) on responsibilities of commenting entities to assist the Staff need not be reviewed by the Staff. Thus, where comments which suggest that the Staff consider collateral State proceedings on the environmental effects of a proposed reactor do not specify the parts of the collateral proceedings which should be considered and the parts of the DES which should be revised, the Staff need not review the collateral proceedings. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), LBP-77-21, 5 NRC 684 (1977).

6.15.3.2 Stays Pending Remand for Inadequate EIS

Where judicial review disclosed inadequacies in an agency's environmental impact statement prepared in good faith, a stay of the underlying activity pending remand does not follow automatically. Whether the project need be stayed essentially must be decided on the basis of (1) a traditional balancing of the equities, and (2) a consideration of any likely prejudice to further decisions that might be called for by the remand.

Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 784-785 (1977).

6.15.4 Alternatives

NEPA requires an agency to consider alternatives to its own proposed action which may significantly affect the quality of the human environment. An agency should not consider alternatives to the applicant's stated gozls. Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 199 (D.C. Cir. 1991).

Perhaps the most important environmentally related task the Staff has under NEPA is to determine whether an application should be turned down because there is some other site at which the plant ought to be located. No other environmental question is both so significant in terms of the ultimate outcome and so dependent upon facts particular to the application under scrutiny. Consequently, the Appeal Board expects the Staff to take unusual care in performing its analysis and in disclosing the results of its work to the public. Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit 2), ALAB-435, 6 NRC 541, 543, 544 (1977).

A hard look for a superior alternative is a condition precedent to a licensing determination that an applicant's proposal is acceptable under NEPA. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 513 (1978). When NEPA requires an EIS, the Commission is obliged to take a harder look at alternatives than if the proposed action were inconsequential. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-660, 14 NRC 987, 1005-1006 (1981), citing, Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263 (1979). In fact the NEPA mandate that alternatives to the proposed licensing action be explored and evaluated does not come into play where the proposed action will neither (1) entail more than negligible environmental impacts, nor (2) involve the commitment of available resources respecting which there are unresolved conflicts. Portland General Electric Company (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 265-266 (1979).

NEPA was not intended merely to give the appearance of weighing alternatives that are in fact foreclosed. Pending completion of sufficient comparison between an applicant's proposed site and others, in situations where substantial work has already taken place, the Commission can preserve the opportunity for a real choice among alternatives only by suspending outstanding construction parmits. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-14, 7 NRC 952, 958-959 (1978).

Despite the importance of alternate site considerations, where all parties have proceeded since the inception of the proceeding on the basis that there was no need to examine alternate sites beyond those referred to in the FES, a party cannot insist at the "eleventh hour" that still other sites be considered in the absence of a compelling showing that the newly suggested sites possess attributes which establish them to have greater potential as alternatives than the sites already selected as alternatives. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-495, 8 NRC 304, 306 (1978).

A party seeking consideration at an advanced stage of a proceeding of a site other than the alternate sites already explored in the proceeding must at least provide information regarding the salient character stics of the newly suggested sites and the reasons why these characteristics show that the new sites might prove better than those already under investigation. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-499, 8 NRC 319, 321 (1978).

The fact that a possible alternative is beyond the Commission's power to implement does not absolve the Commission of any duty to consider it, but that duty is subject to a "rule of reason". Factors to be considered include distance from site to load center, institutional and legal obstacles and the like. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 486 (1978).

Under NEPA, there is no need for Boards to consider economically better alternatives, which are not shown to also be environmentally preferable. No study of alternatives is needed under NEPA unlass the action significantly affects the environment (§ 102(2)(c)) or involves an unresolved conflict in the use of resources (§ 102(2)(e)). Where an action will have little environmental effect, an alternative could not be materially advantageous. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 456-458 (1980); Virginia Electric and Fower Co. (North Anna Power Station, Units 1 and 2), LBP-85-34, 22 NRC 481, 491 (1985).

Pursuant to NEPA § 102(2)(E), the Staff must analyze possible alteratives, even if it believes that such alternatives need not be considered because the proposed action does not significantly affect the environment. A Board is to make the determination, on the basis of all the evidence presented during the hearing, whether other alternatives must be considered. "Some factual basis (usually in the form of the Staff's environmental analysis) is necessary to determine whether a proposal 'involves unresolved conflicts concerning alternative uses of available resources' - the statutory

standard of Section 102(2)(E)." Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), LBP-85-34, 22 NRC 481, 491 (1985), quoting, Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 332 (1981). See also Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 449-50 (1988), reconsidered, LBP-89-6, 29 NRC 127, 134-35 (1989), rev'd on other grounds, ALAB-919, 30 NRC 29 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990).

NEPA does not require the NRC to choose the environmentally preferred site. NEPA is primarily procedural, requiring the NRC to take a hard look at environmental consequences and alternatives. Rochester Gas & clectric Corp. (Sterling Power Project, Nuclear Unit No. 1), CLI-80-23, 11 NRC 731, 736 (1980).

The application of the Commission's "obviously superior" standard for alternative sites (see 6.15.4.1 infra) does not affect the Staff's obligation to take the hard look. The NRC's "obviously superior" standard is a reasonable exercise of discretion to insist on a high degree of assurance that the extreme action of denying an application is appropriate in view of inherent uncertainties in benefit-cost analysis. Sterling, supra, 11 NRC at 735.

Whether or not the parties to a particular licensing proceeding may agree that none of the alternatives (in <u>Seabrook</u>, alternative sites) to the proposal under consideration is preferable, based on a NEPA cost-benefit balance, it remains the Commission's obligation to satisfy itself, that that is so. <u>Public Service Company of New Hampshire</u> (Seabrook Station, Units 1 and 2), ALAB-557, 10 NRC 153, 155 (1979).

The scope of a NEPA environmental review in connection with a facility license amendment is limited to a consideration of the extent to which the action under the amendment will lead to environmental impacts beyond those previously evaluated. Florida Power and Light Co. (Turkey Point Nuclear Generating, Units 3 and 4), LBP-81-14, 13 NRC 677, 684-85 (1981), citing, Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312 (1981). The consideration of alternatives in such a case does not include alternatives to the continued operation of the plant, even though the amendment might be necessary to continued reactor operation. Turkey Point, supra.

Issues concerning alternative energy sources in general may no longer be considered in operating license proceedings. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 527 (1982). In general, the NRC's environmental evaluation in an operating

license proceeding will not consider need for power, alternative energy sources, or alternative sites. 10 CF2 §§ 51.95, 51.106.

5.15.4.1 Obviously Superior Standard for Site Selection

The standard for approving a site is acceptability, not optimality. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503 (1977). Due to the more extensive environmental studies made of the proposed site in comparison to alternate sites, more of the environmental costs of the selected site are usually discovered. Upon more extensive analysis of alternate sites, additional cost will probably be di overed. Moreover, a Licensing Board can do no more than accept or reject the application for the proposed site: it cannot ensure that the applicant will apply for a construction permit at the alternate site. For these reasons, a Licensing Board should not reject a proposed site unless an alternate site is "obviously superior" to the proposed site. ld. at 526. Standards of acceptability, instead of optimality, apply to approval of plant designs as well. Id. In view of all of this, an applicant's selection of a site may be rejected on the grounds that a preferable alternative exists only if the alternative is "obviously superior". Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit 2), ALAB-435, 6 NRC 541 (1977). For a further discussion of the "obviously superior" standard with regard to alternatives, see Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 67, 78 (1977).

The Commission's obviously superior standard for alternate sites has been upheld by the Court of Appeals for the First Circuit. The Court held that, given the necessary improcision of the cost-benefit analysis and the fact that the proposed site will have been subjected to closer scrutiny than any alternative, NEPA does not require that the single best site for environmental purposes be chosen. New England Coalition on Nuclear Pollution v. NRc., 582 F.2d 87, 95 (1st Cir. 1978).

A Licensing Board determination that none of the potential alternative sites successes a proposed site in terms or providing new generation for areas most in need of new capacity cannot of itself serve to justify a generic rejection of all those alternative sites on institutional, legal, or economic grounds. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 491 (1978).

To establis hat no suggested alternative sites are "obviously superior" to the proposed site, there must be either (1) an adequate evidentiary showing that the alternative sites should be generically rejected or (2) sufficient evidence for informed comparisons between the proposed site

and individual alternatives. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB 471, 7 NRC 477, 498 (1978).

It is not enough for rejection of all alternative sites to show that a proposed site is a rational selection from the standpoint solely of system reliability and stability. For the comparison to rest on this limited factor, it would also have to be shown that the alternative sites suffer so badly on this factor that no need existed to compare the sites from other standpoints. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 497 (1978).

For application of the "obviously superior" standard, see Rochester Gas and Electric Corporation (Sterling Power Project, Nuclear Unit No. 1), ALAB 502, 8 NRC 383, 323-399 (1978), particularly at 8 NRC 397 where the Appeal Board equates "obviously" to "clearly and substantially."

6.15.4.2 Standards for Conducting Cost-Benefit Analysis Related to Alternatives

If, under NEPA, the Commission finds that environmentally preferable alternatives exist, then it must undertake a cost-benefit balancing to determine whether such alternatives should be implemented. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units No. 3 and 4), ALAB-660, 14 NRC 987, 1004 (1981), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155 (1978).

Neither the NRC Staff nor a Licensing Board is limited to reviewing only those atternate sites unilaterally selected by the applicant. To do so would permit decisions to be based upon "sham" alternatives elected to be identified by an applicant and would often result in consideration of something less than the full range of reasonable alternatives that NEPA contemplates. The adequacy of the alternate site analysis performed by the Staff remains a proper subject of inquiry by the Licensing Board, notwithstanding the fact that none of the alternatives selected by the applicant proves to be "obviously superior" to the proposed site. <u>Tennessee Valley Authority</u> (Phipps Bend Nuclear Plant, Units 1 & 2), LBP-77-60, 6 HRC 647, 659 (1977). Nevertheless, the NEPA evaluation of alternatives is subject to a "rule of reason" and application of that rule "may well justify exclusion or but limited treatment" of a suggested alternative. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422 6 NRC 33, 100 (1977), citing, CLI-77-8, 5 NRC 503, S40 (1977).

In <u>Public Service Co. of New Hampshire</u> (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503 (1977), the Commission set forth standards for determining whether, in connection with

conducting a second cost-benefit analysis to consider alternate sites, the Licensing Board should account for nontransferable investments made at the previously approved site. Where the earlier environmental analysis of the proposed site had been soundly made, the projected costs of construction at the alternate site should take into account nontransferable investments in the proposed site. Where the earlier analysis lacked integrity, prior expenditures in the proposed site should be disregarded. Seabrook, supra, 5 NRC at 533-536.

Population is one — but only one — factor to be considered in evaluating alternative sites. All other things being equal, it is better to place a plant farther from population concentrations. The population factor alone, however, usually cannot justify dismissing alternative sites which meet the Commission's regulations. Public Service Co. of New Hampshire (Seabrook Station, Units . & 2), ALAB-471, 7 NRC 477, 510 (1978).

In alternative site considerations, the presence of an existing reactor at a particular site where the proposed reactor might be built is significant, but not dispositive. Rochester Gas and Electric Corporation (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 394-395 (1978).

In assessing the environmental harm associated with land clearance necessary to build a nuclear facility, one must look at what is being removed -- not just how many acres are involved. Sterling, supra, 8 NRC at 395.

I considering the economic costs of building a facility at an alternative site, the costs of replacement power which might be required by reason of the substitution at a late date of an alternate site for the proposed site may be considered. Rochester Gas and Electric Corporation (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 394 (19). However, where no alternative site is "obviously superior" from an environmental standpoint, there is no need to consider this "delay cost" factor. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 533-536 (1977); Sterling, supra, 8 NRC at 398. Indeed, unless an alternative site is shown to be environmentally superior, comparisons of economic costs are irrelevant. Sterling, supra, 8 NRC at 395, n.25.

6.15.5 Need for Facility

Pursuant to NEPA, the NRC must make a finding as to the need for the facility or need for power in determining whether construction of the facility should be authorized. "Need-forpower" is a shorthand expression for the "benefit" side of the cost-benefit balance NEPA mandates. A nuclear plant's principal "benerit" is the electric power it generates. Hence, absent some "need-for-power," justification for building a facility is problematical. <u>Public Service Company of New Hampshire</u> (Seabrook Station, Uni's 1 & 2), ALAB-422, 6 NRC 33, 90 (1977). For a further discussion of "need for facility," see Section 3.7.3.2.

NEPA does not foreclose reliance, in resolution of 'need-of-power" issues, on the judgment of local regulatory bodies that are charged with the responsibility to analyze future electrical demand growth, at least where the forecasts are not facially defective, are explained on a detailed record, and a principal participant in the local proceeding has been made available for examination in the NRC proceeding. Carclina Power & Light Company (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-4-J, 8 NRC 234, 241 (1978).

The general rule applicable to cases involving differences or changes in demand forecasts is not whether the utility will need additional generating capacity but when. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30 12 NRC 683, 691 (1980).

The standard for judging the "need-for-power" is whether a forecast of demand is reasonable and additional or replacement generating capacity is needed to meet that demand. Carolina Power & Light Company (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-490, 8 NRC 234, 237 (1978).

For purposes of NEPA, need-for-power and alternative energy source issues are not to be considered in operating license proceedings for nuclear power plants. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 527-528 (1982); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 544-546 (1986).

In general, the NRC's environmental evaluation in in operating license proceeding will not consider need for power, alternative energy sources, or alternative sites. 10 CFR §§ 51.95, 51.106.

6.15.6 Cost-Benefit Analysis Under NEPA

The NEPA cost-benefit analysis considers the costs and benefits to society as a whole. Rather than isolate the costs or benefits to a particular group, overall benefits are weighed against overall costs. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 391 (1978).

A cost-benefit analysis should include the consideration and balancing of qualitative as well as quantitative impacts. Those factors which cannot reasonably be quantified should be considered in qualitative terms. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-84-42, 20 NRC 1296, 1329-1330 (1984). citing, Statement of Considerations for 10 CFR Part 51, 49 Fed. Reg. 9363 (March 12, 1984).

In weighing the costs and benefits of a facility, adjudicatory boards must consider the time and resources that have already been invested if the facility has been partially completed. Money and time already spent are irrelevant only where the NEPA comparison is between completing the proposed facility on the one hand and abandoning that facility on the other. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-392, 5 NRC 759 (1977). In comparing the costs of completion of a facility at the proposed site to the costs of building the facility at an alternate site, the Commission may consider the fact that costs have already been incurred at the proposed site. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 95-96 (1st Cir. 1978).

Unless a proposed nuclear unit has environmental disadvantages when compared to alternatives, differences in financial cost are of little concern. Public Service Company of Oklahoma (Black Fox Station, Units 1 & 2), LBP-78-26, 8 NRC 102, 161 (1978); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117A, 16 NRC 1964, 1993 (1982), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 162 (1978). Only after an environmentally superior alternative has been identified do economic considerations become relevant. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 527 (1982).

A reasonably foreseeable, nonspeculative, substantial reduction in benefits should trigger the need, under NEPA to reevaluate the cost-benefit balance of a proposed action before further irreversible environmental costs are incurred. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 630-31 (1983).

The NRC considers need-for-power and alternative energy sources (e.g., a coal plant) as part of its NEPA costbenefit analysis at the construction permit stage for a nuclear power reactor. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-83-27A, 17 NRC 971, 972 (1983). See Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), 1 NRC 347, 352-72 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 522 (1977). In the operating license

environmental analysis, however, need-for-power and alternative energy sources are not considered and contentions which directly implicate need-for power projections and comparisons to coal are barred by the regulations; correlatively, such comparative cost savings may not be counted as a benefit in the Staff's NEPA cost-benefit analysis. Shearon Harris. supra. 17 NRC at 974.

Even if the cost-benefit balance for a plant is favorable, measures may be ordered to minimize particular impacts. Such measures may be ordered without awaiting the ultimate outcome of the cost-benefit balance. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-11, 17 NRC 413, 419 (1983).

While the balancing of costs and benefits of a project is usually done in the context of an environmental impact statement prepared because the project will have significant environmental impacts, at least one court has implied that a cost-benefit analysis may be necessary for certain Federal actions which, of themselves, do not have a significant environmental impact. Specifically, the court opined that an operating license amendment derating reactor power significantly could upset the original cost-benefit balance and, therefore, require that the cost-benefit balance for the facility be reevaluated. Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1084-85 (D.C. Cir. 1974).

Sunk costs are as a matter of law not appropriately considered in an operating license cost-benefit balance. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 586-87 (1982), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 534 (1977); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-95, 16 NRC 1401, 1404-1405 (1982).

An adequate final environmental impact statement for a nuclear facility necessarily includes the lesser impacts attendant to low power testing of the facility and removes the need for a separate focusing on questions such as the costs and benefits of low power testing. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728 3 NRC 777, 795 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

6.15.6.1 Consideration of Specific Costs Under NEPA

When water quality decisions have been made by the EPA pursuant to the Federal Water Pollution Control Act Amendments of 1972 and these decisions are raised in NRC licensing proceedings, the NRC is bound to take EPA's considered decisions at face value and simply to factor them into the

NEPA cost-benefit analysis. <u>Carolina Power & Light Co.</u> (H.B. Robinson, Unit No. 2), ALAB-569, 10 NRC 557, 561-62 (1979).

The environmental and economic costs of decommissioning necessarily comprise a portion of the cost-benefit analysis which the Commission must make. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 313 (1979).

Alternative methods of decommissioning do not have to be discussed. All that need be shown is that the estimated costs do not tip the balance against the plant and that there is reasonable assurance that an applicant can pay for them. Susquehanna, supra, 9 NRC at 314.

6.15.6.1.1 Cost of Withdrawing Farmland from Production

(SEE 3.7.3.5.1)

6.13.6.1.2 Socioeconomic Costs as Affected by Increased Employment and Taxes from Proposed Facility

Increased employment and tax revenue cannot be included on the benefit side in striking the ultimate NEPA cost-benefit balance for a particular plant. But the presence of such factors can certainly be taken into account in weighing the potential extent of the socioeconomic impact which the plant might have upon local communities. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 509 n.58 (1978).

6.15.7 Consideration of Class 9 Accidents in an Environmental Impact Statement

The ECCS Final Acceptance Criteria as set forth in 10 CFR § 50.46 and Appendix K to 10 FR Part 50 assume that ECCS will operate during an accident. On the other hand, Class 9 accidents postulate the failure of the ECCS. Thus, on its face, consideration of Class 9 accidents would appear to be a challenge to the Commission's regulations. However, the Commission has squarely held that the regulations do not preclude the use of inconsistent assumptions about ECCS failure for other purposes. Thus, the prohibition of challenges to the regulations in adjudicatory proceedings does not preclude the consideration of Class 9 accidents and a failure of ECCS related thereto in environmental impact statements and proceedings thereon. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 221 (1978).

Because the law does not require consistency in treatment of two parties in different circumstances, the Staff does not violate principles of fairness in considering Class 9 accic nts in environmental impact statements for floating but not land based plants. The Staff need only provide a reasonable explanation why the differences justify a departure from past agency practice. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-439, 8 NRC 194, 222 (1978).

In proceedings instituted prior to June, 1980, serious (Class 9) accidents need be considered only upon a showing of "special circumstances." Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 529 (1982); 45 Fed. Req. 4010; (June 13, 1980). The subsequent Commission requirement that NEPA analysis include consideration of Class 9 accidents (45 Fed. Reg. 40101) cannot be equated with a health and safety requirement. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-82-106, 16 NRC 1649, 1664 (1982). The fact that a nuclear power plant is located near an earthquake fault and in an area of known seismic activity does not constitute a special circumstance. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 826-828 (1984), affirming in part (full power license for Unit 1). LBP-82-70, 16 NRC 756 (1982). See also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 795-796 (1983).

Absent new and significant safety information, Licensing Boards may not act on proposals concerning Class 9 accidents in operating reactors. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 870 (1986), citing, 50 Fed. Req. 32,144, 32,144-45 (August 8, 1985). Licensing Boards may not admit contentions which seek safety measures to mitigate or control the consequences of Class 9 accidents in operating reactors. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 846-47 (1987), aff'd in part and rev'd in part, ALAB-869, 26 NRC 13, 30-31 (1987), reconsid. denied, ALAB-876, 26 NRC 277 (1987); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 443-45, 446 (1988), reconsidered, LBP-89-6, 29 NRC 127, 132-35 (1989), rev'd, ALAB-919, 30 NRC 29, 45-47 (1989), vacated in part and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-3, 29 NRC 51, 54 (1989), aff'd on other grounds, ALAB-915, 29 NRC 427 (1989). However, pursuant to their NEPA responsibilities, Licensing Boards may consider the risks of such accidents. <u>Vermont Yankee</u>, <u>supra</u>, 25 NRC at 854-55, aff'd in part and rev'd in part, ALAB-869, 26 NRC 13, 31 n.28 (1987), reconsid. denied, ALAB-876, 26 NRC 277, 285 (1987). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-89-6, 29 NRC 127, 132-35 (1989), citing, Sierra Club v. NRC, 862 F.2d 222 (9th Cir.

1988) and the NRC Severe Accident Policy Statement, 50 Fed. Reg. 32138 (Aug. 8, 1985), rev'd, ALAB-919, 30 NRC 29 (1989), vacated in part and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990).

in Diablo Canyon and Vermont Yankee, supra, the licensees applied for license amendments which would permit the expansion of each facility's spent fuel pool storage capacity. The intervenors submitted contentions, based on hypothetical accident scenarios, and requested the preparation of environmental impact statements. The Appeal Board rejected the contentions after determining that the hypothetical accident scenarios were based on remote and speculative events, and thus were Class 9 or beyond design-basis accidents which could not provide a proper basis for admission of the contentions. The Appeal Board has made it lear that: (1) NEPA does not require the preparation of an environmental impact statement on the basis of an assertion of a hypothetical accident that is a Class 9 or beyond design-basis accident, citing, San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986), cert. denied, 479 U.S. 923 (1986); and (2) the NEPA Policy Statement, 45 Fed. Req. 40101 (June 13, 1980), which describes the circumstances under which the Commission will consider, as a matter of discretion, the environmental impacts of beyond design-basis accidents, does not apply to license amendment proceedings. See Vermont Yankee, supra, 26 NRC at 283-85; Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-877, 26 NRC 287, 293-94 (1987); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 458-460 (1987), affirming, LBP-87-24, 26 NRC 159 (1987), remanded on other grounds, Sierra Club v. NRC, 86% F.2d 222 (9th Cir. 1988); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 443-45, 446 (1988), reconsidered, LBP-89-6, 29 NRC 127, 132-35 (1989), rev'd, ALAB-919, 30 NRC 29, 47-51 (1989), vacated in part and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990). See also Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 458-59 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988).

6.15.8 Power of NRC Under NEPA

The Licensing Board is not obliged under NEPA to consider all issues which are currently the subject of litigation in other forums and which may some day have an impact on the amount of effluent available. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-45, 15 MRC 1527, 1528, 1530 (1982).

The Commission is not required by NEPA to hold formal hearings on site preparation activities because NEPA did not alter the scope of the Commission's jurisdiction under the Atomic Energy Act. United States Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ClI-82-23, 16 NRC 412, 421 (1982), citing, Gage v. United States Atomic Energy Commission, 479 F.2d 1214, 1220 n.19 (D.C. Cir. 1972); 39 Fed. Reg. 14506, 14507 (April 24, 1979).

The National Environmental Policy Act (NEPA) requires that the Commission prepare an environmental impact statement only for major actions significantly affecting the environment.

Clinch River, supra, 16 NRC at 424.

A feder I agency may consider separately under NEPA the different segments of a proposed Federal action under certain circumstances. Where approval of the segment under consideration will not result in any irreversible or irretrievable commitments to remaining segments of the proposed action, the agency may address the activities of that segment separately. United States Department of Energy, Project Management Corporation, Tennessee Villey Authority (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 424 (1982).

An agency will consider the following factors to determine if it should confine its environmental analysis under NEPA to the rortion of the plan for which approval is being sought: (1) whether the proposed portion has substantial independent utility; (2) hether approval of the proposed portion either forecloses the agency from later withholding approval of subsequent portions of the overall plan or forecloses alternatives to subsequent portions of the plan, and (3) if the proposed portion is part of a larger plan, whether that plan has become sufficiently definite such that there is high probability that the entire plan will be carried out in the near future. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-43, 22 NRC 805, 810 (1985), citing, Swain v. Bringar, 542 F.2d 364, 369 (/th Cir. 1976) (en banc). Applying these criteria, the Board determined that it was not required to assess the environmental impacts of possible future construction and operation of transmission lines pursuant to an overall grid system long-range plan when considering a presently proposed part of the transmission system (operation of the Braidwood nuclear facility). Braidwood, supra, 22 NRC at 810-12.

The NRC Staff may, if it desires, perform a more complete review than the minimum legally required. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-72, 16 NRC 968, 972 (1982).

Compliance with the National Historic Preservation Act Goes not preclude the need to comply with NEPA with regard to impacts on historic and cultural aspects of the environment. Therefore, noise impacts on proposed historic districts must be evaluated and, if necessary, mitigation measures undertaken. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-11, 17 Nac 413, 435 (1983).

6.15.8.1 Powers in General

Commensurate with the Commission's obligation to comply with NEPA in licensing nuclear facilities is an implicit power to impose permit and license conditions indicated by the NEPA analysis.

The Commission may prescribe such regulations, orders and conditions as it deems necessary under any activity authorized pursuant to the Atomic Energy Act of 1954, as amended, and NEPA requires the Commission to exercise comparable regulatory authority in the environmental area. Wisconsin Electric Power Co. (Point Beach, Unit 2), ALAB-82, 5 AEC 350, 352 (1972).

Where necessary to assure that NEPA is complied with and its policies protected, Licensing Boards can and must ignore stipulations among the parties to that effect. Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Generating Station, Unit 3), CLI-75-14, 2 NRC 835 (1975). Beyond this, Licensing Boards have independent responsibilities to enforce NEPA and may raise environmental issues sua sponte. Tennessee Valley Authority (Hartsville Nuclear Power Plant, Units 1A, 2A, 1B & 2B), ALAB-380, 5 NRC 572 (1977).

In Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, Unit 2), ALAB-399, 5 NRC 1156 (197.), the Appeal Board dealt with the question as to the degree to which NEPA allows the NRC to preempt State and local regulation with respect to nuclear facilities. Therein, the Appeal Board held that the Federal doctrine of preemption invalidates local zoning decisions that substantially obstruct or delay the effectuation of an NRC license condition imposed by the Commission pursuant to NEPA. Id. at 1169-1170.

The Appeal Board stated:

...NEPA gave this Commission both the power and the duty to interpret and administer with the Atomic Energy Act and its own regulations in accordance with the policies of NEPA. Among the policies of NEPA are to 'fulfill the responsibilities of each generation as trustee of the environment for succeeding generations,' to 'attain the widest range of beneficial uses of the environment without degradation...,' and to 'enhance the quality of renewable resources....' ... State or local regulation is preempted where it 'produces a result inconsistent with

the objective of the Federal statute,' where it 'frustrates the full effectiveness of Federal law,' or where it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' ... (footnotes omitted). 5 NRC 1169.

However, the Appeal Board also indicated that, where a question is presented as to whether State or local regulations relating to alteration of a nuclear power plant are preempted under NEPA, the NRC should refrain from ruling on that question until regulatory action has been taken by the State or local agency involved. <u>Id.</u> at 1170. To the same effect in this regard is <u>Consolidated Edison Co. of N.Y. Inc.</u> (Indian Point Station, Unit 2), ALAB-453, 7 NRC 31, 35 (1978), where the Appeal Board reiterated that Federal tribunals should refrain from ruling on questions of Federal preemption of State law where a State statute has not yet been definitively interpreted by the State courts or where an actual conflict between Federal and State authority has not ripened.

A State or political subdivision thereof may not substantially obstruct or delay conditions imposed upon a plant's operating license by the NRC pursuant to its NEPA responsibilities, as such actions would be preempted by Federal law. However, a State may refuse to authorize construction of a nuclear power plant on environmental or other grounds and may prevent or halt operation of an already built plant for some valid reason under State law. Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit 2), ALAB-453, 7 NRC 31, 34-35 (1978).

When another agency has yet to resolve a major issue pertaining to a particular nuclear facility, NRC may allow construction to continue at that facility only if NRC's NEPA analysis encompasses all likely outcomes of the other agency's review. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-14, 7 NRC 952, 957 (1978).

A Licensing Board may rule on the adequacy of the FES once it is introduced into evidence and may modify it if necessary. A Licensing Board's authority to issue directions to the NRC Staff regarding the performance of its independent responsibilities to prepare a draft environmental statement is limited. <u>Pennsylvania Power and Light Co.</u> (Susquehanna Steam Electric Station, Units 1 and 2), LBP-80-18, 11 NRC 906, 909 (1980).

Neit'er NEPA nor the Atomic Energy Act applies to activities occurring in foreign countries and subject to their sovereign control. Philadelphia Electric Co. (Peach Bottom Atomic Prwer Station, Units 2 and 3), ALAB-562, 10 NRC 437, 445 6 (1975).

6.15.8.2 Transmission Line Routing

Consistent with its interpretation of the Commission's NEPA authority (see Wiscons: Electric Power Co. (Point Beach, Unit 2), ALAB-82, 5 AEC 350 (1972)), the Appeal Board has held that the NRC has the authority under NEPA to cose conditions (i.e., require particular routes) on transmission lines, at least to the extent that the lines are directly attributable to the proposed nuclear facility. Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-247, 8 AEC 936, 939 (1974). In addition, the Commission has legal authority to review the offsite environmental impacts of transmission lines and to order changes in transission routes selected by an applicant. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 83 (1977).

6.15.8.3 Pre-LWA Activities/Officite Activities

NEPA and the Commission's plementing regulations proscribe environmentally signit and construction activities associated uclear plant, including activities beyond the site boundary, without prior Commission approval. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1 (1977). A "site," in the context of the Commission's NEPA responsibilities, includes land where the proposed plant is to be located and its necessary accouterments, including transmission lines and access ways. Id. 10 CFR § 50.10(c), which broadly prohibits any substantial action which would affect the environment of the site prior to Commission approval, can clearly be interpreted to bar, for example, road and railway construction leading to the site, at least where substantial clearing and grading is involved. Id. In those situations where the Commission does approve offsite activities (e.g., through an LWA or a CP), conditions may be imposed to minimize adverse impacts. Id.

6.15.8.4 Relationship to EPA with Regard to Cooling Systems

The NRC may accept and use without independent inquiry EPA's determination of the magnitude of the magnitude environmental impacts from a cooling system in striking an overall costbenefit balance for the facility. Public Service Company of New Hampshire (Seabrook Station, Unit & 2), CLI-78-1, 7 NRC 1, 23, 24 (1978). For a discussion of the statutory framework governing the relationship between NRC and EPA in this area, see Seabrook, supra, 7 NRC at 23-26. Briefly, that relationship in the present setting may be described thusly: EPA determines what cooling system a nuclear power facility may use and NRC factors the impacts resulting from use of that system into the NEPA cost-benefit analysis. Id. 7 NRC at 26.

Although the establishment of a local public document room is an independent Staff function, the presiding officer in an informal proceeding has directed the Staff to establish such a room in order to comply with the requirements of proposed regulations which had beer made applicable to the proceeding. However, the presiding officer acknowledged that he lacked the authority to specify the details of the room's operation.

Alfred J. Morabito (Senior Operator License for Beaver Valley Power Station, Unit 1), LBP-88-5, 27 NRC 241, 243-44 & n.1 (1988).

Although the Licensing Boards and the NRC Staff have independent responsibilities, they are "partners" in implementation of the Commission's policy that decisionmaking should be "both sound and timely," and thus they must coordinate their operations in order to achieve this goal. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 203 (1978).

In an operating license proceeding (with the exception of certain NEPA issues), the applicant's license application is in issue, not the adequacy of the Staff's raview of the application. An intervenor thus is free to challenge directly an unresolved generic safety issue by filing a proper contention but it may not proceed on the basis of allegations that the Staff has somehow failed in its performance. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 55-56 (1985). See Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 186 (1989); Curators of the University of Missouri, LBP-91-31, 34 NRC 29, 108-109 (1991), clarified, LBP-91-34, 34 NRC 159 (1991).

The general rule that the applicant carries the burden of proof in licensing proceedings does not apply with regard to alternate site considerations. For alternate sites, the burden of proof is on the Staff and the applicant's evidence in this regard cannot substitute for an inadequate analysis by the Staff. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-479, 7 NRC 774, 794 (1978).

The Staff plays a key role in assessing an applicant's qualifications. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 34 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

The Staff is assumed to be fair and capable of judging a matter on its merits. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4 (1980). See Public Service Co. of New

Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 73 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moct, ALAB-946, 33 NRC 245 (1991).

When conducting its review of the issues, the Staff should acknowledge differences of opinion among Staff members and give tull consideration to views which differ from the official Staff position. Such discussion can often contribute to a more effective treatment and resolution of the issues. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 580-582 n.6 (1985).

An early appraisal of an applicant's capability does not foreclose the Staff from later altering its conclusions Such an early appraisal would aid the public and the Commission in seeing whether a hearing is warranted. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 33-34 (1980), reconsidered, ALAB-581, 11 NRC 233 (1980), modified. CLI-80-12, 11 NRC 514 (1980).

6.16.1.1 Staff Demands on Applicant or Licensee

While the Commission, through the R. ulatory Staff, has a continuing duty and responsibility under the Atomic Energy Act of 1954 to assure that applicants and licensees comply with the applicable requirements, Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 627 (1973), the Staff may not require an applicant to do more than the regulations require without a hearing. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Power Station), ALAB-191, 7 AEC 431, 445, 447 n.32 (1974). The Staff cannot require a general licensee to comply with public health and safety conditions which are more stringent than the Commission's regulatory requirements applicable to general licensees. Wrangler Laboratories, Larsen Laboratories, Orion Chemical Co., and John P. Larsen, LBP-89-39, 30 NRC 746, 755 (1989), rev'd and remanded, ALAB-951, 33 NRC 505, 516-18 (1991).

Because the law does not require consistency in treatment of two parties in different circumstances, the Staff does not violate principles of fairness in considering Class 9 accidents in environmental impact statements for floating but not land based plants. The Staff need only provide a reasonable explanation why the differences justify a departure from past agency practice. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 222 (1978).

licensee or other person subject to the jurisdiction of the Commission in order to determine whether to initiate an enforcement action. A licensee must respond to the demand for information; a person other than a licensee may respond to the demand or explain the reasons why the demand should not have been issued. 10 CFR § 2.204(b). Since the demand for information only requires the submission of information, and does not by its own terms modify, suspend, or revoke a license, or take other enforcement action, there is no right to a hearing. If the Commission decides to initiate enforcement action, it will serve on the licensee or other person subject to the jurisdiction of the Commission, an order specifying the alleged violations and informing the licensee or other person of the right to demand a hearing on the order. 10 CFR § 2.202(a). The Commission has deleted the term "order to show cause" from Section 2.202.

On May 12, 1992, the Commission issued a tinal rule concerning challenges to the immediate effectiveness of orders. 57 Fed. Reg. 20194 (May 12, 1992). Pursuant to 10 CFR § 2.202(c)(2)(i), the subject of an immediately effective order may, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the order. The NRC Staff must respond within five days after receiving the motion. The Commission declined to specify a time limit for the presiding officer's review of the motion and, instead, strongly emphasized that a presiding officer should decide the motion as expeditiously as possible. 57 Fed. Reg. at 20197. The presiding officer will apply an adequate evidence test to evaluate the set aside motion. Adequate evidence exists "when facts and circumstances within the NRC Staff's knowledge, of which it has reasonably trustworthy information, are sufficient to warrant a person of rear anable caution to believe that the charges specified in the order are true and that the order is necessary to protect the public health, safety, or interest." 57 Fed. Reg. at 20196. The adequate evidence test does not apply to the determination of the merits of the immediately effective order. The presiding officer should rule on the merits of the immediately effective order as expeditiously as possible, although the presiding officer may delay the hearing for good cause. 10 CFR § 2.202(c)(2)(ii.

Under 10 CFR § 2.202, the NRC Staft is empowered to issue an order to show cause why enforcement action should not be taken when it believes that modification or suspension of a license, or other such enforcement action, i. warranted. Under 10 CFR § 2.206, members of the public may request the NRC Staff to issue such an order to show cause. Consolidated Edison Co. of New York (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, Unit 3), CLI-83-16, 17 NRC 1006, 1009 (1983). Any person at any time may request the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, or Director, Office of Inspection and Enforcement, as appropriate, to issue a show cause order for suspension, revocation or modification of an operating license or a construction permit. 10 CFR § 2.206, 10 CFR § 2.202 et seq.

Although petitions for enforcement action are filed with the NRC Staff, the Commission retains the power to rule directly on enforcement petitions. 10 CFR § 2.206(c). The Commission will elect to exercise this power only when the issues raised in the petition are of sufficient public importance. Yankee Atomic Electric Co. (Yankee Rowe Nuclear Power Station), CLI-91-11, 34 NRC 3, 6 (1991).

The Director of Nuclear Reactor Regulation, upon receipt of a request to initiate an enforcement proceeding, is required to make an inquiry appropriate to the facts asserted. Provided he does not abuse his discretion, he is free to rely on a variety of sources of information, including Staff analyses of generic issues, documents issued by other agencies and the comments of the licensee on the factual allegations. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 432, 433 (1978).

In reaching a determination on a show cause petition, the Director need not accord presumptive validity to every assertion of fact, irrespective of the degree of substantiation. Nor is the Director required to convene an adjudicatory proceeding to determine whether an adjudicatory proceeding is warranted. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 432 (1978).

The APA, 5 U.S.C 551 et seq., particularly Section 554, and the Commission's regulations, particularly 10 CFR § 2.719, deal specifically with on-the-record adjudication and thus the Staff's participation in a construction permit proceeding does not render it incapable of impartial regulatory action in a subsequent show cause or suspension proceeding where no adjudication has begun. Moreover, in terms of policy, any view which questions the Staff's capabilities in such a situation is contradicted by the structure of nuclear regulation established by the Atomic Energy Act and 20 years experience implementing that statute. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 431, 432 (1978).

The agency alone has power to develop enforcement policy and allocate resources in a way that it believes is best calculated to reach statutory ends. NRC can develop policy that has licensees consent to, rather than contest, enforcement proceedings. A Director may set forth and limit the questions to be considered in a show cause proceeding. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 441 (1980).

The Commission has broad discretion to allow intervention where it is not a matter of right. Such intervention will not be granted where conditions have already been imposed on a licensee, and no useful purpose will be served by that intervention. <u>Public Service Company of Indiana</u> (Marble Hill Nuclear Generating Station, "hits 1 and 2), CLI-80-10, 11 NRC 438, 442-43 (1980).

In the context of proceedings before the Commission, an order to show cause is a remedial step in dealing with failure to meet required

standards of conduct. The Licensing Board denied a petition for a show cause order which did not make allegations of any such failure. Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), LBP-79-23, 10 NRC 220, 223 (1979).

The Commission's decision that cause existed to start a proceeding by issuing an immediately effective show cause order does not disqualify the Commission from later considering the merits of the matter. No prejudgment is involved, and no due process issue is created. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), C'I-80-1, 11 NRC 1, 4-5 (1980).

New matters which cannot be raised before a Board because of a lack of jurisdiction may be raised in a petition under 10 CFR § 2.206. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 226 (1980); Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1217 n.39 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-782, 20 NRC 838, 840 (1984). Where petitioner's case ha no discernible relationship to any other pending proceeding involving the same facility, the show cause proceeding set out in 10 CFR § 2.206 must be regarded as the exclusive remedy. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 570 (1980).

In every case, a petitioner that for some reason cannot gain admittance to a construction permit or operating license hearing, but wishes to raise health, safety, or environmental concerns before the NRC, may file a request with the Director of Nuclear Reactor Regulatic under 10 CFR § 2.206 asking the Director to institute a proceeding to address those concerns. The Staff must analyze the technical, legal, and factual basis for the relief requested and respond either by undertaking some regulatory activity, or if it believes no show cause proceeding or other action is necessary, by advising the requestor in writing of reasons explaining that determination. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767, 1768 (1982). See Washington Public Power Supply System (WPPSS Nuclear Project Nos. 1 and 2), CLI-82-29, 16 NRC 1221, 1228-1229 (1982). See also Porter County Chapter of the Izaak Walton League of America, Inc. v. Nuclear Regulatory Commission, 606 F.2d 1363, 1369-1370 (D.C. Cir. 1979); Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 552-53 (1983).

Under 10 CFR § 2.206, one may petition the NRC for stricter enforcement actions than the agency contemplates. <u>Public Service Co. of Indiana</u> (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 442-43 (1980).

The agency has broad discretion in establishing and applying rules for public participation in enforcement proceedings. <u>Marble Hill</u>, <u>supra</u>, 11 NRC at 440-41.

A Licensing Board may terminate an enforcement proceeding when the licensee withdraws its challenge to the revocation of its license. The Board should not vacate for mootness any prior decisions in the proceeding when no appeals of those prior decisions are extant. Wrangler Laboratories, Larsen Laboratories, Orion Chemical Co., and John P. Larsen, LBP-91-37, 34 NRC 196, 197 (1991).

6.24.1 Petition for Enforcement Order

The mechanism for requesting a show cause order is a petition filed pursuant to 10 CFR § 2.206. See, e.g., Consolidated Edison Co. of New York (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, Unit 3), CLI-83-16, 17 NRC 1006, 1009 (1983). Note that such a petition may not be used to seek relitigation of an issue that has already been decided or to avoid an existing forum in which the issue is being or is about to be litigated. Consolidated Edison Co. of N.Y., Inc. (Indian Point, Units 1, 2 & 3), CLI-75-8, 2 NRC 173, 177 (1975); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-31-6, 13 NRC 443, 446 (1981); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Units 1 and 2) and (Oyster Creek Nuclear Generating Station), CLI-85-4, 21 NRC 561, 563 (1985).

Nonparties to a proceeding are also prohibited from using 10 CFR § 2.206 as a means to reopen issues which were previously adjudicated. General Public Utilities, supra, 21 NRC at 564. See, e.g., Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429 (1979), aff'd, Porter County Chapter of the Izaak Walton League, Inc. v. NRC, 606 F.2d 1363 (D.C. Cir. 1979).

6.24.1.1 Grounds for Enforcement Order

The institution of a show cause proceeding to modify, suspend, or revoke a license need not be predicated upon alleged license violations, but rather may be based upon any "facts deemed to be sufficient grounds for the proposed action." 10 CFR § 2.202. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 570-71 (1980).

6.24.1.2 Burden of Proof for Enforcement Order

The Atomic Energy Act intends the party seeking to build or operate a nuclear reactor to bear the burden of proof in any Commission proceeding bearing on its application to do so.

including a show cause proceeding. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 571 (1980).

6.24.1.3 Issues in Enforcement Proceedings

One cannot seek to intervene in an enforcement proceeding to have NRC impose a stricter penalty than the NRC seeks. Issues in show cause proceedings are only those set out in the show cause order. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CII-80-10, 11 NRC 438, 442 (1980). One who seeks the imposition of stricter requirements should file a petition pursuant to 10 CFR § 2.206. Sequoyah Fuels Corp. (UF6 Production Facility), CLI-86-19, 24 NRC 508, 513-514 (1986), citing, Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1982).

The Commission may limit the issues in enforcement proceedings to whether the facts as stated in the order are true and whether the remedy selected is supported by those facts. Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 45 (1982), citing, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441-442 (1980); Sequoyah Fuels Corp. (UF6 Production Facility), CLI-86-19, 24 NRC 508, 512 n.2 (1986).

One may only intervene in an enforcement action upon a showing of injury from the contemplated action set out in the show cause order. One who seeks a stricter penalty than the NRC proposes has no standing to intervene because it is not injured by the lesser penalty. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442 (1980).

6.24.2 Standards for Issuing an Enforcement Order

The standard to be applied in determining whether to issue a show cause order is whether substantial health or safety issues have been raised. A mere dispute over factual issues will not suffice. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978).

The Director of Nuclear Reactor Regulation properly has discretion to differentiate between those petitions which indicate that substantial issues have been raised warranting institution of a proceeding and those which serve merely to demonstrate that in hindsight, even the most thorough and reasonable of forecasts will prove to fall short of absolute prescience. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978).

6.24.3 Review of Decision on Request for Enforcement Order

10 CFR § 2.206 has been amended to provide that the Commission may, on its own motion, review the decision of the Director not to issue a show cause order to determine if the Director has abused his discretion. 10 CFR § 2.206(c)(1). No other petition or request for Commission review will be entertained. 10 CFR § 2.206(c)(2).

While there is no specific provision for Commission review of a decision to issue a show cause order, the amended regulation does acknowledge that the review power set forth in Section 2.206 does not limit the Commission's supervisory power over delegated Staff actions. 10 CFR § 2.206(c)(1). Thus, it is clear that the Commission may conduct any review of a decision with regard to requests for show cause orders that it deems necessary.

Prior to the amendment of Section 2.206, that regulation was silent as to Commission review. At that time, the Commission indicated that its review of a decision of the Director would be directed toward whether the Director abused his authority and, in particular, would include a consideration of the following:

- does the statement of reasons for issuing the order permit a rational understanding of the basis for the decision;
- (2) did the Director correctly comprehend the applicable law, regulations and policy;
- (3) were all necessary factors included and irrelevant factors excluded;
- (4) were appropriate inquiries made as to the facts asserted;
- (5) is the decision basically untenable on the basis of the facts known to the Director.

Consolidated Edison Co. of N.Y., Inc. (Indian Point, Units 1, 2 & 3), CLI-75-8, 2 NRC 173 (1975). See also Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 676 n.1 (1979); Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-90-17, 31 NRC 540, 544-45 (1990).

Under the <u>Indian Point</u> standards, the Director's decision will not be disturbed unless it is clearly unwarranted or an abuse of discretion. <u>Licenses Authorized to Possess or Transport Strategic Quantities of Special Nuclear Material</u>, CLI-77-3, 5 NRC 16 (1977). Although the <u>Indian Point</u> review is essentially a deferral to the Staff's judgment on facts

relating to a potential enforcement action, it is not an abdication of the Commission's responsibilities since the Commission will decide any policy matters involved. <u>Id.</u> at 5 NRC 20, n.6.

In determining whether the Director abused his discretion, a Licensing Board will evaluate the reasonableness of the Director's decision in light of the facts available to the Director at the time he issued his decision. The Director's decision must be based upon reliable, probative, and substantial evidence. Substantial evidence is "'such relevant evidence as a reasonable mino might accept as adequate to support a conclusion.'" Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-90-17, 31 NRC 540, 556-57 (1990), quoting, Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

The question of whether the federal courts have jurisdiction to review the Director's denial of a § 2.206 petition has not been directly addressed by the Supreme Court. However, two federal appeals courts have determined that the Director's denial is unreviewable. Safe Energy Coalition v. NRC, 866 F.2d 1473, 1476, 1477-78 (D.C. Cir. 1989); Arnow v. NRC, 868 F.2d 223, 230, 231 (7th Cir. 1989). The courts relied upon: (1) the Administrative Procedure Act, 5 U.S.C. § 701(a)(2). which precludes judicial review when agency action is committed to agency discretion by law, and (2) the Supreme Court's interpretation of § 701(a)(2) in Heckler v. Chaney, 470 U.S. 821 (1985), where the Court held that an agency's refusal to undertake enforcement action upon request is presumptively unreviewable by the courts. That presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. Upon review of the Atomic Energy Act, NRC regulations, and NRC case law, the courts did not find any provisions which would rebut the presumption of unreviewability. Also note Ohio v. NRC, 868 F.2d 810, 818-19 (6th Cir. 1989), in which the court avoided the jurisdictional issue, and instead dismissed the petition for review on its merits.

The Appeal Board normally lacks jurisdiction to entertain motions seeking review only of actions of the Director of Nuclear Reactor Regulation; the Commission itself is the forum for such review. See 10 CFR § 2.206(c). Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-466, 7 NRC 457 (1978).

Review of a show cause order is limited to whether the Director of Nuclear Reactor Regulation abused his discretion. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978).

The validity of a show cause order is judged on the basis of information available to the Director at the time it was issued at the start of the proceeding. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). See Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-90-17, 31 NRC 540, 542-43 n.5, 556-57 (1990).

Issuance of a show cause order requiring interim action is not the determination of the merits of a controversy. <u>Nuclear Engineering Co., Inc.</u> (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 6 (1980).

6.24.4 Notice/Hearing on Enforcement Order to Licensee/Permittee

While a show cause order with immediate suspension of a license or permit may be issued without prior written notice where the public health, interest or safety is involved, the Commission cannot permanently revoke a license without prior notice and an opportunity for a hearing guaranteed by 10 CFR § 2.202. Consumers Power Co. (Midland Plant, Units 1 & 2), CLI-74-3, 7 AEC 7 (1974).

The Director may issue an immediately effective order without prior written notice under 10 CFR § 2.202(f) (now § 2.202(a) (5)) if (1) the public health, safety or interest so requires, or (2) the licensee's violations are willful. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radio-active Waste Disposal Site), CLI-79-6, 9 NRC 673, 677 (1979). In civil proceedings, action taken by a licensee in the belief that it was legal does not preclude a finding of willfulness. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 678 (1973).

Latent conditions which may cause harm in the future are a sufficient basis for issuing an immediately effective show cause order where the consequences might not be subject to correction in the future. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, S HRC 673, 677 (1979), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-74-3, 7 AEC 7, 10-12 (1974).

Purported violations of agency regulations support an immediately effective order even where no adverse public health consequences are threatened. <u>Nuclear Engineering Company, Inc.</u> (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 677-78 (1979).

6.24.5 Burden of Proof in Enforcement Proceedings

The burden of proof in a show cause proceeding with respect to a construction permit is on the permit holder. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-283, 2 NRC 11 (1975). As to safety matters this is so until the award of a full-term operating license. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-81-7, 13 NRC 257, 264-65 (1981). However, the burden of going forward with evidence "sufficient to require reasonable minds to inquire further" is on the person who sought the show cause order. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-315, 3 NRC 101, 110-11 (1976).

Civil penalties may be imposed for the violation of regulations or license conditions without a finding of fault on the part of the licensee, so long as it is believed such action will positively affect the conduct of the licensee, or serve as an example to others. It matters not that the imposition of the civil penalty might be viewed as punitive. A licensee is responsible for all violations committed by its employees, whether it knew or could have known of them. There is no need to show scienter. One is not exempted from regulation by operating through an employee. In re Atlantic Research Corp., CLI-80-7, 11 NRC 413 (1980).

6.24.6 Consolidation of Petitioners in Enforcement Proceedings

The Director may, in his discretion, consolidate the essentially indistinguishable requests of netitioners if those petitioners are unable to demonstrate prejudice as a result of the consolidation. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), CLI-78-7. 7 NRC 429, 433 (1978).

5.24.7 Necessity of Hearing in Enforcement Proceedings

Once a notice of opportunity for hearing has been published and a request for a hearing has been submitted, the decision as to whether a hearing is to be held no longer rests with the Staff but instead is transferred to the Commission or an adjudicatory tribunal designated to preside in the proceeding. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 371 (1980).

6.24.8 Intervention in Enforcement Proceedings

The requirements for standing in a show cause proceeding are no stricter than those in the usual licensing proceeding.

<u>Dairyland Power Cooperative</u> (La Crosse Boiling Water Reactor),
LBP-80-26, 12 NRC 367, 374 (1980).

6.25 Summary Disposition Procedures

(SEE 3.5)

6.26 Suspension, Revocation or Modification of License

A license or construction permit may be modified, suspended or revoked for:

- any material false statement in an application or other statement of fact required of the applicant;
- (2) conditions revealed by the application, statement of fact, inspection or other means which would warrant the Commission to refuse to grant a license in the first instance;
- (3) failure to construct or operate a facility in accordance with the terms of the construction permit or operating license; or
- (4) violation of, or failure to observe, any terms and provisions of the Atomic Energy Act, the regulations, a permit, a license, or an order of the Commission. 10 CFR § 50.100.

The procedures for modifying, suspending or revoking a license are set forth in Subpart B to 10 CFR. See All Chemical Isotope Enrichment, Inc., LBP-90-26, 32 NRC 30, 36-38 (1990), citing, Atomic Energy Act § 186(a), 49 U.S.C. § 2236(a).

Where information is presented which demonstrates an undue risk to public health and safety, the NRC will take prompt remedial action including shutdown of operating facilities. Such actions may be taken with immediate effect notwithstanding the Administrative Procedure Act requirements of notice and opportunity to achieve compliance. Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 404, 405 (1978).

A violation of a regulation does not of itself result in a requirement that a license be suspended. Both the Atomic Energy Act and NRC regulations support the conclusion that the choice of remedy for regulatory violations is within the sound judgment of the Commission and not foreordained. See 42 U.S.C. § 2236, § 2280, § 2282; 10 CFR § 50.100. Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 405 (1978)

A decision on whether to suspend a permit pending a decision on remand must be based on (1) a traditional balancing of the equities, and (2) a consideration of any likely prejudice to further decisions that might be called for by the remand. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-623, 12 NRC 670, 677 (1980).

If a safety problem is revealed at any time during low-power operation of a facility or as a result of the merits review of a party's appeal of the decision to authorize low-power operation, the low-power license can be suspended. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1447 (1984). See also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 1), CLI-81-30. 14 NRC 950 (1981).

There is no statutory requirement under Sectic 189a of the Atomic Energy Act of 1954 for the Commission to offer a hearing on an order lifting a license suspension. 42 U.S.C. § 2233(a). It is within the discretionary powers of the Commission to offer a formal hearing prior to lifting a license suspension. The Commission's decision depends upon the specific circumstances of the case and a decision to grant a hearing in a particular instance (such as the restart of Three Mile Island, Unit 1) does not establish a general agency requirement for hearings on the lifting of license suspensions. The Commission has generally denied such requests for hearings. Southern California Edison Co. (San Onofre Nuclear Generating Station, Unit 1), CLI-85-10, 21 NRC 1569, 1575 n.7 (1985). See, e.g., Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI 84-5, 19 NRC 953 (1984), aff'd, San Luis Obispo Mothers for Peace V. NRC, 751 F.2d 1287, 1314 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986).

6.27 Technical Specifications

10 CFR § 50.36 specifies, inter alia, that each operating license will include technical specifications to be derived from the analysis and evaluation included in the safety analysis report, and amendments thereto, and may also include such additional technical specifications as the Commission finds appropriate. The regulation sets forth with particularity the types of items to be included in technical specifications. Portland General Electric Company (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 272 (1979).

There is neither a statutory nor a regulatory requirement that every operational detail set forth in an application's safety analysis report (or equivalent) be subject to a technical specification to be included in the license as an absolute condition of operation which is legally binding upon the licensee unless and until changed with specific Commission approval. Technical specifications are reserved for those matters where the imposition of rigid conditions or limitations upon reactor operation is deemed necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety. Trojan, supra, 9 NRC at 273; Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-831, 23 NRC 62, 65-66 & n.8 (1986) (fire protection program need not be included in technical specification).

Technical specifications for a nuclear facility are part of the operating license for the facility and are legally binding

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1257 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985), citing, Trojan, supra, 9 NRC at 272-73.

6.28 Termination of Facility Licenses

Termination of facility licenses is covered generally in 10 CFR § 50.82.

6.29 Procedures in Other Types of Hearings

6.29.1 Military or Foreign Affairs Functions

Under the Administrative Procedure Act, 5 U.S.C. § 554(a) (4), and the Commission's Rules of Practice, 10 CFR § 2.700a, procedures other than those for formal evidentiary hearings may be fashioned when an adjudication involves the conduct of military or foreign affairs functions. Nuclear Fuel Services. Inc. (Erwin, Tennassee), CLI-80-27, 11 NRC 799, 802 (1980).

6.29.2 Export Licensing

Individual fuel exports are not major Federal actions. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-15, '1 NRC 672 (1980). (See also 3.4.6)

6.29.2.1 Jurisdiction of Commission re Export Licensing

The Commission is neither required nor precluded by the Atomic Energy Act or NEFA from considering impacts of exports on the global commons. Provided that NRC review does not include visiting sites within the recipient nation to gather information or otherwise intrude upon the sovereignty of a foreign nation, consideration of impacts upon the global commons is legally permissible. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 637-644 (1980). The Commission's legislative mandate neither compels nor precludes examination of health, safety and invironmental effects occurring at road that could affect U.S. interests. The decision whether to examine these effects is a question of policy to be decided as a matter of agency discretion. Id., 11 NRC at 654.

As a matter of policy, the Commission has decrement not to conduct such reviews in export licensing decisions primarily because no matter how thorough the NRC review, the Commission still would not be in a position to determine that the reactor could be operated safely. <u>Id.</u>, 11 NRC at 648.

The Commission lacks legal authority under AEA, NEPA and NNPA to consider health, safety and environmental impacts upon citizens of recipient nations because of the traditional rule

of domestic U.S. law that Federal statutes apply only to conduct within, or having effect within, the territory of the U.S. unless the contrary is clearly indicated in the statute. Id., 11 NRC at 637. See also General Electric Co. (Exports to Taiwan), CLI-81-2, 13 NRC 67, 71 (1981).

The alleged undemocratic character of the Government of the Philippines does not relate to health, safety, environmental and non-proliferation responsibilities of the Commission and are beyond the scope of the Commission's jurisdiction. Exports to the folippines, supra, 11 NRC at 656.

6.29.2.2 Export License Criteria

The AEA of 1954, as amended by the NNPA, provides that the Commission may not issue a license authorizing the export of a reactor, unless it finds, based on a reasonable judgment of the assurances provided, that the criteria set forth in §§ 127 and 128 of the AEA are met. The Commission must also determine that the export would not be inimical to the common defense and security or health and safety of the public and would be pursuant to an Agreement for Cooperation. Westinghouse Electric Corp. (Exports to the Philippines), ClI-80-14, 11 NRC 631, 652 (1980).

The Commission may not issue a licens or component exports unless it determines that the three sprific critaria in § 109(b) of AEA are met and also determines that the export word to be inimical to common defense. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 654 (1980).

6.29.3 High-Level Waste Licensing

The procedures for the conduct of the adjudicatory proceeding on the application for a license to receive and possess high-level radioactive waste at a geologic repository operations area are specified in Subpart J of 10 CFR Part 2 (10 CFR §§ 2.1000 - 2.1023). 54 Fed. Procedures (April 14, 1989). These procedures take precedence over the rules of general applicability in 10 CFR Part 2, Subpart G, although 10 CFR § 2.1000 specifies many of the rules of general applicability which will continue to apply to high-level waste licensing proceedings.

Subpart J provides procedures for the development and operation of the Licensing Support System, an electronic information management system, which will contain the documentary material generated by the participants in the proceeding as well as the NRC orders and decisions related to the proceeding. See 2.11.7, Discovery in High-Level Waste Licensing Proceedings.

Facility Index

| (ALLENS CREEK NUCLEAR GENERATING | STATION, UNIT 1). |
|----------------------------------|-------------------|
| ALAB-535, 9 NRC 377(1979) | 2.9.7 |
| | 3.4.4 |
| | |
| ALAB-539, 9 NRC 422(1979) | 3.4.4 |
| | |
| ALAB-544, 9 NRC 630(1979) | 5.12.1 |
| | |
| ALAB-547, 9 NRC 638(1979) | 5.4 |
| | |
| ALAB-565, 10 NRC 521(1979) | 2.9.5 |
| | 2.9.5.3 |
| | 3.4.1 |
| | 6.14 |
| | |
| ALAB-574, 11 NRC 7(1980) | 1.7.1 |
| | 2.5.2 |
| | 2.5.3 |
| | 2.9.3.1 |
| | 2.9.3.3.1 |
| | 2.9.5 |
| | 3,1,2,4 |
| | |
| ALA8-582, 11 NRC 239(1980) | 2.9.3.3.3 |
| | 2.9.4.1.4 |
| | 5.10.3 |
| | 5.5.1 |
| 11 10 TO: 11 NOC 573(1000) | 2 9.7 |
| ALAB-583, 11 NRC 472(1980) | 5.8.1 |
| | |
| ALAB-F30, 11 NRC 532(1980) | 2.9.3.1 |
| ALAB-150, 11 NRC 3-2(1500) | 3.5 |
| | |
| ALAB-629, 13 NRC 75(1981) | 3.5 |
| ALAD 023, 15 Miles 15115011 | 3.5.2.3 |
| | 3.5.5 |
| | 6.15.1.2 |
| | |
| ALA8-630, 13 NRC 84(1981) | 3.1.4.1 |
| | 3.15 |
| | 5.12.2.1 |
| | |
| ^(AB-631 13 NRC 87(1981) | 5.2 |
| | |
| ALAB-635, 13 NRC 309(1981) | 5.12.2 |
| | 5.12.2.1 |
| | 20222 |
| ALA8-671, 15 NRC 508(1982) | 2,9.3.3.3 |
| | 2 6 |
| LBP-81-34, 14 NRC 637(1981) | |
| | |

```
(ALLENS CREEK NUCLEAR GENERATING STATION, UNITS 1 AND 2).
   ALAB-301, 2 NRC 853(1975)
                                 5.4
                                  5.8.10
  ALAB-585, 11 NRC 469(1980)
                                  5.5
(ALVIN W. VOGTLE ELECTRIC GENERATING PLANT, UNITS 1 AND 2).
  ALAB-851, 24 NRC 529(1986)
                                  3.6
  ALAB-859, 25 NRC 23(1987)
                                  4.6
                                  5.6.1
                                  2.9.5.4
  ALAB-972 26 NRC 127(1987)
                                  3.5.2.2
                                  4.4.2
                                  5.10.3
                                  5.5.1
  LBP-90-29, 32 NRC 89(1990)
                                  2.9.3
                                  2.9.4.1.2
                                  2.9.4.1.4
  LBP-91-21, 23 NRC 419(1991)
                                  2.9.5.1
                                  2.9.5.3
  LEP-91-33, 34 NRC 138(1991)
                                  2.9.3
                                  2.9.4.1.2
                                  2.9.4.1.4
  LBP-91-36, 34 MRC 193(1991)
  LBP-91-6, 33 NRC 169(1991)
                                 2.11.:
(ALVIN W. VOGTLE NUCLEAR PLANT, UNITS 1 AND 2),
```

(ALVIN W. VOGTLE NUCLEAR PLANT, UNITS 1 AND 2),
ALAB-291, 2 NRC 404(1975) 4.4.2
4.4.3
6.1.4.4
6.15
6.5.4.1
6.9.2.1

LBP-84-35, 20 NRC 887(1984) 2.9.5.1
3.7.3.2
6.20.4
6.9

(AMENDMENT TO MATERIALS LIC. SNM-1773), CLI-80-3, 11 NRC 185(1980) 3.3.7 (APPLIC. FOR CONSID. OF FACILITY EXPORT LICENSE). CLI-77-18, 5 NRC 1332(1977) 2.9,4,1,3

(APPLICATION TO EXPORT SPECIAL NUCLEAR MATERIALS), CLI-77-16, 5 NRC 1327(1977) 3 3.6

CLI-78-4, 7 NRC 311(1978) 3.3.6

(ARKANSAS NUCLEAR-1, UNIT 2), ALAB-94, 6 AEC 25(1973) 3.11.2

(ATLANTIC GENERATING STATION, UNITS 1 ANP 2). LBP-75-62. 2 NRC 702(1975) 2.11.5.2

LBP-78-5, 7 NRC 147(1978) 2.8.1.3

(BAILLY GENERATING STATION, NUCLEAR-1), ALAB-192, 7 AEC 420(1974) 5.7

AB-192, / AEC 420(19/4) 5.7.1

5.7

ALAB-204, 7 AEC 835(1974) 5.10.3 5.8.13

6.4.1.1

ALA8-207, 7 AEC 957(1974) 5.10.1

5.13.2

ALAB-224, 8 AEC 244(1974) 2.8.1.2

2.8.1.3

3.1.4.1

3.1.4.2

3.6

5.15.2

5.7

5.7.1

5.8.2

6.16.3

ALAB-227, 8 AEC 416(1974) 3.14.3

4.4.2

```
(BAILLY GENERATING STATION, NUCLEAR-1).
  ALAB-249. 8 AEC 980(1974)
                                 3.13.3
                                 3.3.1.2
                                 4.4.2
                                  2,11.6
  ALAB-303, 2 NRC 858(1975)
                                 5.6.3
                                 5.8.3.2
  ALAB-619, 12 NRC 558(1980)
                                 2.5.1
                                  2.9.4.1.4
                                 3.1.2.1
                                 3.4
                                 3.4.5
                                 6.24
                                 6.24.1.1
                                 6.24.1.2
  CLI-74-39, 8 AEC 631(1974)
                                 4.4.2
  CLI-78-7, 7 NRC 429(1978)
                                 6.24
                                 6.24.2
                                 6.24.3
                                 6.24.6
                                 2.9.4.1.4
  LBP-80-22, 12 NRC 191(1980)
                                 6.1.4.2
  LBP-80-31, 12 NRC 699(1980)
                                 3.4.5
  LBP-81-6, 13 NRC 253(1981)
                                 3.4.5
```

(BARNWELL FUEL RECEIVING AND STORAGE STATION), ALAB-328, 3 NRC 420(1976) 2.9.4.1.2 LBP-77-13, 5 NRC 489(1977) 2 11.2 2.11.2.2

(BARNWELL NUCLEAR FUEL PLANT SEPARATION FACILITY). ALAB-296, 2 NRC 671(1975) 3.3.1 3.3.1.2 5.7.1 6.15.3

(BEAVER VALLEY POWER STATION, UNIT 1), ALA8-105, E AEC 181(1973) 2.9.3

```
(BEAVER VALLEY POWER STATION, UNIT 1).
   ALAB-109, 6 AEC 243(1973)
                                  2.6.2
                                  2.9.3
                                  2.9.5.1
                                  2.9.5.3
                                  2.9.7.1
                                  3.4.1
                                  3.5
                                  5.6.3
   ALAB-310, 3 NRC 33(1976)
                                  5.4
   ALAB-408, 5 NRC 1383(1977)
                                  3.1.2.5
                                  4.6
                                  6.16.1
(BEAVER VALLEY POWER STATION, UNIT 2).
   LBP-74-25, 7 AEC 711(1974) 3.10
   LBP-84-6, 19 NRC 393(1984)
                                  2.10.2
                                  2.9.4.1.1
                                  2.9.4.1.2
                                  2.9.5.1
                                  2.9.5.7
(BEAVER VALLEY POWER STATION, UNITS 1 AND 2),
   ALAB-172, 7 AEC 42(1974)
                                 2.8.1.1
                                  3.1.4.1
(BELLEFONTE NUCLEAR PLANT, UNITS 1 AND 2).
   ALAB-164, 6 AEC 1143(1973)
                               2.8.1.2
   ALAB-237, 8 AEC 654(1974)
                                  5.2
(BIG ROCK POINT NUCLEAR PLANT).
  A_AB-725, 17 NRC 562(1983)
                                 6.20.3
(BIG ROCK POINT PLANT).
  ALAB-636, 13 NRC 312(1981)
                                  3.1.2.5
                                  5.10.2.2
                                  6.15.1.2
                                  6.15.4
                                  6.15.9
```

| (BIG ROCK POINT PLANT), ALAB-795, 21 NRC 1(1985) | 5.6.6 |
|---|--------------------------------|
| CLI-81-32, 14 NRC 962(1981) | 2.9.3 2.9.3.1 |
| LBP-82-19B, 15 NRC 627(1982) | 3.1.2.3 3.5.2 |
| LBP-82-51A, 16 NRC 180(1982) | 4.2 |
| LBP-82-77, 16 NRC 109(1982) | 3.7 |
| LBP-82-78, 16 NRC 110(1982) | 6.15.1.1 |
| LBP-82-8, 15 NRC 299(1982) | 2.2 3.5 3.5.2.1 6.5.1 |
| LBP-83-62, 18 NRC 708(1983) | 3.1.2.1 |
| (BLACK FOX STATION, UNITS 1 AND 2) | |
| ALAB-370, 5 NRC 131(1977) | 4.5 5.8.3.2 5.8.4 |
| ALAB-388, 5 NRC 640(1977) | 5.10.3 |
| ALAB-505, 8 NRC 527(1978) | 5.7.1 6.4.1 |
| ALA8-573, 10 NRC 775(1979) | 3.5 5.1 5.10.3 6.15.3 |
| CLI-80-31, 12 NRC 264(1980) | 3.4 6.15.2 |
| CL1-80-35, 12 NRC 409(1980) | 6.23.1 |
| LBP-77-17, 5 NRC 657(1977) | 2.9.4.1.1 |
| LBP-77-18, 5 NRC 671(1977) | 2.11.2.2 3.12.4.1 |
| LBP-78-26, 8 NRC 102(1978) | 6.15.1 6.15.6 6.19.2 |
| LBP-78-28. 8 NRC 281(1978) | 6.15 |

```
(BLOOMSCURG SITE DECONTAMINATION),
```

ALAB-931, 31 NRC 350(1990) 5.12.2.1 5.7.1

LBP-90-8, 31 NRC 143(1990)

5.7.1

(BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2),

ALAB-817, 22 NRC 470(1985) 2.9.5.1 3.15

5.12.2 5.12.2.1

ALAB-874, 26 NRC 156(1987) 3.1.2.1

CLI-86-21, 24 NRC 681(1986) 4.7

CLI-86-8, 23 NRC 241(1986) 2.9.5

2.9.5.1

2.9.5.

3.13.1

6.5.4.1

LEP-85-11, 21 NRC 609(1985)

2.9.5

2.9.5.5

3.17

6.5.4.1

LBP-85-20, 21 NRC 1732(1985) 2.9.5

2.9.5.1

2.9.5.4

3.13.1

LBP-85-27, 22 NRC 126(1985) 2.9.5.9

5.5.1

LBP-85-40, 22 NRC 759(1985)

2.11.2.4

LBP-85-43, 22 NRC 805(1985) 6.15.8

3.11.1.1.1

3.5

3.5.2.3

3.5.3

LBP-86-31, 24 NRC 451(1986)

LBP-86-12, 23 NRC 414(1986)

6.16.1

LBP-86-7, 23 NRC 177(1986)

2.11.2.6

```
(BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2),
LBP-87-13, 25 NRC 449(1987) 4.2.2
```

LEP-87-19, 25 NRC 950(1987) 3.1.2.1

LBP-87-22, 26 NRC 41(1987) 3.1.2.1

(BROWNS FERRY NUCLEAR PLANT, UNITS 1 AND 2), ALAB-3/11, 4 NRC 95(1976) 2.9.3.3.2

2.9.3.3.3

LSP-76-10, 3 NRC 209(1976) 2.9.3.1 2.9.5.1

(BROWNS FERRY NUCLEAR PLANT, UNITS 1, 2 AND 3), ALAB-677, 15 NRC 138(1982) 6 5.4.1

CLI-82-26, 16 NRC 880(1982) 5.15

LBP-73-29, 6 AEC 682(1973) 3.5

(BYRON NUCLEAR POWER STATION, UNITS 1 AND 2).

ALAB-659, 14 NRC 983(1981) 4.3.1

5.4

ALAB-678, 15 NRC 140(1982) 2.11.4

2.11.5.2

ALAB-735, 18 NRC 19(1983) 3.15

5.12.1

ALAB-770, 19 NRC 1163(1984) 5.19.2

ALAB-793, 20 NRC 1591(1984) 3.1.2.5

4.6

5.10.3

5.2

6.16.1.3

LBP-83-40, 18 NRC 93(1983) 3.11.1.5

6.23.1

LBP-83-41, 18 NRC 104(1983) 3.14.2

4.4.1

4.4.2

LEP-84-2, 19 NRC 36(1984) 3.1.2.5

(BYRON NUCLEAR POWER STATION, UNITS | AND 2), 6.16.1.3

| (BYRON STATION, UNI; 5 1 AND 2), LBP-80-30, 12 NRC 683(1980) | 2.9.5.1 2.9.5.6 2.9.5.7 2.9.5.8 6.15.5 |
|---|--|
| LBP-81-30-A, 14 NRC 364(1981) | 2.11.1 2.11.4 2.9.3 3.1.2.2 |
| LBP-81-52, 14 NRC 901(1981) | 2.11.4 |
| LBP-82-5, 15 NRC 209(1982) | 2.11.5.? |
| (CALLAWAY PLANT, UNIT 1). ALAB-740, 18 NRC 343(1983) | 3.10 3.4 5.10.3 |
| ALAB-750, 18 NRC 1205(1983) | 3.1.2.1 3.14.2 6.24 6.5.4.1 |
| ALAB-754, 18 NRC 1333(1983) | 1.8 |
| LBP-83-71, 18 NRC 1105(1983) | 1.8 |
| (CALLAWAY PLANT, UNITS 1 AND 2). ALAB-347, 4 NRC 216(1976) | 3.7.3.4 |
| ALAB-348, 4 NRC 225(1976) | 3.7.3.3 5.6.4 |
| ALAB-352, 4 NRC 371(1976) | 6.20.4 |
| LBP-78-31, 8 NRC 366(1978) | 3.1.2.1 6.10 |

(CALVERT CLIFFS NUCLEAR POWER PLANT, UNITS 1 AND 2), 2AELR 11,57(1969) 6.20.3

```
ALAB-601, 12 NRC 18(1980)
                                 6.6.1
(CATAWBA NUCLEAR STATION, UNI
                               1 AND 2).
   ALAB-355, 4 NRC 397(1976)
                                  3.11.1.1.1
                                  5.10.3
                                 5.6.3
                                 6.16.3
  ALAB-359, 4 NRC 619(1978)
                                 4.4.1
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  ALAB-687, 16 NRC 460(1982)
                                 2.9.5.1
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                                 3.1.2.1.1
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  ALAS-768, 19 NRC 988(1984)
                                 5.12.2
  ALAB-794, 20 NRC 1630(1984)
                                 5.7.1
  ALA8-813. 22 NRC 59(1985)
                                 2.9.5.5
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                                 3.13
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                                 3.7.3.2
                                 5.10.3
                                 5.5.1
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  ALAB-825, 22 NRC 785(1985)
                                 3.1.2.1
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  CLI-83-19, 17 NRC 1041(1983)
                                 2.9.1
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  CLI-83-31, 18 NRC 1303(1983)
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| (CATAWBA NUCLEAR STATION, UNI: 1 L8P-74-22, 7 AEC 659(1974) | |
|--|---|
| LBP-74-5, 7 AEC 82(1974) | 3.10 |
| LBP-81-1, 13 NRC 27(1981) | 2.9.3.1 2.9.3.2 2.9.3.6 2.9.4.2 |
| LBP-82-107A 16 NRC 1751(1982) | 3.17 6.9.1 |
| L8P-82-116, 16 NRC 1937(1982) | 2.11.1 2.11.2 2.11.2.4 2.11.2.5 2.11.2.8 2.11.5 2.9.5 |
| LBP-82-51, 16 NRC 167(1982) | 2.9.5.0 |
| LBP-83-20A, 17 NRC 1121(1983) | 2.11.5.2 |
| LBP-93-8A, 17 NRC 282(1983) | 3,3.1 |

(CHEROKEE NUCLEAR STATIK: UNIIS 1, 2 AND 3), ALAB-440, 6 NRC 642(15/7) 2.9.2 2.9.3.3.3 ALAB-457, 7 NRC 70(1978) 6.14.1 ALAB-482, 7 NRC 979(1978) 5.1 5.7 6.18

LBP-84-24, 19 NRC 1418(1984) 2.11.1

3.13.1

(CLINCH RIVER BREEDER REACTOR PLANT),
ALAB-326, 3 NRC 4C6(1976) 5.12.2.1

ALAB-330, 3 NRC 613(1976) 5.12.2.1

ALAB-345, 4 NRC .12(1977) 5.1
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ALAB-354, 4 NRC 383(1976) 2.10.2
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5, 12, 2, 6, 19, 2, 1

16 NRC 471(1982)

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ALA8-721, 17 NRC 539(1983)

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ALAB-755.

6.19.2

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19 NRC 487(1984)

ALAB-761.

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4 NRC 67(1976)

CLI-16-13,

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5.17 15 NRC 109(1982)

CLI-82-8,

CLI-83-1, 17 NRC 1(1983)

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L8P-83-8;

6, 19, 2 21 NRC 507(1985)

LBP-85-7,

(CLINTON POWER STATION, UNIT NO.1). LBP-82-103, 15 NRC 1603(1982)

2.9.5.7 2.9.5.7 3.4 6.8

2.11.2.1 (CLINTON POWER STATION, UNIT 1). L8P-81-81, 14 NRC 1735(1981)

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(CLINTON POWER STATION, UNITS 1 AND 2).
   ALAB-340, 4 NRC 27(1976)
                                  2.11.2.2
                                  2.11.2.3
                                  3,11,1,3
                                  3.13.1
                                  5.10.3.1
LEP-81-15, 13 NRC 708(1981)
                                  3.4.1
(COBALT-60 STORAGE FACILITY).
   ALAB-682. 16 NRC 150(1982)
                                  2.9.3.3.3
                                  2.9.4.1.1
                                  3,10
                                  6.13
   LBP-82-24, 15 NRC 652(1982)
                                  2.9.3.3.3
                                  2.9 4.1 2
(COMANCHE PEAK STEAM ELECTRIC STATION, UNIT 1).
   ALAB-868, 25 NRC 912(1987)
                                  2.9.5
                                  2.9.5.13
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                                  5.10.3
  CLI-86-15, 24 NRC 397(1986)
                                  3.4.5
   CLI-86-4, 23 NRC 113(1986)
                                  3.4.5
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  LEP-86-36A, 24 NRC 575(1986)
                                 2.9.5.5
  LBP-87-20, 25 NRC 953(1987)
                                 2.11.2.4
(COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2).
  ALAB-260, 1 NRC 51(1975)
                                 5.6.3
  ALAB-621, 12 NRC 578(1980)
                                  3.15
  ALAB-714, 17 NRC 86(1983)
                                  2.11.2.4
                                  5.6.1
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  ALAB-716, 17 NRC 341(1983)
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  ALAB-870, 26 NRC 71(1987)
                                  2.11.2.2
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| CLI-81-24, 14 NFC 614(1981) | CLI-81-36, 14 NRC 1111(1981) | CLI-83-6, 17 NRC 333(1983) | CLI-88-12, 28 NRC 605(1988) | CLI-89-6, 29 NRC 348(1989) | LEP-81-23, 14 NRC 159(1981) | LBP-81-25, 14 NRC 241(1981) | LBP-81-51, 14 NRC 896(1981) | LBP-82-17, 15 NRC 593(1982) | LEP-82-18, 15 NRC 598(1982) | L8P-82-59, 16 NRC 533(1982) | LBP-82-87, 16 NRC 1195(1982) | LEP-83-33, 18 NRC 27(1983) | LBP-83-34, 78 MRC 36(1983) | LBP-83-55, 18 NRC 415(1983) | L8P-83-75A, 18 NRC 1260(1983) | LEP-83-81, 18 NRC 1410(1983) | LEP-84-10, 19 NRC 509(1984) |

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LBP-84-25, 19 NRC 1589(1984)

(COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2).

LBP-84-50, 20 NRC 1464(1984) 2.11.2.4

LBP-85-32, 22 NRC 434(1985) 2.11.2.2 3.5.2.2

6.16.1.3

L8P-85-39, 22 NRC 755(1985) 3.11.1.1

LBP-85-41, 22 NRC 765(1985) 2.11.4

LBP-86-20, 23 NRC 844(1986) 3.1.2

LBP-87-18, 25 NRC 945(1987) 2.11.2 2.11.2.2

LBP-87-27, 26 NRC 228(1987) 2.11.2

(DAVIS-BESSE NUCLEAR POWER STATION).

ALAB-157, 6 AEC 858(1973) 5.8.8

ALAB-25, 4 AEC 633(1971) 5.7

ALAB-290, 2 NRC 401(1975) 6.11

ALA3-300, 2 NRC 752(1975) 5.12.2.1

5.4

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ALA8-332, 3 NRC 785(1976) € 4.1.1

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6.4.2.1

6.3.2.2

6.4.2.3

(DAVIS-BESSE NUCLEAR POWER STATION, UNIT 1).

ALAB-297, 2 NRC 727(1975)

3.15

5.12.2.1

ALA8-314, 3 NRC 98(1976)

5.12.2.1

ALAB-323, 3 NRC 331(1976)

6.3

LBP-87-11, 25 NRC 287(1987)

6.16.1.3

(DAVIS-BESSE NUCLEAR POWER STATION, UNITS 1,2,3). 3.17

ALAB-378. 5 NRC 552(1977)

6.4.2.2

6.3 ALAB-560, 10 NRC 265(1979)

2,11,2,2 3 NRC 199(1976)

LBP-76-8.

6.3 5 NRC 452(1977) LBP-77-7,

(DAVIS-BESSE NUCLEAR POWER STATION, UNITS 2 AND 3).
ALAB-622, 12 NRC 667(1980) 3.18.1
3.18.2

5.6.1 14 NRC 627(1981) ALAB-652.

(DAVIS-BESSE STATION, UNITS 1, 2, 3; PERRY PLANT, UNITS 1 AND 2), ALAB-430, 6 NRC 457[1977] 4.4 5.10.3

CLI-77-22, 6 NRC 451(1977)

(DIABLO CANYON NUCLEAR POWER PLANT, UNIT 2).
ALAB-254, 8 AEC 1184(1975) 3.16
3.8.1
4.3
5.6.3

(DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AMC 2). ALAB-223, 8 AEC 241(1974). 2.9.3.3.4

3.11.1.2 3 NRC 809 (1976)

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ALA8-410.

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2.11.2.4 3.12.4 6.20.4

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(DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2).
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| ALAB-776, 19 NRC 1373(1984) | 3.1.2 |
|------------------------------|-----------|
| ALAB-781, 20 NRC 819(1984) | 4 |
| | 5.10.1 |
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| | 6.15.7 |
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| ALAB-782, 20 NRC 838(1984) | 5.6.1 |
| | 6.24 |
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| ALAB-811, 21 NRC 1622(1985) | 3.16 |
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| ALAB-873, 26 NRC 154(1987) | 2.9.5.13 |
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| ALAB-877, 26 NRC 287(1987) | 2.9.5 |
| | 5.7.1 |
| | 6.15.1.2 |
| | 6.15.7 |
| | |
| ALAB-880, 26 NRC 449(1987) | 2.9.5 |
| | 2.9.5.1 |
| | 2.9.5.7 |
| | 3,1,2,6 |
| | 5.10.3 |
| | 5.5.1 |
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| CLI-76-1, 3 NRC 73(1976) | 5.4 |
| | 5.8.11 |
| | |
| CLI-80-11, 11 NRC 511(1980) | 3.1.4.2 |
| | 5.6.7 |
| | |
| CLI 80-24, 11 NRC 775(1980) | 2.9.5.9 |
| | 6.23.3.2 |
| | |
| CLI-80-6, 11 NFC 411(1980) | 5.16.1 |
| | |
| CLI-80-9, 11 NFC 436(1980) | 3.1.4.1 |
| | |
| CLI-81-6, 13 NFC 443(1981) | 3.1.2.1 |
| | 6.24.1 |
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| CLI-32-39, 16 NRC 1712(1982) | 3.4.4 |
| | 4.4.1 |
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| CLI-83-32, 18 NRC 1309(1983) | 1.8 |
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  CLI-84-5, 19 NRC 953(1984)
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  CLI-85-14, 22 NRC 177(1985)
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  CLI-86-12, 24 NRC 1(1986)
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  LBP-78-36, 8 NRC 567(1978)
                                 3.12.4
  LBP-81-5, 13 NRC 226(1981)
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  LBP-86-21, 23 NRC 849(1986)
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  LBP-87-24, 26 NRC 159(1987)
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(DOUGLAS POINT NUCLEAR GENERATING STATION, UNITS 1 AND 2).
  ALAB-218, 8 AEC 79(1974)
                                 2.9.5.6
                                 2.9.5.7
                                  6.20.4
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  ALAB-277, 1 NRC 539(1975)
                                 3.3.1
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3.3.1.2 3.3.2.1 3.4.4

(ERESDEN NUCLEAR POWER STATION, UNIT 1), CLI-81-25, 14 NRC 616(1981) 2.10.1.1 2.9.4.1.2 2.9.4.2 2.9.5.1 2.9.9.2.2 6.1.4

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(DRESDEN NUCLEAR POWER STATION, UNIT 1).
  LBP-82-52, 16 NRC 183(1982)
                               2.9.4.1.1
                                 2.9.4.1.2
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(DUANE ARNOLD ENERGY CENTER).
  ALAB-108, 6 AEC 195(1973)
                                 2.10.1
                                 2.10.1.2
                                 3.4.2
(ENERGY SYSTEMS GROUP SPECIAL NUCLEAR MATERIALS LICENSE NO. SNM-21).
  CLI-83-15, 17 NRC 1001(1983)
                                 6.13
  LBP-83-65, 18 NRC 774(1983)
                                 2.2
                                 2.9.4.1.1
                                 6.13
(ENRICO FERMI ATOMIC POWER PLANT),
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ALAB-77, 5 AEC 315(1972)

(ENRICO FERMI ATOMIC POWER PLANT, UNIT 2), ALAB-466, 7 NRC 457(1978) 5.6.1 5.8.14 6.24.3 ALAB-469, 7 NRC 470(1978) 5.9 6.14 # = 8-470, 7 NRC 473(1978) 2.9.4.1.1 2.9.4.1.2 2.9.4.1.4 2.9.4.2 3.1.2.5 6.16.1 ALAB-707, 16 NRC 1760(1982) 2.9.3.3.3 2.9.3.3.4 4.4.2 6.24 ALAB-709, 17 NRC 17(1983) 4.2.2 5.5.1

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  CLI-80-15, 11 NRC 672(1980)
                                6.15.1.1
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(FINANCIAL ASSISTANCE TO PARTICIPANTS IN COMMISSION PROCEEDINGS),
  CLI-76-23, 4 NRC 494(1976) 2.9.10.1
(FLOATING NUCLEAR POWER PLANTS).
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  ALAB-489, 8 NRC 194(1978)
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  ALAB-500, 8 NRC 323(1978)
  LEP-79-15, 9 NRC 653(1979)
                                6.15.2
(FORT CALHOUN STATION, UNIT 2).
  LEP-77-8. 5 NRC 437(1977)
(FULTON GENERATING STATION, UNITS 1 AND 2).
  ALAB-206, 7 AEC 841(1974) 2.9.7
  ALA3-657, 14 NRC 967(1981)
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LBP-79-23, 10 NRC 220(1979)

(FULTON GENERATING STATION, UNITS 1 AND 2). LBP-84-43, 20 NRC 1333(1984) 1.9

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(GETR VALLECITOS), LBP-83-19, 17 NRC 573(1983) 2.5 2.9.3 2.9.4 2.9.5 LBP-84-54, 20 NRC 1637(1984) 2.9.3.3.3 3.6

LBP-85-4, 21 NRC 399(1985) 3.47 3.5

(GRAND GOLF NUCLEAR STATION, UNIT 1), Ct*-~a 48. 20 NRC 1055(1984) 6.1

LBP-84-19, 19 1' C 1076(1984) 6.1.4 LBP-84-23, 49 1' 3 1412(1984) 6.1.4

LBP-84-39, 20 N.C 1031(1984) 6.1.4

(GRAND GULF NUCLEAR STATION, UNITS 1 AND 71, ALAB-130, 6 AEC 423(1973) 2.6.3.5

2.9.3 2.9.5.1 3.5

ALAB-140, 6 AEC 575(1973) 2.9.7 5.10.1

ALAB-195, 7 AEC 455(1974) 5.13.1.1 5.4

ALAB-704, 16 NRC 17₄5(1982) 2.9.3.3.3 2.9.3.3.4 6.20.2 6.20.4

LBP-73-41, 6 AEC 1057(1973) 2.9.3.5 2.9.8

(GRAND GULF NUCLEAR STATION, UNITS) AND 2). IBP-82-92 16 NRC 1376(1982) 2933 3.1.2.1 6 20 4 (GREENE COUNTY NUCLEAR PLANT). ALAB-434, 6 NRC 471(1977) 2.9.7 ALAB-439, 6 MRC 640(1977) 5,12.2.1 (GREENWOOD ENERGY CENTER, UNITS 2 AND 3). ALAB-225, 8 AEC 379(1974) 2 8 1 1 3.14.1 6.15 ALAB-247, 8 AEC 936(1974) 6.15.8.2 ALAB-376, 5 NRC 426(1977) 2.9.4.1.1 2.9.7 3.1.2.4 5.4 5.8.1 ALAB-472, 7 NRC 5701,378) 2.9.7 5 4 5.8.1 ALAB-475, 7 NRC 759(1978) 2.9.3.3.3 (4. B. ROBINSON, UNIT 2), ALAB-569, 10 NRC 557(1979) 6.15.6.1 6.15.8.5 LBP-78-22, 7 NRC 1052(1978) 6.15.8.4 (HANFORD NO. 2 NUCLEAR POWER PLANT). ALAB-113, 6 AEC 251(1973) 3.10 (HARTSVILLE NUCLEAR PLANT UNITS 14,24,18,28), ALAB-367, 5 NRC 92(1977)

3.11.1.1.1 3.13.1 5.10.1 5.10.3

(HARTSVILLE NUCLEAR PLANT UNITS to 24, 18, 28). 5.6.3 ALAB-380, 5 NRT 572(1977) 3.1.2.3 6.15.8.1 6.19.2 6.9.1 ALAB-409, 5 NRC 1391(1977) 5.13.4 ALAB-418, 6 NRC 1(1977) 4.5 5.12.1 ALAB-463, 7 NRC 341(1978) 3.1.2.7 3.11.4 3.13.1 3.14.3 3.16 3.7.2 4.3 4.4 5.5.1 6.7.1 6.7.2 ALAB-467, 7 NRC 459(1978) 4.5 5.1 5.4 5.5 5.6.1 5.8.15 ALAB-554, 10 NRC 15(1979) 3.5 (HEMATITE FUEL FABRICATION FACILITY), LBP-89-23, 30 NRC 140(1989) 2.9.3 2.9.4.1.1 2.9 1.1.2 6.13 LBP-39-25, 30 NRC 187(1989) 6.13

HOPE CREEK GENERATING STATION, UNIT 1), ALAB-759, 19 NRC 13(1984) 3.1.4.1 3.1.4.2 3.17

(HOPE CREEK GENERATING STATION, UNITS 1 AND 2). ALAB-251, 8 AEC 993(1974) 5.2 5, 10, 3 ALAB-394, 5 NRC 769(1977)

4.3 7 NRC 204(1978) ALAB-460.

2.9.3.3.3 6,15,1,2 LBP-77-9, 5 NRC 474(1977) 9 NRC 14(1979) ALAB-518.

3.12 (BP-78-15, 7 NRC 642(1978)

(IMPORT OF SOUTH AFRICAN URANIUM ORE CONCENTRATE). CL.-(7-6, 25 NRC 891(1987) 2.9.4.1.3 3.3.6 6.1.4 (HUMBOLDI BAY POWER PLANT, UNIT 3). LBP-88-4, 27 NRC 236(1988)

(INCIAN POINT NUCLEAR STATION, UNITS 1, 2 AND 3).
ALAB-304, 3 NRC 1(1976) 5.2
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2.9.3 (INDIAN POINT STATION, UNIT NO. 2). LEP-82-1, 15 NRC 37(1982)

5. 10. (INDIAN POINT STATION, UNIT 2), ALAB-159, 6 \(\) \(\ 6,16.2 ALA8-188, 7 AEC 323(1974)

7 AEC 971(1974) ALAB-209.

ALAB-243.

6, 15, 8, 1 ALAB-399, 5 NRC 1156(1977)

6.16.3 2.9.1 5.2 8 AEC 850(1974) 5 NRC 129(1977) ALAB-369,

| (INDIAN POINT STATION, UNIT 2). ALAB-414, 5 NRC 1425(1977) | 5.15 5.7 |
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| AL/B-453, 7 NRC 31(1978) | 6,15.8.1 |
| ALAB-75, 5 AEC 309(1972) | 3.10 |
| CLI-74-23, 7 AEC 947(1974) | 2.9.5.9 6.16.1.3 6.16.2 |
| (INDIAN POINT STATION, UNIT 3), ALAB-281, 2 NRC 6(1975) | 5.12.1 5.13.1.2 5.4 |
| CLI- 4-29, 8 AEC 7(1974) | 3.4.2 |
| CLI-75-14, 2 NRC 835(1975) | 3.9 6.15.8.1 |
| (INDIAN POINT STATION, UNITS 1, 2 ALAB-319, 3 NRC 188(1976) | AND 3). 3.1.2.3 3.4.2 6.16.1 3 |
| ALAB-357, 4 NRC 542(1976) | 6.1.5 |
| ALAB-377, 5 NRC 439(1977) | 2.6 3.3.3 |
| CLI-75-8, 2 NRC 173(1975) | 6.24.1 6.24.3 |
| CLI-77-2, 5 ° C 13(1977) | 3.7 6.5.4.1 |
| CLI-77-4, 5 NRC 31(1977) | 6.1.5 |
| (INDIAN POINT, UNIT NO. 2); (INDIA LEP-82-105, 16 NRC 1629(1982) | |
| LBP-82-113, 16 NRC 1907(1982) | 2.11.3 |
| LBP-82-12A, 15 NRC 513(1982) | 3.1,2.4 |

33 (INDIAN POINT, UNIT NO. 2); (INDIAN POINT, UNIT NO. LBP-82-12B, 15 NRC 523(1982) 3:1.2.4

3, 1, 2, 1 15 NRC 647(1982) LBP-82-23,

2.10.2 15 NRC 715(1982) LBP-82-25.

(INDIAN POINT, UNIT 2); (INDIAN POINT, UNIT 3); CLI-81-1, 13 NRC 1(1981) 3.1.2.7 5.16.1

14 NRC 610(1981) CLI-81-23,

5.16.1

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3.1.2.7 16 NRC 1721(1982)

CLI-82-41,

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CLI-82-15,

6.5.3.1 17 NRC 1,06(1983)

6.10.1 3.5

3, 13 17 NRC 1117(1983) LBP-83-29,

2.9.5 17 NRC 134(1983) LBP-83-5, (JAMESPORT NUCLEAR POWER STATION, UNITS 1 AND 2). ALAB-318, 3 NRC 186(1976) 5.12.2.1

(JAMESPORT NUCLEAR STATION, UNITS 1 AND 2), ALAB-292, 2 NRC 634(1975) 2.5.3

5, 12, 2, 1 4 NRC 381(1976)

ALAB-353.

5,7.1 ALAB-481, 7 NRC 807(1978)

6, 15, 3 18P-77-21, 5 NRC 684(1977)

29

(JOSEPH M. FARLEY NUCLEAR PLANT, UNITS 1 AND 2), CLI-74-12, 7 AEC 203(1974) 3.17 5.6.2

5.7.1 CLI-81-27, 14 NRC 795(1981)

6.3 LBP-77-24, 5 NRC 804(1977) (UDSE-H M. FARLEY PLANT, UNITS 1 AND 2), ALAB-182, 7 AEC 210(1974) 2.9.5.3 3.17 3.4.1 3.5.3

2.9.3.1 (KEWAUNEE NUCLEAR POWER PLANT), LBP-78-24, 8 NRC 78(1978)

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(KOSHKOMONG NUCLEAR PLANT, UNITS 1 AND 2). CLI-74-45, 9 AEC 928(1974) 2.11.3

(KDSHKON9NG NUCLEAR POWER PLANT, UNITS 1 AND 2). CLI-75-2, 1 NRC 39(1975) 3.3.2.2

3.1.2.1 (KRESS CREEK DECONTAMINATION), ALAB-867, 25 NRC 900(1987) 3.1.2.6 LBP-85-48, 22 NRC 843(1985)

3.1.4.1 (LA CROSSE BOILING WATER REACTOR), ALAB-497, 8 NFC 312(1978)

ALAB-614, 12 NRC 347(1980)

3.1.4.2

6.24.7 12 NRC 36 1980) LBP-80-26.

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(LA CROSSE BOILING WATER REACTOR).
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  LEP-82-58, 16 NRC 512(1982)
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  LEP-88-15, 27 NRC 576(1968)
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(LASALLE COUNTY NUCLEAR STATION, UNITS 1 AND 2).
  ALAB-153, 6 AEC 821(1973)
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  CLI-73-8, 6 AEC 169(1973)
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(LIMERICK GENERATING STATION, UNIT 1).
  ALAB-833, 23 NRC 257(1986)
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  ALAE-835, 23 NRC 267(1986)
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  LBP-86-9, 23 NRC 273(1986)
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  LBP 88-12, 27 NRC 495(1988)
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(LIMERICK GENERATING STATION, UNIT 2).
  CLI-89-17, 30 NRC 105(1989) 5.7
(LIMERICK GENERATING STATION, UNITS 1 AND 2).
  ALAB-262, 1 NRC 163(1975)
                                  2.3.9.1
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  ALAS-726, 17 NRC 755(1083)
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ALAB-765, 19 NRC 645(1984)

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  ALA8-778, 20 NRC 42(1984)
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  ALAB 785, 20 NRC 848(1984)
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  ALAB-789, 20 NRC 1443(1984)
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  ALAB 804, 21 NRC 587(1985)
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  ALA3-806, 21 NRC 1183(1985)
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  ALAB-808, 21 NRC 1595(1985)
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  ALAB-814, 22 NRC 191(1985)
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  ALAB-819, 22 NRC 681(1985)
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(LIMERICK GENERATING STATION, UNITS 1 AND 2). 3.7

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2.11.5 ALAB-863, 25 NRC 273(1967)

3.11.1.1.1 5.1

5.10.3

5.5.1 5.8.2

CLI-85-13, 22 NRC 1(1985) 5.7

ULI-US-15, 22 NRC 184(1985) 2.11.1 2.9.5

3.1.4.1 5.7

CLI-86-18, 24 NRC 501(1986)

4.4.2 5.6.1

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C11-86 6, 23 NRC 130(1986) 4.4.1

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CLI-89-10. 30 NRC 1(1989) 6.15.1.1

5.7.1 CLI-89-15, 30 NRC 96(1989)

6.15.1.1

2.9.3 LGP-82-43A, 15 NRC 142(1982)

2.9.4.1.1

2.9.4.1.2

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3.4.1 6.15

6.15.1

LBP-82-72, 16 NRC 968(1982) 6.14

6.15.8

5.15.8.4

LEP-83-11, 17 NRC 413(1983)

6.15.6 6.15.8

6.15.8.5

LBP-83-25, 17 NRC 681(1983)

3.1.2.1.

5.5.1 5.8.10

LBP-83-39, 18 NRC 67(1983)

1.8 2.5.5.5

2.9.5.8

(LIMERICK GENERATING STATION UNITS 1 AND 2).
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LBP-84-

3.4.1

2.9.5.8 19 NRC 1020(1954)

LBP-84-18,

LBP-84-31, LBP-89-14.

6,15,3 20 NRC 446(1984)

3.1.2.1 30 NRC 55(1989)

L8P-89-19.

(LOW ENRICHED URANIUM EXPORTS TO EURATOM MEMBER NATIONS).
CLI-77-31, 6 NRC 849(1977) 2.9.10.1

(MAINE YANKEE ATOMIC POWER STATION). ALAB-144, 6 AEC 628(1973) 5.10.2.1

3.7.2 ALAB-161, 6 AFC (003(1973)

6 AEC 1148(1973)

At AB-156,

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3.7.2 ALAB-175, 7 AEC 621 1974]

3.7.2 7 AEC 2(1974)

2.9.3.1 15 NRC 199(1982)

6.10.1

18 NRC (57(1983)

CLI-83-21,

CL.T-74-2,

LBP-82-4,

(MANUSACTURING LICENSE FOR FLOATING NUCLEAR POWER PLANTS). 4.3 16 NRC 454(1982) ALAB-686,

4.6 16 NRC 837(1982) ALAB-689.

4.3 16 NRC 1691(1982)

Ct.I-82-37.

(BP-75-67, 2 NRC 813(1975)

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| | BLE HILL NEICLEAR GENER | : AB-"16. 3 NRC 1671197 |
| | ABLE HILL NEICLEAR GENER | A: AB-716, 3 NRC 167/197 |
| | ARBLE HILL NEICLEAR GENER | At AB-716, 3 NRC 167/197 |
| | MARRIE HILL NUCLEAR GENER | A: AB-~16. 3 NRC 1671197 |
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(MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2),
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                                 5.18
                                 5.19.4
                                 5.7.1
                                 6.18
                                 6.5.1
                                 6.5.2
  ALAB-530, 9 NRC 261(1979)
                                 4.4
  CLI-80-10, 11 NRC 438(1980)
                                 2.9.3.1
                                 2.9.4.1.1
                                 2.9.4.2
                                 6.24
                                 6.24.1.3
  LBP-86-16, 23 NPC 789(1986)
                                 6.14.3
  LEP-86-37, 24 NRC 719(1986)
                                 1.9
                                 3.1.2.1
(MIDLAND PLANT UNITS 1 AND 2).
  ALAB-101, 6 AEC 60(1973)
                                 2.8.1
                                 2.8.1.1
                                 2.8.1.3
                                 3.1.4.1
  ALAB-115, 6 AEC 257(1973)
                                 5.10.2.2
  ALAB-118, 6 AEC 263(1973)
                                 2.11.5
  ALAB- 6 AEC 322(1973)
                                 2.11.5
                                 2.11.6
                                 E -3
                                 5.8.3.1
  ALAB-123, 6 AEC 331(1973)
                                 3, 1, 1
                                 3.10
                                 3.7.2
                                 5.5.1
                                 5.5.2
  ALAB-235. 8 AEC 645(1974)
                                 4.3.1
                                 6.14.2.1
  ALAB-270, 1 NRC 473(1975)
                                 5.10.1
                                 5.10.3
                                 5.13.2
  ALAB-282, 2 NRC 9(1975)
                                 5.2
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| (MIDLAND PLANT, UNITS 1 AND 2). | |
|---------------------------------|---|
| ALAB-283, 2 NRC 11(1975) | 6.24.5 |
| ALAB-315, 3 NRC 101(1976) | 6.24.5 |
| ALAB-344, 4 NRC 207(1976) | 5.8.2 |
| ALAB-379, 5 NRC 565(1977) | 3.12 3.12.2 |
| ALAB-382, 5 NRC 603(1977) | 2.9.10.2 3.12.3 |
| ALAB-395, 5 NRC 772(1977) | 5.15.2 5.18 5.19.3 5.6.2 5.7 5.7.1 6.15.3.2 |
| ALAB-417, 5 NRC 1442(1977) | 5.4 6.14.3 6.4.1.1 |
| ALAB-438, 6 NCC 638(1977) | 2.11.6 5.12.2.1 |
| ALA8-458, 7 NRC 155(1978) | 4.3 5.15.3 5.7.1 5.7.2 6.15.4.2 |
| ALAB-468, 7 NRC 464(1978) | 3.3.4 5.8.2 |
| ALAB-541, 9 NRC 436(1579) | 5.12.2.1 5.8.2 |
| ALA8-634, 13 NRC 96(1981) | 5.12.2.1 |
| ALA8-674, 15 NRC 110(1982) | 3.1.2.1 |
| ALA8-684, 16 NRC 162(1982) | 3.1.2.5 5.4 |
| ALA8-6S1, 16 NRC 897(1982) | 1.5.2 3.1.2 3.7.1 4.2 4.2.2 4.6 |

(MIDLAND PLANT, UNITS 1 AND 2).

| MIDLAND PLANT, UNITS 1 AND 2). | |
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| | 6.4.1 |
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| ALAB-764, 19 NRC 633(1984) | 2.11.2 |
| | 2.11.2.4 |
| | 2.11.2.5 |
| | 2.11.6 |
| | |
| ALAB-842, 24 NRC 197(1986) | 2.9.9.3 |
| | 2.9.9.4 |
| | |
| CLI-74-3, 7 AEC 7,1974) | 6.24.4 |
| | |
| CLI-79-3, 9 NRC 107(1979) | 6.4.2.2 |
| | |
| CLI-83-2, 17 NRC 69(1983) | 1.5.2 |
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| LBP-74-54, 8 AEC 112(1974) | 3.7 |
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| LEP-78-27, 8 NRC 275(1978) | 2.6.3.3 |
| EUC 10 21, 0 MIL 2121 12101 | |
| | 2.9.3.1 |
| | 2.9.4 |
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| | 5.8.1 |
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| LBP-81-63, 14 NRC 1768(1981) | 2.11.2.6 |
| | |
| | 3.12 |
| | 6.5.4.1 |
| | |
| LBP-82-118, 16 NRC 2034(1982) | 6.21 |
| | |
| LBP-82-63, 16 NRC 571(1982) | 2.9.3.1 |
| | 2.9.3.3.3 |
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| LBP-82-95, 16 NRC 1401(1982) | 6.15.6 |
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| LBP-83-28, 17 NRC 987(1983) | 2.9.9 |
| | 2.9.9.2.2 |
| | 3.13 |
| | |
| LBP-83-53, 18 NRC 282(1983) | 2.11.2 |
| | 2.11.2.4 |
| | |
| LBP-83-64, 18 NRC 766(1983) | 2.11.2 |
| | 2.11.2.4 |
| | |
| LBP-83-70, 18 NRC 1094(1983) | 2.11.2.4 |
| | The second secon |

| (MIDEAND PLANT, UNITS 1 AND 2), LBP-34-20, 19 NRC 1285(1984) | 1.5.2 2.9.5.4 2.9.5.5 2.7.2.7 4.2 |
|---|---|
| LBP-85-2, 21 NRC 24(1985) | 2.9.3 3 2.9.4 |

(MONTAGUE NUCLEAR POWER STATION, UNITS 1 AND 2), LEP-75-19, 1 NRC 436(1975) 1.8 6 5.3.1

| (MONTICELLE PLANT, UNIT 1), ALAB-16, 4 AEC 435(1970) | 2.11.2.4 6.23.3.1 | | |
|---|----------------------|--|--|
| ALAB-611, 12 NRC 201(1980) | 4.6 | | |
| ALA8-620, 12 NRC 574(1980; | 3.4.3 | | |
| 4 AEC 440(1970) | 2.11.2.4 6.23.3.1 | | |

(NEP UNITS 1 AND 2). LBP-78-18, 7 NRC 932(1978) 2.9.3.3.3 (LBP-78-9, 7 NRC 271(1978) 1.5.1 1.8 0.1.2.5 6.16.1

(NINE MILE POINT NUCLEAP STATION, UNIT 2),
ALAB-264, 1 NRC 347(1975) 3.16
0.7.3.2
4.4.2
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5.6.3
6.15.3

LBP-74-26, 7 AEC 758(1974) 3.10

LBP-83-45, 18 NRC 213(1983) 2.10.2
2.9.4.1.1

| (NORTH ANNA NUCLEAR TATION, UNITS | 1 AND 2). |
|---|-----------|
| ALAB-146, 6 AEC 631(1978) | 2.9.3.2 |
| | 2.9.4.1.4 |
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| ALAB-256, 1 NRC 10(1975) | 2.9.1 |
| | 3.13 |
| | 3.7 |
| | 3.8 |
| | 4.3 |
| | |
| ALAB-289, 2 NRC 395(1975) | 2.9.3.3.3 |
| | |
| ALAB-324, 3 NRC 347(1976) | 1.5.2 |
| ALAB-342, 4 NRC 98(1976) | 2.9.3.3.3 |
| ALAB 342, 4 NKC 30(13/0) | 2.9.3.3.4 |
| | 2.9.4 |
| | 2.9.4.1.1 |
| | 2.9.7.1 |
| | 5.5.3 |
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| ALAB-491, 8 NRC 245(1978) | 5.5.1 |
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| | 6.9.2.2 |
| | |
| ALAB-522, 9 NRC 54(1979) | 2,9,4,1,1 |
| | 2.9.7.1 |
| | |
| ALAB-551, 9 NRC 704(1979) | 4.6 |
| | 5.19.1 |
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| | |
| ALAB-555, 10 NRC 23(1979) | 3.12.4 |
| | 3.16 |
| | |
| ALAB-568, 10 NRC 354(1979) | 5.10.2 |
| ALA8-578, 11 NRC 189(1980) | 4.6 |
| ALAB-SIB, IT MIC 1831 (1900) | 5.15 |
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| ALAB-584 11 NRC 4511 80) | 3.1.1 |
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| CLI-74-16, 7 AEC 313(1974) | 2.11.3 |
| | 2.11.5 |
| | |

(NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2), CLI-76-22, 4 NRC 480(1976) 1.5.2 6.5.4.1

UNPUBL. DEC(1976)

2.9.2

(NORTH ANNA POWER STATION, UNITS 1 AND 2', ALAB-741, 18 NRC 371(1983) 5.12.2 5.12.2.1

ALAB-790, 20 NRC 1450(1984) 5.1 5.1,1

LBP-85-34, 22 NRC 481(1985) 6.15.4

(NORTH COAST NUCLEAR PLANT, UNIT 1),

ALAB-286, 2 NRC 213(1975) 2.9.7 5.8.1

ALAB-313, 3 NRC 94(1976) 2.7 6.5.2

ALAB-605, 12 NRC 153(1980) 1.10

ALAB-652, 14 NRC 1125(1981) 1.3

1.9

LEP-80-15, 11 NRC 765(1980) 2.9.10. 3.1.2.2

3.1.2.2

(NUCLEAR FUEL RECOVERY AND RECYCLING CENTER). ALAB-447, 6 NRC 873(1977) 2.10.2

(OCONEE NUCLEAR STATION AND MCGUIRE NUCLEAR STATION).

ALAB-528, 9 NRC 146(1979) 2.9.3.3.3 2.9.4.1.2 2.9.4.2

2.9.6

(ONE FACTORY ROW, GENEVA, OHIO 44041), ALAB-929, 31 NRC 271(1990) 5.12.2

LBP-89-11, 29 NRC 306(1989) 3.1.2.2

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3.5.2.3
   LBP-90-17, 31 NRC 540(1990)
                                  6.24.3
   LBP-91-9, 33 NRC 212(1991)
                                  3.5.2
                                  3.5.2.3
(PALISADES NUCLEAR PLANT).
   ALJ-80-1, 12 NRC 117(1980)
                                  2.11.2.4
                                  2.11.3
                                  6.23.1
  LBP-/9-20, 10 NRC 108(1979)
                                  2.9.4.1.1
                                  2.9.4.1.2
                                  2.9.4.1.4
                                  2.9.5.1
                                  6.15.1.1
(PALISADES NUCLEAR POWER FACILITY).
  LBP-82-101, 16 NRC 1594(1982) 2.9.9.5
(PALO VERDE NUCLEAR GENERATING STATION, UNITS 1, 2 ALT 71.
   ALAB-336, 4 NRC 3(1976)
  ALAB-713, 17 NRC 83(1993)
                                 2.9.7
                                  5.6.6
  CLI-91-12, 34 NRC 149(1991)
                                  2.9.5
                                  2.9.5.1
                                  2.9.5.10
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  LBP-82- 17A, 16 NRC 1964(1982) 3.1.2.1
                                  3.1.2.6
                                  6.15
                                  6.15.1.2
                                  6.15.6
  LBP-82-1178, 16 NRC 2024(1982) 2.9.3
                                  2.9.3.3.3
                                  4 4 2
  LBP-82-45, 15 NRC 152(1982)
                                  6.15.8
  LBP-82-62, 16 NRC 565(1982)
                                 5.12.2.1
  LBP-91-13, 33 NRC 259(1991)
                                 2.9.9.5
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(ONE FACTORY ROW, GENEVA, OHIO 44041).

(PALO VERDE NUCLEAR GENERATING STATION, UNITS 1, 2 AND 3),

6.17.1

LBP-91-18, 33 NRC 394(1991) 3.1.2.2

LBP-91-19, 33 NRC 397(1991) 2.9.5

2.9.5.1 2.3.5.10

2.9.5.6

LBP-91-20, 33 NRC 416(1991) 2.9.5.1

LBP-91-4, 33 NRC 153(1981) 2.9.3.1

2.9.4.1.1 2.9.4.1.2

(PALD VERDE NUCLEAR GENERAT & STATION, UNITS 2 AND 3).

ALAB-742, 18 NRC 380(19:

5.12.2 5.12.2.1

LBF-83-36, 18 NRC 45(1983)

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3.1.2.1

3.1.2.5 6.15.1.1

6, 15.3

6.16.1

(PATHFINDER ATOMIC PLANT).

LP -89-30, 30 NRC 311(1989)

2.9.4

2.9.4.1.1 2.9.4.1.2

2.9.4.1.4

LBP-90-3, 31 NRC 40(1990)

2.9.4.1.2

2.9.4.1.4

6.13

(PEACH BOTTOM ATOMIC POWER STATION, UNIT 3),

4.1 ALAB-532, 9 NRC 279(1979)

6.15.8.5

(PEACH BOTTOM ATOMIC STATION, UNITS 2 AND 3).

ALAB-158, 6 AEC 999(1973)

5.7.1

ALAB-165, 6 AEC 1145(1973) 5.11.2

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(PEAC' | BOTTOM ATOMIC STATION, UNITS 2 AND 3).
   SLAB-216 8 AEC 13(1974)
                                   2 9 5 1
                                   6.16.2
   ALAB-221, 8 AEC 95(1974)
                                   5 7 1
   ALAB-389. 5 NRC 727(1977)
                                   3.1.2.1.1
                                   5 19 1
                                   5.5.4
   ALAR-540. 9 NRC 428(1979)
   ALA8-546, 9 NRC 636(1979)
                                   5.5.4
   ALAB-562, 10 NRC 437(1979)
                                   6.15.1.2
                                   6, 15, 8, 1
                                   3.3.5.2
   ALAB-566, 10 NRC 527(1979)
                                   3.7.1
                                   5.9.1
  CLI-74-32, 8 AEC 217(1974)
                                   2.10.2
```

(PEACH BOTTOM UNITS 2.3: ISLAND UNIT 2: HOPE CREEK UNITS 1.2).
ALAB-640. 13 NRC 487(1981) 3.17

(PEBBLE SPRINGS NUCLEAR PLANT, UNITS 1 AND 2).
ALAB-273, 1 NRC 492(19 3) 2.9.7
5.8.1

ALAB-333, 3 NRC 804(1976) 2.9.4
2.9.4.1.1

CLI-76-26, 4 NRC 608(1976) 3.3.6

CLI-76-27, 4 NRC 610(1976) 7.9.4
2.9.4.1.1
2.9.4.2

(PERKINS NUCLEAR STATION, UNITS 1, 2 AND 3),
ALAB-302, 2 NHC 856(1975) 2.9.7
5.8.1

ALAB-431, 6 NRC 4(.)(1977) 2.9.3.3.3

ALAB-433, 6 NRC 469(1977) 5.12.2
5.2

ALAB-591, 11 NRC 741(1980) 3.1.2.1

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FURKINS NUCLEAR STATION, UNITS 1, 2 AND 3),
  ALAB-597, 11 NRC 870(1980)
                                  5.6.5
                                  5.8.10
```

ALAB-668, 15 NRC 450(1982) 1.9

LBP-82-81, 16 NRC 112(1982) 1.9

(PERRY NUCLEAR POWER PLANT, LNIT 1). LBP-90-15, 31 NRC 501(1990) 2.9.4.1.1

LEP-90-25, 32 NRC 21(1990) 2.9.4.1.1

(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2). ALAB-294, 2 NRC 663(1975)

ALAB-298, 2 NRC 730(1975) 3.1.2.5

ALAB-443, 6 NRC 741(1977) 3.1.2.1 3.1.2.6 3.14.2 3.5.2.3 3.5.3

5.6.4

ALAB-675, 15 NRC 110(1982) 5.12.2.1

ALAB-706, 16 NRC 1754(1982) 2.9.5 5.12.2.1

ALAB-736, 18 NRC 165(1983) 3.15 3.5.5

ALAB-802, 21 NRU 490(1985) 2.9.2 3.1.2.7

3.11.1.1.1 5.10.3

6.16.1.2

ALAB-805, 21 NRC 596(1985) 5.12.2 5.12.2.1

ALAB-820, 22 NRC 743(1985) 5.7.1

ALAB-831, 23 NRC 62(1986) 6.27

ALAB-841, 24 NRC 64(1986) 3.3.1 3.5.2.3

5.10.3

5.6.3

| (PERRY | NUCLEAR | POWER | PLANT, UNITS | 1 AND 2), 5.8.2 6.16.1.3 |
|--------|----------|--------|--------------|--|
| CLI | -86-20, | 24 NRC | 518(1986) | 2.10.2 |
| CLI | -86-22, | 24 NRC | 685(1986) | 1.8 5.15.1 |
| CLI | -86-7, 2 | NRC : | 223(1986) | 3.14.2 4.4.2 4.4.4 |
| LBP | -81-24, | 14 NRC | 175(1981) | 2.9.4.1.1 3.17 |
| LBP | -81-35, | 14 NRC | 682(1981) | 2.11.4 2.9.3.3.3 2.9.5.3 2.9.9.2.2 3.7.3.2 |
| LBP | -81-42. | 14 NRC | 842(1981) | 2.9.5.7 |
| LBP | -81-57, | 14 NRC | 1037(1981) | 6.21.2 |
| LBP | -82-1A. | 15 NR | 43(1982) | 2.9.5.7 6.9.1 |
| LBP | -82-102, | 16 NRC | 1597(1982) | 2.11.2.2 |
| LBP | -82-11, | 15 NR(| 348(1982) | 2.9.5.5 2.9.5.7 |
| LEP | -82-114, | 16 NRC | 1909(1982) | 3.1.2.5 3.5 |
| LEP | -82-15. | 15 NRC | 555(1982) | 2.9.5.5 2.9.5.7 |
| LBP | -82-53, | 16 N.C | 196(1982) | 2.9.3.3.3 5.18 |
| LBP | -82-67, | 16 NRC | 734(1982) | 2.11.2.8 |
| LBP | -82-69, | 16 NAC | 751(1982) | 3.1.2.1 |
| LBP | -82-79, | 16 NRC | 111(1982) | 2.9.5.5 3.1.2.3 |
| LBP | -82-89, | 6 NRC | 1355(1982) | 2.9.5.5 |
| LBP | -82-9, | 15 NRC | 339(1982) | 3.1.2.3 |

| PERRY NUCLEAR POWER PLANT, UNITS LBP-82-90, 16 NRC 1259(1982) | 1 AND 2). 2.9.5.5 |
|--|---|
| LBP-82-98, 16 NRC 1459(1982) | 2.9.5 |
| LBP-83-18, 17 NRC 501(1983) | 6.17.1 |
| LBP-83-3, 17 NRC 59(1983) | 3.5.2.3 3.5.3 |
| LBP-83-38, 18 NRC 61(1983) | 6.13 6.15.1.1 |
| LBP-83-46, 18 NRC 218(1983) | 3.5.3 |
| LBP-83-52, 18 NRC 256(1983) | 3.1.2 |
| LBP-83-77, 18 NRC 1365(1983) | 5.4 |
| LBP-83-79, 18 NRC 1400(1983) | 2.11.1 |
| LBP-83-80, 18 NRC 1404(1983) | 2.9.3.3.3 2.9.5.5 |
| LSP-84-28, 20 NRC 129(1984) | 2.9.5.1 |
| LBP-84-3, 19 NRC 282(1984) | 3.14.2 4.4.1 |
| LBP-85-33, 22 NRC 442(1985) | 2.5.5.6 6.20 4 |
| | |
| (PHIPPS BEND NUCLEAR PLANT, UNITS ALAB-506, 8 NRC 533(1978) | 1 AND 2), 6.15 |
| ALAB-752, 18 NFC 1318(1983) | 6.5.4.1 |
| LBP-77-14, 5 NRC 494(1977) | 6.15 |
| LBP-77-60, 6 NRC 647(1977) | 6.15.4.2 |
| (PILGRIM NUCLEAR POWER STATION). | |
| ALAB-81. 5 AEC 348(1972) | 5.7.1 |
| ALAB-816, 22 NRC 461(1985) | 2.9.3.3.3 2.9.4 2.9.4.1.1 6.20.1 |
| CLI-82-16. 16 NRC 44(1982) | 2.9.3.1 |

| (PILGRIM NUCLEAR POWER STATION). | |
|---|----------------------------------|
| | 6.24.1.3 |
| LEP-85-24, 22 NRC 97(1985) | 2.9.3.3.3 2.9.4 2.9.4.1.1 |
| (PILGRIM NUCLEAR STATION). | |
| ALA8-74, 5 AEC 308(1972) | 5.10.2.1 |
| ALAB-83, 5 AEC 354(1972) | 3,1,1 3,11,1,1 3,16 4,2 |
| ("ILGRIM NUCLEAR STATION, UNIT 1). | |
| ALAB-191, 7 AEC 417(1974) | 3.5.1.2 6.1.4.3 |
| 21 AB-231, 8 AEC 633(1974) | 4.6 5.8.6 |
| (PILGRIM NUCLEAR STATION, UNIT 2), | |
| ALAB-238, 8 AEC 656(1974) | 2.9.3.3.3 |
| ALAB-269, 1 NRC 411(1975) | 2.9.7 5.4 5.8.1 |
| ALAB-479, 7 NRC 774(197P) | 3.7 6.16.1 |
| LEP-74-63, 8 AEC 330(1974) | 2.9.3.3.3 |
| LBP-76-7, 3 NRC 156(1976) | 2.9.9.5 |
| (POINT BEACH NUCLEAR PLANT), ALAB-73, 5 AEC 297(1972) | 4.6 |
| (PDINT BEACH NUCLEAR PLANT, UNIT 1 ALAB-696, 16 NRC 1245(1982) | 2.11.1 3.1.2.4 2.17 |

```
(POINT BEACH NUCLEAR PLANT, UNIT 1).
                                 3.3.2.4
                                 3.3.4
                                 3.5
                                 3.5.2.1
                                 4.6
                                 5.13.2
                                 5.4
  ALAB-719, 17 NOC 387(1983)
                                 3.3.1
                                 3.6
  CL1-80-38, 12 NRC 547(1980)
                                 2.9.4.1.1
                                 5.14
  LBP-80-29, 12 NRC 58:(1980)
  LBP-82-108, 16 NFC 1811(1982)
                                2.9.5
                                 2.9.9.5
                                 3.6
(POINT BEACH NUCLEAR PLANT, UNIT 2).
  ALAB-137, 6 AEC 491(1973)
                                3.7.2
                                 6.23.3.1
                                 3.1.1
  ALAB-78, 5 AEC 319(1972)
                                 5.16
                                 4.2
                                 5.6.1
                                 5 6.3
                                 6.20.4
  ALAB-32, 5 AE 350(1972)
                                 6.15.8.1
                                 6.15.8.2
(POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2),
                                 5.11
  ALAB-556. 15 NRC 277(1982)
                                 5.1.1
                                 5.11.2
  ALAR-739, 18 NRC 335(1983)
                                 3.1.2.1
                                 5.10.3
                                 5.6.1
  LBP-78-23, 8 NRC 71(1978)
                                 2.6
                                 2.9.3
                                 2.9.3.1
                                 3.1.2.2
  _BP-81-39, 14 NRC 819(1981)
                              3.1.2.4
```

```
(POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2).
  LBP-81-44, 14 NRC 850(1981)
                                 3.1.2.4
  LBP-81-45, 14 NRC 853(1981)
                                 3.1.2.4
                                 3.4
  LBP-81-46, '1 NRC 862(1981)
                                 3.1.2.4
  LBP-81-55, 14 RC 1017(1981)
                                 3.3.7
                                 3.4.1
                                 3.5.3
                                 6.23.3.1
  LBP-81-62, 14 NRC 1747(1981)
                                 6.23
  LSP-82-10, 15 NRC 341(1982)
                                2.11.5 2
                                 3.7.2
  LBP-82-12, 15 NRC 354(1982)
                                 3.1.1
                                 3.1.2.3
  LBP-82-19A, 15 NRC 623(1982)
                                3.1.2.4
  LBP-82-2, 15 NRC 48(1982)
                                 3.1.2.7
                                 6.23
  LBP-82-24A, 15 NRC 661(1982)
                                3.1.2.3
  LBP-82-33. 15 NRC 587(1982)
                                6 23
  LBP-82-42 15 NRC 130(1982)
                                6.23.3.1.
  LBP-82-5A, 15 NRC 216(1982)
                                 3.1.1
                                 3.1.2.3
                                 3.4.2.4
                                 6.23.3
                                 6.4.1.1
  LBP-82-6, '5 NRC 28:(1982)
                                 3.1.1
                                 3.1.2.3
                                 4.5
  LBP-82-88, 16 NRC 1035(1982)
```

(FRATRIE ISLAND NUCLEAR GENERATING PLANT, UNITS 1 AND 2),
ALAB-104, 6 AEC 179(1973) 2.9.3
4.3

ALAB-107, 6 Ar 4973) 2.11.1
2.9.3.1
2.9.4 1.4
2.9.5.11

```
(PRAIRIE ISLAND NUCLEAR GENERATING PLANT, UNITS 1 AND 2).
```

2.9.7.1

5.6.3

ALAB-110, 6 AEC 247(1973)

2.11.1 2.9.4.1.4 2.9.5.11

ALAB-244, 8 AEC 857(1974)

2.9.11 2.9.9.2.1 2.9.9.3 2.9.9.4 3.11.3 3.13.1 4.2.2 5.13.3 5.5.2

ALAB-252, 8 AEC 1175(1974)

2.9.5.2. 3.13.1 5. + 5.5

ALAB-284, 2 NRC 197(1975)

3.14.1

ALAB-288, 2 NRC 390(1975)

3.6

#LAB-419, 6 NRC 3(1977)

3.15 3.4

3.16

5.12.2.1.1

ALAB-455, 7 NRC 41(1978)

5.6.1 6.1 6.1.3 1 6.15.1 6.15.9

6.20.2

CLI-73-12, 6 AEC 241(1973)

2.11.1 2.9.4 1.4 2.9.5.11 3.5

CLI-75-1, 1 NRC 1(1975)

2.9.9 2.1 2.9.9.3 3.11.3 3.13.1 5.1 5.5

EN EN

(QUAD CITIES NUCLEAR POWER STATION), LBF 90-28, 32 NR.2 85(1990) 3.18.1

10 (QUANICASSEE PLANT, UNIT: 1 AND 2). CLI-74-29, 8 AEC 10(19'4) CLI-74-37, 8 AEC 627(1974)

2.9.10.1 (R.E. GINNA NUCLEAR PLANT, UNIT 1), LBP-83-73, 18 NRC 1231(1983)

2.9.4 1.1 2.9.4.1.2 6.15.1.1 6, 15, 1, 1 (RANCHO SECO NUCLEAR GENERA ING STATION), ALAB-655, 14 NRC 799(1981) 2 9.5. 5.6.3 42-91-17, 33 'RC 379(1931) LBF -91-30, 34 NRC 23(1991)

(REACTON OPERATOR LICENSE FOR SAN ONDFRE NUCLEAR GENERATING STATION, UNITS 2 AND 3). ALB ALAB-923, 30 NRC 261(1989) 4.6

(REVISION OF ORDERS TY MODIFY SOURCE MATERIALS LICENSES), CLI-86-23, 24 NRC 704(1986) 6.20.4

2.9.4. (RIVER BEND STATION, UNITS 1 AND 2), ALAB-183, 7 AEC 222(1974)

ALAB-317, 3 NRC 175(1976)

5.2 4

| (RIVER BEND STATION, UNITS 1 AND 2 ALAB-329, 3 NRC 607(1976) | 2.9.7 2.9.7.1 5.8.1 |
|--|--|
| ALA8-358. 4 NRC 558(1976) | 2.9.4.1.4 |
| ALAB-383, 5 NRC 609(1977) | 5.6.1 |
| ALAS-444. 6 NRC 760(1977) | 2.10.2 2.9.3.3 3 2.9.5.7 3.1.2.5 3.12.1.2 3.4.2 3.7.3.4 6.16.2 6.20.3 5.9.2.1 |
| LBP-74-74, 8 4EC 669(1974) | 2.11.5 |
| LBP-75-10, 1 NRC 246(1975) | 3.5 |
| LEP-83-52A, 18 NRC 265(1983) | 2,9,9,2,2 |
| (ROCKETDYNE DIVISION), A: AB-925, 30 NRC 709(1989) | 2.9.3 3.1.2.5 3.1.2.7 5.12.2 |
| CLI-90-5, 31 NRC 337(1990) | 2.9 3 3.1.2.5 3.1.2.7 5.12.2 |
| LBP-89-29, 30 NRC 299(1989) | 3.1.2.7 |
| LBP-90-10. 31 NRC 293(1990) | 3,11,1,1 |
| LBP-9C-11, 31 NRC 320(1990) | 3.11.1.2 |
| (SALEM NUCLEAR GENERATING STATION, ALAB-588, 11 NRC 533(1980) | UNIT 1), 5.12.2.1 |
| ALAB-650, 14 NRC 43(1981) | 4.2 4.4.2 5.10.1 |

```
(SALEM NICLEAR GENERATING STATION, UNIT 1).
                                 5.5.1
                                 6.15.1.2
                                 6.15.9
                                 3, 4, 1, 2
  LBP-/9-14. 9 NRC 557(1979)
                                 253
  LBP-80-27, 12 NRC 435(1980)
                                 6.15
(SALEM NUCLEAR GENERATING STATION, UNITS 1 AND 2).
  ALAB-136, 6 AEC 487(1973)
                                 2.9.2
                                 2.9.3
                                 2.9.3.1
(SAN ONOFRE NUCLEAR GENERATING STATION, UNIT 1),
  CLI-85-10, 21 NRC (569(1985) 6.26
(SAN ONDERE NUCLEAR GENERATING STATION, UNITS 1 AND 2).
  ALAB-680, 16 NRC 127(1982) 5.5.1
                                 5.6.1
                                 5 6 3
                                 5.7
                                 5.7.
                                 6.16.1
                                 6.5.1
```

(SAN ONOFRE NUCLEAR GENERATING STATION, UNITS 2 AND 3), ALAB-199, 7 AEC 478(1974) 5.7.1

ALAB-212, 7 AEC 986'1974) 3.3.2.4 ALAB-268, 1 NRC 383(1975) 3.4.3 3.7.3.1

> 5.6.4 6.16.1 6.16.3

ALAB-432, 6 NRC 465(1977) 5.6.1

ALAP-673, 15 NRC 688(1982) 3.17 5.7.1 5.8.13

ALAB-717, 17 NRC 346(1983) 1.8

```
(SAN ONOFRE NUCLEAR GENERATI G STATION, UNITS 2 AND 3).
                                 3 11
                                 3.11.1
                                 3.11.1.1
                                 3.11, 1, 1, 1
                                 3,11,2
                                 3.17
                                 3.4
                                 4.2
                                 4.2.2
                                 6.5.1
  CLI-82-11, 15 NRC 1383(1982)
                                 2.9.9.4
                                 3.13.1
                                 5.12.3
                                 3.1.2.2
  LBP-77-35, 5 NRC 1290(1977)
                                 6.20.1
  LBP-81-36, 14 NRC 691(1981)
                                 3.1.2.3
                                 3.4.2
                                 5.14
  LBP-82-3, 15 N°C 61(1982)
                                 3.17
  LBP-82-46, 15 NRC 1531(1982)
                                 3.14.2
(SEABROOK STATION, UNIT 1).
  LBP-91-28, 33 NRC 557(1991) 2.9.4.1.1
(SEABROOK STATION, UNIT 2).
  CLI-84-6, 19 NRC 975(1984)
                                 2.9.4.1.1
                                 2.9.5.1
                                 3.4.5
(SE
```

| ALAB-271, | | UNITS 1 AND 2), 478(1975) | 3.15 5.12.2.1 |
|-----------|-------|------------------------------|-------------------------|
| ALAB-293, | 2 NRC | 660(1975) | 3.3.1 3.3.4 5.8.2 |
| ALAB-295. | 2 NRC | 668(1975) | 3.3.1 3.3.4 5.8.2 |
| ALAB-338, | 4 NRC | 10(1976) | 5.7 |

(SEABROOK STATION, UNITS 1 AND 2), 5.7.1 ALAB-349 4 NRC 235(1976) 3.17 3.7.3.3 5.18 5.4 ALAB-350, 4 NRC 365(1976) 5.18 ALAB-356, 4 NRC 525(1976) 5.6.1 5.7 ALAB-366, 5 NRC 39(1977) 6.15. ALAB-390, 5 NRC 733(1977) 6.20.5 ALAB-422, 6 NRC 33(1977) 3.1.1 3.1.4.3 3.1.5 3.12.1 3.13.1 3.18 3.16.1 4.2 4.3 4.4 5.6.1 5.6.3 6.1.4 6.15 6.15.4.1 6.15.4.2 6.15.5 6.15.8.2 ALAB-423, 6 NRC 115(1977) 4.3 5.6.5 ALAB-471, 7 NRC 477(1978) 3.11.1.5 3.16 3.7.2 3.7.3.6 6.15.4 6.15.4.1 6.15.4.2 6.15.6.1.2 ALAB-488, 8 NRC 187(1978) 2.6 2.9.9.5

2.9.9.6 3.6 6.17.1

| | | UNITS 1 AND 2 304(1978) | 6.15.4 |
|-----------|---------|----------------------------|--|
| ALAB-499, | 8 NRC | 319(1978) | 6.15.4 |
| ALAB-513. | 8 NRC | 694(1978) | 3.1.2.1 5.6.1 |
| ALAB-520. | 9 NRC | 48(1979) | 3.11.1.1 3.11.1.6 |
| ALAB-548. | 9 NRC | 640(1979) | 5.15.2 |
| ALAB-557. | 10 NRC | 153(1979) | 6,15,4 |
| ALAB-623, | 12 NRC | 670(1980) | 6.26 |
| ALA8-731. | 17 NRC | 1073(1983) | 5.12.2 |
| ALAB-734, | 18 NRC | 11(1933) | 5.12.2 |
| ALAB-737, | 18 NRC | 168(1983) | 1.8 2.9.5 2.9.5.5 5.12.2 5.12.2.1 5.6.1 |
| ALAB-748. | 18 NF.C | 184(1983) | 2.1.4.1 |
| ALAB-T | 18 NRC | 1195(1983) | 3.1.4.1 3.1.4.2 |
| ALA8-751. | 18 NRC | 1313(1983) | 3.1.4.1 3.1.4.2 |
| ALA8-757. | 18 NRC | 1356(1983) | 3.1.4.1 |
| ALAB-762, | 19 NRC | 565(1984) | 5.12.2.1 |
| ALAB-838, | 23 NRC | 585(1986) | 2.9.7 5.12.2.1 |
| ALAB-839. | 24 NRC | 45(1986) | 2.6.1 5.12.2.1 |
| ALAB-854, | 24 NRC | 783(1986) | 2.9.9 5.8.11 6.14.3 6.16.1 6.16.1.3 |

| ISFARROOK ST | ATT | ON | UNITS 1 AND 2) | |
|--------------|-----|-----------|----------------|--|
| ALAB-858. | | | | 5.12.2 |
| ALTE SOUL | - | | | 5.12.2.1 |
| | | | | 5.8.2 |
| | | | | 0.0.2 |
| ALAB-860. | 25 | NIDO | 62(1082) | 5,12,2,1 |
| ALAD BOU. | 20 | DARKE | 031 1907 1 | |
| | | | | 5.8.2 |
| | | | | 6.20.4 |
| | - | | | |
| ALAB 862, | 25 | NRC | 144(1987) | 2.10.2 |
| | | | | 3,1,2,6 |
| | | | | 5.10.4 |
| | | | | |
| ALAB-864. | 25 | NRC | 417(1987) | 5.12.2.1 |
| | | | | 5.8.2 |
| | | | | |
| ALAB-865. | 25 | NRC | 430(1987) | 2.9.5.13 |
| | | | | 5.7.1 |
| | | | | |
| ALAB-875. | 26 | NRC | 251(1987) | 6.15.1.1 |
| | | | | 6.16.2 |
| | | | | 6.20.4 |
| | | | | |
| ALAB-879. | 26 | NRC | 410(1987) | 3,14,2 |
| | | | | 4 4 4 |
| | | | | |
| ALA8-883, | 27 | Nen | 43((988) | 2.9.5.5 |
| ALMO GOV. | | 1905 | | 4.4.2 |
| | | | | |
| ALAB-884. | 27 | NDC | 56(1982) | 5.12.2.1 |
| MEMB DOM, | - | N. Marine | July 1 July 1 | Maria Maria |
| ALAD-DOG | 27 | NIDC | 74(1988) | 4.4.1.1 |
| SCAD GGO, | - | 1415 | 14112001 | |
| A1 A2 - 900 | 0.7 | 81017 | 265(1988) | . 12.2.1 |
| ALIO DOD. | 4.1 | 1,650.0 | 2031 13003 | |
| | | | | The second secon |
| | | | | 5,8,2 |
| | | - | 244442224 | 4 |
| ULAR-RAI | 21 | IRC. | 341(1988) | 3,11 |
| | | | | 5.6.1 |
| | | A 1000 CT | | |
| ALAF | 27 | NRC | 485(1988) | 2.9.5.1 |
| | | | | 3.1.2.1 |
| | | | | 6.16.1 |
| | | | | |
| ALAB-894, | 27 | NRC. | 632(1988) | 5.4 |
| | | | 21.10221 | |
| ALAB-895. | 28 | NRC | 71 1988) | 6,20,4 |
| | | | | 6.8 |
| | | | | |
| ALAB-896, | 28 | NRC | 27(1988) | 5.12.2.1 |
| | | | | 5.8.1 |
| | | | | |
| ALAB-899. | 28 | NRC | 93(1988) | 2.9.5.1 |
| | | | | |

| (SEAEROOK 'T | ATI | ON. I | UNITS | 1 AND | 2). | |
|--------------|-----|-------|-------|-------|-----|----------|
| ALAB-904, | 28 | NRC | 509(| 1988) | | 5.16.1 |
| ALAB-906, | 28 | NRU | 615(| 1988) | | 5.12.2 |
| ALAB-915, | 29 | NRC | 4271 | 1989) | | 3.17 |
| | | | | | | 1.4.1 |
| | | | | | | 8.15.7 |
| ALA8-916, | 29 | NRC | 434(| :989) | | 5.12.2.1 |
| ALAB-918. | 29 | NRC | 473(| 1989) | | 2.9.5.13 |
| | | | | | | 2.9.5.4 |
| | | | | | | 2.9.5.5 |
| | | | | | | 1.4.1 |
| | | | | | | 1.4.2 |
| | | | | | | 5.16.1 |
| ALA8-920. | 30 | NRC | 121(| 1989) | | 5.4 |
| | | | | | | 8.8 |
| ALA8-924. | 30 | NRC | 331(| 1989) | | 1.8 |
| | | | | | - | 5.5.1 |
| | | | | | | 5.18 |
| ALA8-927, | 31 | NRC | 137(| 1990) | | 1.4.1.1 |
| ALAB-930. | 31 | NRC | 343(| 1990) | | 5.5.1 |
| | | | | | | 5.6.1 |
| ALAB-932. | 31 | NRC | 371(| 1990) | | 1.11.3 |
| | | | | | | 1.12 |
| | | | | | | 3.5.2 |
| | | | | | | 3,5.2,3 |
| | | | | | | 5.6.3 |
| ALA8-933, | 31 | NRC | 491(| 1990) | | 5.4 |
| ALAB-934. | 22 | NIDIC | 4/40 | 201 | | 1.10.2 |
| ALAB-939. | 22 | PARC | 11 13 | 301 | | 9.3.5 |
| | | | | | | 2.9.9.5 |
| | | | | | | 3.6 |
| | | | | | | 1.4.1.1 |
| | | | | | | 1.4.2 |
| ALAB-936, | 32 | NRC | 75(1 | 990) | | 9.5.5 |
| | | | | | | 1.4.1 |
| | | | | | | 1.4.2 |
| ALA8-937 | 32 | NRC | 135(| 1990) | | 8. |
| | | | | | | 1.1.2.5 |
| | | | | | | 1.10 |

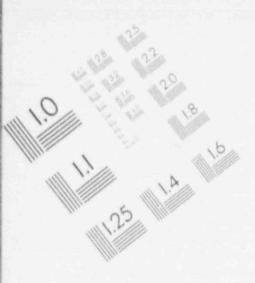
| 0.3.11.4 6.55.4.3 6.1.3 | 2 2 2 4 4 4 2 4 2 4 2 4 2 4 2 4 2 4 2 4 | 1.8 3.1.2.5 3.10 6.16.1.3 | 2 9 5 1 | 4 | 2 2 2 2 2 2 4 4 6 2 2 2 2 2 4 4 4 4 4 4 | 6 3 3 4 5 5 5 5 5 5 5 5 5 5 5 5 5 5 5 5 5 | 8.5.1 6.20.5 | 6, 16, 1 | 2.10.2 5.15 | 5, 15 |
|----------------------------------|---|------------------------------------|----------------------------|---------------------------|---|---|----------------------------|----------|----------------------------|---------------------------|
| (SEABROOK STATION, UNITS 1 AND 2 | ALAB-940, 32 NRC 225(1990) | ALAB-941, 32 NRC 337(1990) | ALAB-942, 32 NRC 305(1990) | ALAB-945, 33 NRC 11(1991) | ALAB-946, 33 NRC 245(1991) | ALAB-947, 33 NRC 299(1991) | ALAB-949, 33 NRC 484(1991) | 6-17, 4 | CLI-77-25, 6 NRC 535(1977) | CLI-77-8, 5 ARC 503(1977) |

(SEABROOK STATION, UNITS 1 AND 2). 5.7 5.7.1 6.15 6.15.2 6.15.3.1 6. 15.4.1 6.15.4.2 CLI-78-1, 7 NRC 1(1978) 3.17 5.12.3 5.3.3 5.7 6.15.3 6.15.8.4 C. B. CLI-78-14, 7 NRC 952(1978) 5.19.1 6.15.4 6.15.8.1 4.7 CLI-78-15, 8 NRC 1(1978) CLI-78-17, 8 NRC 179(1978) 6.15.8.4 CL1-83-23, 18 NRC 311(1983) 2.9.5.5 CLI-88-10, 28 NRC 573(1988) 6.20.4 6.8 CLI-88-7, 28 NRC 271(1988) 6.8 CLI-88-8, 28 NGC 419(1988) 2.9.5.5 4.4.2 6.8 CLI-89-20, 30 NRC 231(1989) CLI-89-3, 29 NRC 234(1989) 2.9.5.1 2.9.5.4 4.5 6.20.4 6.8 CLI-89-4, 29 NRC 243(1989) 5.8.2 CLI-89-7, 29 NRC 395(1989) 6.8 CLI-89-8, 29 NRC 399(1989) 5.7.1 6.15.1.1 6.20.4 CLI-90-10, 32 NRC 218(1990) 4.4.2

CLI-90-3, 31 NRC 219(1990)

3.1.2

| (SEABROOK STATION, UNITS 1 AND 2). | |
|------------------------------------|-----------|
| | 5.15 |
| | 5.7.1 |
| | |
| CLI-90-6, 31 NRC 483(1990) | 4.4.1.1 |
| | 4.4.2 |
| | |
| LEP-74-36, 7 AEC 877(1974) | 1.9 |
| | 3.5 |
| | 3.5.3 |
| LBP-75-28. 1 NRC 513(1975) | 2.11.2.4 |
| COT 10 20. 1 MIG 313113131 | |
| LBP-75-9, 1 NRC 243(1975) | 3.5.2.2 |
| | |
| LBP-82-106, 16 NRC 1649(1982) | 2.9.3.1 |
| | 2.9.3.2 |
| | 2.9.5 |
| | 2.9.5.3 |
| | 2.9.5.7 |
| | 4.5 |
| | 5.12.2.1 |
| | 6.15.7 |
| | 0.10.2 |
| LBP-82-76, .6 NRC 102(1982) | 1.7.1 |
| COP 02 (0, 10 MAG 102) | 2.10.2 |
| | 2.9.5.1 |
| | |
| | 3.1.2.1.1 |
| | 3.17 |
| | 6.15.1.1 |
| 100 82 17 12 NOC 4007 (002) | 2 44 2 |
| LBP-83-17, 17 NRC 490(1983) | 2.11.2 |
| | 2.11.2.4 |
| | 2.11.2.6 |
| | 2.11.2.8 |
| LBP-83-20A, 17 NRC 586(1983) | 2.11.5.2 |
| LDF 03 20A, 17 NRC 300(1903) | 3.7.2 |
| | 3.7.2 |
| LBP-83-32A, 17 NRC 1170(1983) | 3.5.2.3 |
| CDF 03 32M, 11 MAC 11701 12037 | 3.5.3 |
| | 3.3.9 |
| LSP-83-9, 17 NRC 403(1983) | 2.10.2 |
| | |
| LBP-86-22, 24 NRC 103(1986) | 2.9.9 |
| | |
| LBP-86-24, 24 NRC 132(1986) | 2.10.2 |
| | 5.2 |
| | 6.20.4 |
| | |
| LEP-86-25, 24 NRC 141(1986) | 6 20.4 |
| | |
| LBP-86-30, 24 NRC 437(1986) | 3.5.2.3 |
| | 3.5.3 |





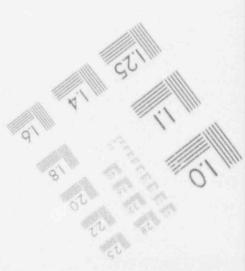


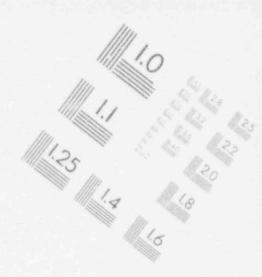




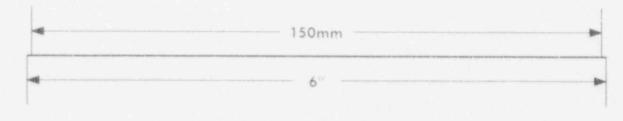
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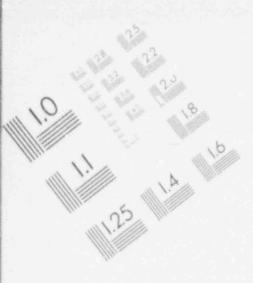


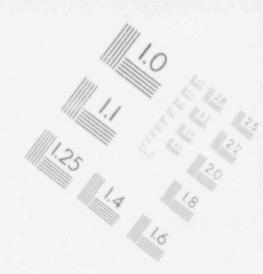


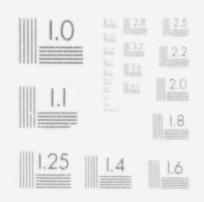


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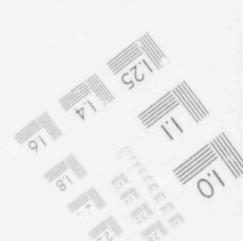


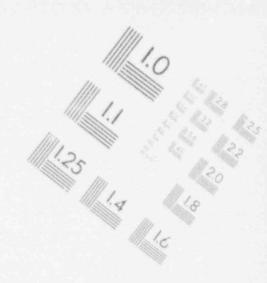


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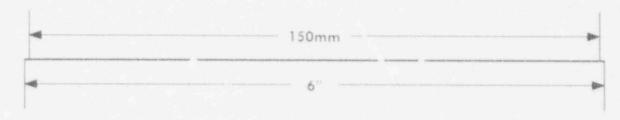
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770 BASKET ROAD P.O. BOX 338 WEBSTER, NEW YORK 14580 (716) 265-1600 2.9.9 6.14.3 6, 16, 1

LBP-87-12, 25 NRC 324(1987)

6.20.4

LBP-87-3, 25 NRC 71(1987)

2.9.5.5 4.4.1 4 (2

LBP-88-20, 28 MRC 161(1988)

6.16.1

LBP-88-21, 28 NRC 170(1988)

5.12.2 5.12.2.1

LBP-88-28, 28 NRC 537(1988)

2.11.2.5

LBP-88-31, 28 NRC 652(1987)

3.5.2.3 3.5.3

LBP-88-32, 28 NRC 667(1988)

1.8

LBP-88-6, 27 NRC 245(1988)

2.9.5.1 3.1.2.1

LBP-88-8, 27 NRC 293(1988) 6.23

6.8

LBP-89-10, 29 NRC 297(1989)

2.2

LBP-89-28, 30 NR 271(1989)

2.9.5.1

3.17

4.4.2

LBP-89-3, 29 NRC 51(1989)

3.17 6.15.7

LBP-89-32, 3. NRC 375(1989)

1.8 3.1.2.5

3.10

3.11.4

6.16.1.3

LBP-89-33, 30 NRC 656(1989)

3.1.2

LBP-89-38, 30 NRC 725(1989)

3.5.1 4.4.1

6.20.5

LBP-89-4, 29 NRC 62(1989)

2.9.5.4

2.9.5.5

3.1.2.1

4.4.1

3

| 6.46.1 | 3.5.2.3 | 4 4 2 5 | 00000044 0000044 000 + 0 | 3.5.2.3 | 3 5 2 3 |
|-----------------------------------|----------------------------|---------------------------|--------------------------------|-----------------------------|-----------------------------|
| (SEABROOK STATION, UNITS 1 AND 2) | LBP-89-9, 29 NRC 271(1989) | LEP-90-1, 31 NRC (9(1990) | LBP-90-12, 31 NRC 427(1990) | LBP-90-44, 32 NRC 433(1990) | LBP-91-24, 33 NRC 446(1991) |

3.1.2.6 (SECTION 274 AGREEMENT), CLI-88-6, 28 NRC 75(1988) (SENIOR OPERATOR LICENSE FOR BEAVER VALLEY POWER STATION, UNIT 1), LBP-87-23, 26 NRC 81(1987) 3.7.

6,23,1 6.16.1 LBP-87-28, 26 MRC 297(1987) LBP-88-5, 27 NRC 241(1988)

2.2 (SEQUOYAH UF6 TO UF4 FACILITY). CLI-86-17, 24 NRC 489(1986) (SHEARON HARRIS NUCLEAR PLANT, UNITS 1 AND 2).
LBP-84-15, 19 NRC 837(1984) 3.12.3
3.5.2.3
3.5.2.3

LEP-84-7, 19 NRC 432(1984)

| SHEARON HARRIS NUCLEAR PLANT. | UNITS 1-4). |
|-------------------------------|---------------|
| ALAB-184, 7 AEC 229(1974) | 6.19.2 |
| | 6.5.3.2 |
| ALAB-490, 8 NRC 234(1978) | 3.7.2.2 |
| | 6.15.5 |
| ALAB-526, 9 NRC 122(1979) | 2.9.12 |
| ACAD VEV. R 1995 7251 757 77 | 2.9.3.3.3 |
| | 5.19.1 |
| ALAB-577, 11 NRC 18(1980) | 3.1.2.1.1 |
| | 3.16 |
| | 3.3.1 |
| | 3.3.1.1 |
| | 3.4 |
| | 3.7.3.7 |
| | 4.3 |
| | 5.19.1 |
| | 5.2 |
| | 5.5 |
| | 5.6.1 |
| | 6.16.1 |
| ALA8-581, 11 NRC 233(1980) | 1.8 |
| | 3.1.2.1.1 |
| | 3.3.1 |
| | 3.7.3.7 |
| | 5.6.3 |
| CLI-79-10. 10 NRC 675(1979) | 4.4.2 |
| CLI-79-5, 9 NRC 607(1979) | 3.1.2.1 |
| | 4.4.2 |
| CLI-80-12, 11 NRC 514(1980) | 1.8 |
| | 2.5.1 |
| | 3.1.2.1.1 |
| | 3.1.2.5 |
| | 3.16 |
| | 3.3.1 |
| | 3.3.1.1 |
| | 3.4 |
| | 3.7.3.7 |
| | 4.3 5.19.1 |
| | 5.2 |
| | 5.5 |
| | 5.6.1 |
| | 5.6.3 |
| | 6.16.1 |
| (8P-78-2, 7 NRC 83(1978) | 4.4 |
| For 10.5' 1 1410 05(15)0) | |

(SHEARON HARRIS NUCLEAR POWER PLANT),
ALAB-837, 23 N.C 525(1986) 2 9.5.6
3 17
5 10.3
5 2
5 2
6 3

ALAB-843, 24 NRC 200(1986)

ALAB-852, 24 NRC 532(1986)

2 11.5.2 2 9 5.1 5 5.10.3 6 6.3 6 1.2 ALA8-856, 24 NRC 802(1986)

CLI-86-24, 24 NRC 769(1986)

2.2

1.6 CLI-87-1, 25 NRC 1(1987) LBP-85-27A, 22 NRC 207(1985)

107 LC LSP-85-28, 22 NRC 232(1985) 22 NRC 899(1985)

LBP-85-49.

23 NRC 294(1986)

LBP-86-11,

(SHEARON HARRIS NUCLEAR POWER PLANT, UNITS 1 AND 2), LBP-82-119A, 16 NRC 2069(1982) 2.9.1 2.9.5.1

2.9.5.6 6.20.4 6.5.3.2

LBP-83-27A, 17 NRC 971(1983) 6.15.6

(SHEFFIELD, ILL. LOW-LEVEL RADIOACTIVE WASTE DISPOSAL SITE).

ALAB-473, 7 NRC 737(1978) 2.9.4.1.1 2.9.4.1.4 2.9.4.2

2.9.5.3 2.9.7 5.8.1

ALAB-494, 8 NRC 299(1978) 3.1.4.1

3.1.4.2

ALAB-606, 12 NRC 156(1980) 5.4 6.15.1.1

ALAS-866, 25 NRC 897(1987) 6.13

CLI-79-6, 9 NRC 673(1979) 6.24.3

6.24.4

CLI 80-1, 11 NRC 1(1980) 3.1.1

3.1.4.2

4.4.2

5.15

6.24

6.24.3

LBP-87-5, 25 NRC 98(1987) 6.13

(SHOREHAM NUCLEAR POWER STATION).

ALAB-99, 6 AEC 53(1973) 6.9.1

CLI-85-12, 21 NRC 1587(1985) 6.15.1.1

(SHOREHAM NUCLEAR POWER STATION, UNIT 1). ALAB-743, 18 NRC 387(1983) 2.9.3.3

2.9.3.3

5.6.1

| UNIT 1). 2.9.3.3.4 2.1.2.2 5.12.2 5.12.2 5.12.2 5.7.1 5.7.1 | - 0 - 5 6 | 00 00 - | 2 - 2 - 2 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 | 3.1.4.2 |
|---|--|--|--|----------------------------|
| DREHAM NUCLEAR POWER STATION, ALAB-773, 19 NRC 995(1984) ALAB-777, 20 NRC 21(1984) ALAB-787, 20 NRC 1097(1984) ALAB-788, 20 NRC 1097(1984) ALAB-788, 20 NRC 1097(1984) ALAB-810, 21 NRC 1616(1985) ALAB-827, 23 NRC 3(1996) | ALAB-832, 23 NRC 135(1986) ALAB-855, 24 NRC 792(1986) | LAB-861, 25 NRC 1291 987 LAB-889, 27 NRC 257(1988 LAB-900, 28 NRC 275(1988 | ALAB-901, 28 NRC 302(1988) ALAB-902, 28 NRC 423(1988) ALAB-905, 28 NRC 515(1988) | ALAB-907, 28 NRC 620(1988) |

| (SHOREHAM NUCLEAR POWER STATION, ALAB-311, 29 NRC 247(1989) | UNIT 1), 4.6 |
|--|--|
| CLI-84-20, 20 NRC 1061(1984) | 3.1.4.1 |
| CLI-84-21, 20 NRC 1437(1984) | 5.7.1 |
| CL1-84-8, 19 NRC 1154(1984) | 3.1.1 6.19 |
| CLI-84-9, 19 NRC 1323(1984) | 6.15.1.1 |
| CLI-86-13, 24 NRC 22(1986) | 1.8 |
| CLI-87-12, 26 NRC 383(1987) | 2.11.1 2.9.5.6 5.1 5.2 5.6.3 |
| CLI-87-5, 25 NRC 884(1987) | 4.4.2 |
| CLI-88-11, 28 NRC 603(1988) | 2.11.5.2 |
| CLI-98-3, 28 NRC 1(1988) | 4.4.1 4.4.2 1.5 |
| CLI-88-9, 28 NRC 567(1988) | 3.3.1.1 |
| CLI-89-1, 29 NRC 89(1989) | 4.4.2 |
| CLI-89-2, 29 NRC 211(1989) | 2.11.5.2 |
| CLI-90-8, 32 NRC 201(1990) | 6.13.1.1 |
| CLI-91-1, 33 NRC 1(1991) | 6.15,1.1 |
| CLI-91-2, 33 NRC 61(1991) | 3.1.2.7 3.10 6.15.1.1 |
| CLI-91-3, 33 NRC 76(1991) | 3.15 5.12.2 5.12.2.1 |
| CLI-91-4, 33 NRC 233(1991) | 2.9.7 5.12.2 5.12.2.1 |
| CLI-91-8, 33 NRC 461(1991) | 3.1,2.7 3.10 6.14 6.15.1.1 |

| UNIT 1). 2.9.4.1.2 | 3.4.1 | 3.1.2.7 | 6 9 9 9 9 9 9 9 9 9 9 9 9 9 9 9 9 9 9 9 | 2,10.2 | (C) | 3.1.2.7 | 2.9.5 | 6.23.3.2 | 22.11.2.2.11.2.4.4.4.6.6.6.4.4.6.6.6.4.6.6.6.6.6.6.6 | 2.10.2 | 3 1.2.7 | 6.16.2 | 0 0 0 0 0 0 0 0 0 0 0 0 0 0 0 0 0 0 0 | 2.9.3 | 0 0 + 0 0 + + 0 0 |
|--|------------------------|---------------------------|---|-------------------------|---------------------------|-------------------------|-------------------------|-------------------------|--|-------------------------|-------------------------|-------------------------|---------------------------------------|-------------------------|-------------------------|
| AM NUCLEAR POWER STATION. 77-11, 5 NRC 481(1977) | 81-18, 17 NRC 71(1981) | 82-107, 16 NRC 1657(1982) | 82-115, 16 NRC 1923(1982) | 82-19. 15 NRC 601(1982) | 82-41, 15 NRC 1295 (1982) | 82-73, 16 NPC 974(1982) | 82-75, 16 NRC 986(1982) | 82-80, (6 NRC 112(1982) | 82-82, 16 NRC 114(1582) | 83-13, 17 NRC 469(1983) | 83-21, 17 NRC 593(1983) | 83-22, 17 NRC 60£(1983) | 83-30, 17 NRC 1132(1983) | 83-42, 18 NRC 112(1983) | 83-57, 18 NRC 445(1983) |
| | | | LBP-82 | | | | | | | L8P-83 | | | | | |

```
(SHOLEHAM NUCLEAR POWER STATION, UNIT 1).
                                  3.14.2
                                  3.16
                                  3.8.1
                                  6.15.1.1
                                  6.15.6
                                  6.9.1
                                  6.9.2.2
  LBP-83-61, 18 NRC 700(1983)
                                  2.11.3
                                  3.11.1.5
  LBP-83-72, 18 NRC 1221(1983)
                                  2.11.2.4
  LEP-84-29A, 20 NRC 385(1984)
                                  3.1.4.1
  LEP-84-30, 20 NRC 426(1984)
                                  2.9.5.5
                                  6.19
  LBP-84-45, 20 NRC 1343(1984)
  LBP-84-53, 20 NRC 1531(1984)
                                  5.19.3
                                  6.5.4.1
  LBP-85-12, 21 NRC 644(1985)
                                  1.8
                                  3.1.2.6
  LBP-86-38A, 24 NRC 819(1986)
                                  3.1.2.1
  LEP-87-26, 26 NRC 201(1987)
                                  3.5.2
                                  3.5.2.3
                                  3.5.3
  LBP-87-29, 26 NRC 302(1987)
                                  3.5.2
                                  3.5.2.3
                                  3.5.3
                                  5.14
  LBP-88-13, 27 NRC 509(1988)
                                  3.10
  LBP-88-24, 28 NRC 311(1988)
                                  2.11.5.2
  LBP-88-29, 28 NRC 637(1988)
                                  3.1.4.2
  LBP-88-30, 28 NRC 644(1988)
                                  6.16.1
  LBP-88-7, 27 NRC 289(1988)
                                  3.1.2.1
  LBP-89-1, 29 NRC 5(1989)
                                  2.9.5.10
                                  2.9.5.6
                                  7 1.2.6
                                  0.12.2.1
  LEP-91-1, 33 NRC 15(1991)
                                 2.9.3.2
```

| (SHOREHAM NUCLEAR POWER STATION, | UNIT 1), 2.9.4 2.9.4.1 2.9.4.1.1 2.9.4.1.2 3.1.2.1 |
|---|---|
| | 2.9.4.1.1 2.9.4.1.1 2.9.4.1.2 |
| LBP-91-26, 33 NRC 537(1991) | 2.9.4 2.9.4.1 2.9.4.1.1 2.9.4.1.2 |
| LBP-91-32, 34 NRC 132(1991) | 2.9.4 2.9.4.1 2.9.4.1.1 2.9.4.1.2 |
| LBP-91-35, 34 NRC 163(1991) | 2.9.4.1 2.9.5.1 2.9.5.3 6.15.1.1 |
| LBP-91-7, 33 NRC 179(1991) | 2.9.3.2 2.9.4 2.9.4.1 2.9.4.1.1 2.9.4.1.2 |
| (SKAGIT NUCLEAR PROJECT, UNITS 1 ALAB-446, 6 NRC 870(1977) | AND 2), 6.19.1 |
| ALAB-523, 9 NRC 58(1979) | 2.9.3.3.3 |
| ALAB-552, 10 NRC 1(1979) | 2.9.3.3.3 |
| ALAB-556, 10 NRC 20(1979) | 3.1.4.1 3.1.4.2 5.2 |
| ALAB-559, 10 NFC 162(1979) | 2,9,3,3,3 |
| ALAB-572, 10 NRC 693(1979) | 3.15 |
| CLI-80-34, 12 NRC 407(1980) | 2.9.3.3.5 |
| LBP-77-61, 6 NRC 674(1977) | 6.19.1 |

```
(SKAGIT NUCLEAR PROJECT, UNITS 1 AND 2),
LBP-79-16, 9 NRC 711(1979) 2 9.3.3.3
UNREPORTED(1980) 2.9.3.3.4
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(SKAGIT/HANFORD NUCLEAR POWER PROJECT, UNITS 1 AND 2), ALAB-683, 16 NRC 160(1982) 5.8.1

ALAB-700, 16 NRC 1329(1982) 2.9.4.1.2.

ALAB-712, 17 NRC 81(1983) 2.9.7

LBP-82-26, 15 NRC 74(1982) 2.9.4.1.1

LBP-82-74, 16 NRC 98!(1982) 2.9.3.2 2.9.3.2 2.9.3.3.3 2.9.4.1.1 2.9.4.1.2

(SOUTH TEXAS PROJECT, UNITS 1 AND 2).

ALAB-381, 5 NRC 582(1977) 3.1.2.1.1 3.1.2.5 4.4

6.16.1

ALAB-549, 9 NRC 644(1979) 2.9.3.3.3 2.9.4.1.2

2.9.5.1

ALAB-575, 11 NRC 14(1980) 3.17

ALAB-639, 13 NRC 469(1981) 2.11.2.4

5.12.2.1

6.23.3.1

ALAB-672, 15 NRC 677(1982) 3.1,4.1 3.1.4.2

ALAB-799, 21 NRC 360(1985) 2.9.3.3.3

2.9.3.5

2.9.9

3.1.2.1

3.13

5.10.3

| (SOUTH TEXAS PROJECT, UNITS 1 AND | 2), |
|--|-----------|
| CLI-77-13, 5 NRC 1303(1977) | 3.17 |
| | 6.3.1 |
| | |
| CL1-78-5, 7 NRC 397(1978) | 6.3 |
| | |
| CLI-80-32, 12 NRC 281(1980) | 2.2 |
| CLI-82-9. 15 NRC 136(1982) | 3.1.4.2 |
| CE1-82-9, 13 MMC /301 (302) | |
| CLI-87-8, 26 NRC 6(1987) | 6.10 |
| | |
| LBP-79-10, 9 NRC 439(1979) | 2.9.4.1.1 |
| | 2.9.4.1.2 |
| | 2.9.4.2 |
| | 3.17 |
| | 6.15 |
| LBP-79-27, 10 NRC 563(1979) | 3.1.2.2 |
| the rate, to the same same | 3.17 |
| | 6.3 |
| | |
| LBP-79-5, 9 NRC 193(1979) | 2.11.2.6 |
| | 2.11.5 |
| The second secon | |
| LBP-81-54, 14 NRC 918(1981) | 3.1.2.5 |
| | 3.4.2 |
| LBP-82-91, 16 NRC 1364(1982) | 2.9.5.5 |
| COP 02 31. 10 Mile 1841. | 6.16.1 |
| | |
| LBP-83-26, 17 NRC 945(1983) | 2.10.2 |
| | |
| LBP-83-37, 18 NRC 52(1983) | 2.9.5.5 |
| | 6.8 |
| 100 00 10 10 100 000 1000 | c 20 4 |
| LBP-83-49, 18 NRC 239(1983) | 0.20.9 |
| LBP-84-13, 19 NRC 659(1984) | 3.7.3.7 |
| LDF -04 13, 13 1865 5531 1957 | |
| LBP-85-19, 21 NRC 1707(1985) | 4.4.1.1 |
| | 4.4.2 |
| | 5.6.1 |
| | 6.4.2.3 |
| | |
| LBP-85-42, 22 NRC 795(1985) | 4.4.1 |
| | 4.4.2 |
| LBP-85-45, 22 NRC 819(1985) | 4 4 1 1 |
| FOL 02 42' 15 JAVE 019113001 | 4.4.2 |
| | 6.4.2 |
| | |
| LBP-85-6, 21 NRC 447(1985) | 6.5.4.1 |
| | |

```
(SOUTH TEXAS PROJECT, UNITS 1 AND 2),
  LEP-85-8, 21 NRC 516(1985) 3.1.2.3
  LBP-85-9, 21 NRC 524(1985)
                                 2.9.5.5
  LBP-86-15, 23 NRC 595(1986)
                                 3.5
                                  3.5.2.3
                                  3.5.3
                                 4.4.2
                                  4.4.4
                                  6.4.1.1
                                  6.5.4.1
  LBP-86-5, 23 NRC 89(1986)
                                 6.9.1
  LBP-86-8, 23 NRC 182(1986)
                                  2.9.5
                                  6.9.1
(ST. LUCIE NUC_EAR PLANT UNITS 1 AND 2:TURKEY POINT, UNITS 3 AND 4).
  LBP-77-23, 5 NRC 789(1977)
                                2.9.3.3.3
                                 3.1.2.1.1
(ST. LUCIE NUCLEAR PLANT, UNIT 2),
  ALAB-274, 1 NRC 497(1975)
                               5.13.1.1
  ALAB-280. 2 NRC 3(1975)
                               4.2.2
                                 5, 13.3
                                 5.5.2
  ALAB-335, 3 NRC 830(1976)
                                 3.11.4
                                 4 4
                                 5.10.1
                                 5.5.1
                                 6.19.2.1
  ALAB-404, 5 NRC 1185(1977)
                                 5.7.1
  ALAB-420, 6 NRC 8(1977)
                                 2.9.3.3.3
                                 2.9.3.3.4
                                 5.5.3
                                 6.3
  ALAB-435, 6 NRC 541(1977)
                                 5.10.1
                                 6.15.4
                                 6.15.4.1
                                 6.23.3.1
  ALAB-553, 10 NRC 12(1979)
                                 3.3.2.4
  ALA8-579, 11 NRC 223(1980)
                                 4.4.1.1
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(ST. LUCIE NUCLEAR PLANT, UNIT 2);
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5.12.1 6.24 ALAB-661, 14 NRC 1117(1981) 2.5.1 6.3.1 CLI-78-12, 7 NRC 939(1978) 2.9.3.3.3 2.9.3.6 2.9.7 5.8.1 6.3 6.3.1 6.3.2 CLI-80-41, 12 NRC 650(1980) 5.17 LBP-79-4, 9 NRC 164(1979) 2.11.2 6 3.3 6.3.3.1 LBP-81-28, 14 NRC 333(1981) 6.3.2

(ST. LUCIE NUCLEAR POWER PLANT, UNIT 1). ALAB-893, 27 NRC 627(1988)

LBP-81-58, 14 NRC 1167(1981) 3.17

2.9.4.1.4 2.9.5 2 9 5 1 5.6.6 6.1.4.4 6.15.7 6.15.9 6.16.2

ALAB-921, 30 NRC 177(1989) 5.10.3

5.6.3 6.16.1

LBP-88-10A, 27 NRC 452(1988) 2.9.4.1.4

2.9.5 6.1.4.4 6.15.7 6.15.9 6.16.2

LBP-88-27, 28 NRC 455(1988) 3.5.2.3

3.5.3

(ST. LUCIE NUCLEAR POWER PLANT, UNIT 2). LBP-87-2, 25 NRC 32(1987) 2.9.4 2.9.4.2 (ST. LUCIE NUCLEAR POWER PLANT, UNITS 1 AND 2). CLI-89-21, 30 NRC 325(1989) 2.2 2.9.4.1.1 (ST. LUCIE PLANT, UNIT NO. 2). ALAB-665, 15 NRC 22(1982) 2.9.3.6 6.3 6.3.2 LBP-82-21, 15 NRC 639(1982) 6.3 (ST. LUCIE PLANT, UNIT 1: TURKEY POINT PLANT, UNITS 3 AND ~). ALAB-428, 6 NRC 221(1977) 6.3 6.3.1 (STANISLAUS MUCLEAR PROJECT, UNIT 1). ALAB-400, 5 NRC 1175(1977) 3.1.2.2 3.5.2.1 5.8.5 ALAB-550, 9 NRC 683(1979) 2.11.2 2.11.5 2.11.6 CLI-82-5, 15 NRC 404(1982) 1.9 LBP-78-20, 7 NRC 1038(1978) 2.11.2 2.11.2.2 LBP-83-2, 17 NRC 45(1983) 1.9 (STERLING POWER PROJECT, UNIT 1). 3.7.3.2 ALAB-502, 8 NRC 383(1978) 5.1 6.15.4.1 6.15.4.2

6.13

ALAB-507, 8 NRC 551(1978)

ġ1 (STERLING POWER PROJECT, UNIT 1). ALAB-596, 11 NRC 867(1980)

12 6,15 11 NRC 731(1380) CLI-80-23,

6.13 (STRONTIUM-90 AFP: ICATOR), LBP-86-35, 24 NRC 557(1986) (5) LBP-88-3, 27 NRC 220(1988) (SUMMIT POWER STATION, UNITS 1 AND 2), AE.8-516, 9 NRC 5(1979) 1.3 6.2

(SURRY NUCLEAR POWER STATION, UNITS 1 AND 2). CLI-80-4, 11 NRC 405(1980) 6.15.1.1

(SUSQUEHANNA STEAM ELECTRIC STATION, UNITS 1 AND 21, ALAB-148, 6 AEC 642(1973) 2.9.3.3.2

ev. 5, 12, ALAB-593, 11 NRC 751(1980)

ALAB-613, 12 NRC 317(1980)

5.8.5

ALAB-641, 13 NRC 550(1981)

5.10.3

16 NRC 952(1982)

A1 AB-693,

5.14 CLI-80-17, 11 NRC 678(1980) 2.9.5.10 2.9.5.10 6.15.6.1

LBP-79-6, 9 NRC 291(1979)

2.11.2.2 18P-80-18, 11 NRC 906(1980)

(SUSQUEHANNA STEAM ELECTRIC STATION, UNITS 1 AND 2).

LBP-81-8, 13 NRC 335(1981)

3.5.2.3

3.5.3

(THREE MILE ISLAND NUCLEAR STATION, UNIT NO. 1).

ALAB-685, 16 NRC 449(1982)

2.9.9.1 ALAE-697, 16 NRC 1265(1982)

3.7

6.20.3 ALAB-698, 16 NRC 1290(1982)

3.1.2.2 ALAB-699, 16 NRC 1324(1982)

4.4

4.4.1.1

4.4.2

6.12.1.2 ALAB-705, 16 NRC 1733(1982)

3.1.2.1. CLI-82-31, 16 NRC 1236(1982)

6.10.1.1

LBP-82-34A, 15 NRC 914(1982) 3.14.2

LBP-82-86, 16 NRC 1190(1982) 3.1.2.1

2.9.5.1 LBP-83-76, 18 NRC 1266(1983)

2.9.5.6

2.9.5.7

3.4

(THREE MILE ISLAND NUCLEAR STATION, UNIT 1).

ALAB-715, 17 NRC 102(1983)

3.4 6.16.1.2

2.9.5.7 ALAB-729, 17 NRC 814(1983)

3.4.1

5.6.1

ALAB-738, 18 NRC 177(1983)

4.4.1 4.4.1.1

4.4.2

5.18

6.5.1.

6.5.4 1

ALAB-766, 19 NRC 981(1984)

5.19 5.19.2

```
(THREE MILE ISLAND NUCLEAR STATION, UNIT 1).
   ALAB-772, 15 NRC (193(1984)
                                 2.11.5.2
                                  2.2
                                  2.9.10.1
                                  2.9.2
                                  2.9.9
                                  3.1.2.5
                                  3.12
                                  3.12.3
                                  3.12.4
                                  3.14.2
                                  3.4.4
                                  3.7
                                  3.7.1
                                  3.7.2
                                  3,7.3.7
                                  4.2.2
                                  6.27
  ALAB-774, 19 NRC 1:50(1984)
                                  3.14.2
                                  6.5.4.1
  ALAB-791, 20 NRC 1579(1984)
                                  3.5.3
                                  5.12.2
                                  5.12.2.1
  ALAB-807, 21 NRC 1191(1985)
                                 2.9.10.1
                                  3.3.7
                                  3.5.5
                                  4.4.2
                                  6.23.3.1
  ALAB-815, 22 NRC 198(1985)
                                 4.4.1.1
                                  4.4.2
  ALAB-821, 22 NRC 750(1985)
                                 5.6.1
  ALAB-826, 22 NRC 893(1985)
                                 5.6.1
                                  5.6.6
  ALAB-881, 26 NRC 465(1987)
                                 3.1.2.1
                                  5.6.3
  CLI-79-3, 10 NRC 141(1979)
                                 2.11.2.2
                                  2.11.4
  CLI-80-16, 11 NRC 674(1980)
                                 3.4
  CLI-80-19, 11 NRC 700(1980)
                                 2.9.10.1
  CLI-80-20, 11 NRC 705(1980)
                                 2.9.10.1
  CLI-80-5, 11 NRC 408(1980)
                                 3.7.3.7
```

| (THREE MILE ISLAND NUCLEAR STATE | |
|----------------------------------|-----------|
| CLI-83-22, 18 NRC 299(1983) | 6.16.2 |
| | 6.20.3 |
| CLI-83-25, 18 NRC 327(1983) | 2.10.1.2 |
| | 2.9.3 |
| | 2.9.3.3.3 |
| | 2.9.4 |
| | 2.9.4.1 |
| | |
| C11-83-3, 17 NRC 72(1983) | 6.5.1 |
| CLI-83-5, 17 NRC 33*(1983) | 6.5.1 |
| CLI-84-11, 20 NRC 1(1984) | 2.9.5.7 |
| | 3.4.1 |
| | 5.6.1 |
| CLI-84-17, 20 NRC 801(1984) | 5.7.1 |
| CcI-85-2, 31 NRC 282(1985) | 2.11.5.2 |
| | 2.2 |
| | 2.9.10.1 |
| | 2.9.2 |
| | 2.9.4.1.1 |
| | 2.9.9 |
| | 3.1.2.5 |
| | 3.11.1.1 |
| | 3.12 |
| | 3.12.3 |
| | 3.12.4 |
| | 3.14.2 |
| | 3.4.4 |
| | 3.7 |
| | 3.7.1 |
| | 3.7.2 |
| | 3.7.3.7 |
| | |
| | 4.2.2 |
| | 4.4.1 |
| | 4,4,1,1 |
| | 5.6.1 |
| CLI-85-5, 21 NRC 566(1985) | 3.1.4.2 |
| CL1-85-7, 21 NRC 1104(1985) | 2.11.1 |
| | 4.4.2 |
| | 4.4.4 |
| GLI-85-8, 21 NRC 1111(1985) | 3.11.2 |
| CLI-85-9, 21 NRC 1118(1985) | 3.7.3.7 |
| | 6.10.1 |
| LEP-80-17, 11 NRC 893(1980) | 2.11.5.2 |
| | |

| (THREE MILE ISLAND NUCLEAR STATION | I, UNIT 1). |
|---|---|
| LBP-81-50, 14 NRC 888(1981) | 6.11 |
| | 6.23 |
| | 5.23.1 |
| | |
| LBP-81-60, 14 NRC 1724(1981) | 3.4.1 |
| | |
| LBP-82-56, 16 NRC 281(1982) | 3.1.2.1 |
| | 6.11 |
| | |
| LBP-84-47, 20 NRC 1405(1984) | 4.2.2 |
| | |
| LBP-86-10, 23 NRC 283(1986) | 2.9.5 |
| | 3.17 |
| | |
| LBP-86-14, 23 NRC 553(1986) | 3.1.2.7 |
| Con 40 141 KG 4615 GGG 1900) | 3.6 |
| | |
| | 6.16.1.3 |
| | 6.5.4.1 |
| | |
| LEP-86-17, 23 NRC 792(1986) | 6.16.1.3 |
| | |
| | |
| | |
| (THREE MILE ISLAND NUCLEAR STATION | . UNIT 2), |
| ALAB-384, 5 NRC 612(1977) | 2.9.3.3.3 |
| | |
| ALAB-454, 7 NRC 39(1978) | 2.10.1.2 |
| | 2.10.2 |
| | |
| | 5.2 |
| | 5.2 |
| ALAB-456, 7 NRC 63(1978) | |
| ALAB-456, 7 NRC 63(1978) | 2,9,5,6 |
| ALAB-456, 7 NRC 63(1978) | |
| | 2.9.5.6 6.20.4 |
| ALAB-456, 7 NRC 63(1978) ALAB-474, 7 NRC 746(1978) | 2,9,5,6 |
| ALAB-474, 7 NRC 746(1978) | 2.9.5.6 6.20.4 2.9.2 |
| | 2.9.5.6 6.20.4 2.9.2 4.4.2 |
| ALAB-474, 7 NRC 746(1978) | 2.9.5.6 6.20.4 2.9.2 |
| ALAB-474, 7 NRC 746(1978) ALAB-486, 8 NRC 9(1978) | 2,9.5,6 6.20.4 2.9.2 4.4.2 5.5.1 |
| ALAB-474, 7 NRC 746(1978) | 2.9.5.6 6.20.4 2.9.2 4.4.2 |
| ALAB-474, 7 NRC 746(1978) ALAB-486, 8 NRC 9(1978) ALAB-525, 9 NRC 111(1979) | 2.9.5.6 6.20.4 2.9.2 4.4.2 5.5.1 3.14.1 |
| ALAB-474, 7 NRC 746(1978) ALAB-486, 8 NRC 9(1978) | 2.9.5.6 6.20.4 2.9.2 4.4.2 5.F.1 3.14.1 |
| ALAB-474, 7 NRC 746(1978) ALAB-486, 8 NRC 9(1978) ALAB-525, 9 NRC 111(1979) | 2.9.5.6 6.20.4 2.9.2 4.4.2 5.5.1 3.14.1 |
| ALAB-474, 7 NRC 746(1978) ALAB-486, 8 NRC 9(1978) ALAB-525, 9 NRC 111(1979) ALAB-914, 29 NRC 357(1989) | 2.9.5.6 6.20.4 2.9.2 4.4.2 5.5.1 3.14.1 3.12.4 5.7.1 |
| ALAB-474, 7 NRC 746(1978) ALAB-486, 8 NRC 9(1978) ALAB-525, 9 NRC 111(1979) | 2.9.5.6 6.20.4 2.9.2 4.4.2 5.5.1 3.14.1 3.12.4 5.7.1 |
| ALAB-474, 7 NRC 746(1978) ALAB-486, 8 NRC 9(1978) ALAB-525, 9 NRC 111(1979) ALAB-914, 29 NRC 357(1989) | 2.9.5.6 6.20.4 2.9.2 4.4.2 5.7.1 3.12.4 5.7.1 3.12.4 3.7 |
| ALAB-474, 7 NRC 746(1978) ALAB-486, 8 NRC 9(1978) ALAB-525, 9 NRC 111(1979) ALAB-914, 29 NRC 357(1989) | 2.9.5.6 6.20.4 2.9.2 4.4.2 5.5.1 3.14.1 3.12.4 5.7.1 3.12.4 3.7 5.10.3 |
| ALAB-474, 7 NRC 746(1978) ALAB-486, 8 NRC 9(1978) ALAB-525, 9 NRC 111(1979) ALAB-914, 29 NRC 357(1989) | 2.9.5.6 6.20.4 2.9.2 4.4.2 5.7.1 3.12.4 5.7.1 3.12.4 3.7 |
| ALAB-474, 7 NRC 746(1978) ALAB-486, 8 NRC 9(1978) ALAB-525, 9 NRC 111(1979) ALAB-914, 29 NRC 357(1989) ALAB-926, 31 NRC 1(1990) | 2.9.5.6 6.20.4 2.9.2 4.4.2 5.5.1 3.14.1 3.12.4 5.7.1 3.12.4 3.7 5.10.3 5.6.3 |
| ALAB-474, 7 NRC 746(1978) ALAB-486, 8 NRC 9(1978) ALAB-525, 9 NRC 111(1979) ALAB-914, 29 NRC 357(1989) | 2.9.5.6 6.20.4 2.9.2 4.4.2 5.5.1 3.14.1 3.12.4 5.7.1 3.12.4 3.7 5.10.3 5.6.3 |
| ALAB-474, 7 NRC 746(1978) ALAB-486, 8 NRC 9(1978) ALAB-525, 9 NRC 111(1979) ALAB-914, 29 NRC 357(1989) ALAB-926, 31 NRC 1(1990) | 2.9.5.6 6.20.4 2.9.2 4.4.2 5.5.1 3.14.1 3.12.4 5.7.1 3.12.4 3.7 5.10.3 |
| ALAB-474, 7 NRC 746(1978) ALAB-486, 8 NRC 9(1978) ALAB-525, 9 NRC 111(1979) ALAB-914, 29 NRC 357(1989) ALAB-926, 31 NRC 1(1990) | 2.9.5.6 6.20.4 2.9.2 4.4.2 5.5.1 3.14.1 3.12.4 5.7.1 3.12.4 3.7 5.10.3 5.6.3 5.12.3 |
| ALAB-474, 7 NRC 746(1978) ALAB-486, 8 NRC 9(1978) ALAB-525, 9 NRC 111(1979) ALAB-914, 29 NRC 357(1989) ALAB-926, 31 NRC 1(1990) | 2.9.5.6 6.20.4 2.9.2 4.4.2 5.5.1 3.14.1 3.12.4 5.7.1 3.12.4 3.7 5.10.3 5.6.3 5.12.3 |

(THREE MILE ISLAND NUCLEAR STATION, UNIT 2), LBP-87-15, 25 NRC 671(1987) 3.10

3.8

LBP-88-23, 28 NRC 178(1988) 3.5.2.3

LBP-89-7, 29 NRC 138(1989) 3,12.4

(THREE MILE ISLAND NUCLEAR STATIO 1, UNI/S 1 AND 2). CLI-73-16, 6 AEC 391(1973) 2.9.3

(THREE MILE ISLAND NUCLEAR STATION, UNITS AND 2). (DYSTER CREEK NUCLEAR GENERATING STATION). CLI-85-4, 21 NRC 561(1985) 6.24.1

(TROJAN NUCLEAR PLANT),

ALAB-181, 7 AEC 207(1974) 3.4.2

5.6.6

6.16.1.3

ALAB-451, 6 NRC 889(1977) 3.1.2.5

6.1.6

2.9.9.2.2 5.8.4.1

ALAB-524, 9 NRC 65(1979) 5.7.1

ALAB-496, 8 NRC 308(1978)

ALAB-531, 9 NRC 263(1979) 6.15

6.15.4

6.15.9

6.27

ALAB-534, 9 NRC 287(1979) 2.5.1

3.4

6.1.3.1

6.1.4.4

ALAB-796, 21 NRC 4(1985) 4.6

LBP-77-69, 6 NRC 1179(1977) 6.1.6

LBP-78-32, 8 NRC 413(1978) 3.16

LBP-78-40, 8 NRC 717(1978) 6.1.3.1

6.1.4.4

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33 NRC 521(1991) ALAB-952,

3.1.2.0 34 NRC 185(1991)

CL 1-91-13.

5,10.1 CLI-91-5, 33 NRC 238(1991)

22 NRC 300(1985)

LBP-85-29,

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3.5.2.3

LBP-86-27, LBP-87-21,

24 NRC 255(1986)

25 NRC 958 (1987)

29 NRC 493(1989)

LBP-89-15,

3.1.2.1

9.3.5 N N 31 NRC 509 (1990)

LBP-90-16,

2.9.3.

LBP-90-24, 72 NRC 12(1990)

10 N

3, 1, 2, 3 LBP-90-32, 32 NRC 181(1990) 3.5.3

LEP-90-4.

31 NRC 54(1990)

2.9.3.3.3 31 NRC 73(1990)

LdP-90-5.

9.4.1.4 NRC 42(1991) 33 (BP-91-2, (TURKEY POINT NUCLEAR GENERATING UNITS 3 AND 4). LEP-79-21, 10 NRC 183(1979) 2.5.3

(TURKEY POINT NUCLEAR GENERATING UNITS 3 AND 4).

2.9.5.5

| (TURKEY | POINT | PLANT. | UNIT | 3 3 | AND 4 | 43. |
|---------|-------|--------|------|-----|-------|-----|
| | | | | | | |
| | | | | | | |

ALAB-660, 14 NRC 987(1981) 3.5,2,3 6.15.4 6.15.4.2

CLI-81-31, 14 NRC 959(1981) 2.9.3 2.9.3.1

LBP-81-14, 13 NRC 677(1981) 6.1,4,4 6.15.1.2

6.15.4

LBP-81-30, 14 NRC 357(1981) 5.7.

(TYRONE ENERGY PARK, UNIT 1).

ALAB-464, 7 NRC 372(1978) 3.1.2.6 4.4.1.1

AL48-492, 8 NRC 251(1978) 2.9.5.13 5.8.1

CLI-80-36, 12 NRC 523(1980) 2.9.4.1.4

LBP-77-37, 5 NRC 1298(1977) 2.11.5.2

(UCLA RESEARCH REACTOR).

LBP-81-29, 14 NRC 353(1981) 3.13.2

LBP-82-93, 16 NRC 1391(1982) 3.5.2

LBP-84-22, 19 NRC 1383(1984) 1.5.2

6.4.1

(UF6 PRODUCTION FACILITY).

CLI-86-19, 24 NRC 508(1986) 6.24 1.3

(VALLECITOS NUCLEAR CENTER-GENERAL ELECTRIC TIST REACTOR, OPERATING LICENSE TR-1), ALAB-720, 17 NRC 397(1983) 5.8.6

(VALLECITOS NUCLEAR CENTER, GENERAL ELECTRIC TEST REACTOR). LBP-78-33, 8 NRC 461(1978) 2.11.2.4

| (VERMONT YANKEE NUCLEAR POWER | STATION), |
|-------------------------------|-----------|
| ALAB-124, 6 AEC 358(1973) | 3.1.1 |
| | 4.4 |
| | 4.4.1 |
| | 4.4.1.1 |
| | 4.4.2 |
| | 5.6.1 |
| | |
| ALAB-126, 6 AEC 393(1973) | 4.4.1.1 |
| ALAB-138, 6 AEC 520(1973) | 2.11.1 |
| ALAD 130, 0 ALC 320(13/3) | |
| | 3.1.1 |
| | 4.4.1.1 |
| | 4.4.2 |
| | 4,4,4 |
| | 6.16,1 |
| ALAB-141, 6 AEC 576(1973) | 4.4.2 |
| | |
| ALAB-179, 7 AEC 159(1974) | 6.15.3 |
| | 6.16.2 |
| | 6.5.3.2 |
| ALAR-194, 7 AEC 431(1974) | 6.16.1 |
| | 6.16.1.1 |
| | 6.20.1 |
| | |
| ALAB-217, B AEC 61(1974) | 6.16.2 |
| | |
| ALAB-229, 8 AEC 425(1974) | 2.9.1 |
| | 3, 16, 1 |
| | 5.16.2 |
| ALAB-245, B AEC 873(1974) | 6.1.4.2 |
| | |
| ALA8-392, 5 NRC 759(1977) | 6,15,6 |
| | |
| ALAB-421, 6 NRC 25(1977) | 5.14 |
| ALAB-57, 4 AEC 946(1972) | 6.20.4 |
| ALAG DY, T ALC DAGGISTES | |
| ALAB-869, 26 NRC 13(1987) | 2.9.5 |
| | 2.9.5.1 |
| | 3.17 |
| | 3.4.2 |
| | 6.1.4.4 |
| | 6.15.7 |
| | 6.15.9 |
| | |

```
(VERMONT YANKEE NUCLEAR POWER STATION),
                                 6.16.3
  ALAB-876, 26 NRC 277(1987)
                                 2.9.5
                                 2.9.5.1
                                 3.1.2.6
                                 3,17
                                 3.4.2
                                 5.12.2
                                 5.14
                                 6.1.4.4
                                 5.15.7
                                 6.15.9
                                 6.16.3
  ALAB-919, 30 NRC 29(1989)
                                 2.9.5
                                 2.9.5.5
                                 3.15
                                 6.15.4
                                 6.15.7
  ALAB-938, 32 NRC 154(1990)
                                 2.9.5
                                 2.9.5.5
                                 3.15
                                 6.15.4
                                 6.15.7
  CLI-74-40. 8 AEC 809(1974)
                                 3.16.1
                                 6.16.2
                                 6.21.2
                                 6.9.1
  CLI-74-43, 8 AEC 826(1974)
                                 6.16.2
                                 6.21.2
                                 6.9.1
  CLI-76-14, 4 NRC 163(1976)
                                5.6.2
                                 6.21.1
  CLI-90-4, 31 NRC 333(1990)
                                 2.9.5
                                 2.9.5.5
                                 3.15
                                6.15.4
                                6.13.7
 CLI-90-7, 32 NRC 129(1990)
                                2.9.5
                                2.9.5.5
                                3.15
                                6.15.4
                                6.15.7
 LBP-87-17, 25 NRC 838(1987)
                                2.9.5
                                2.9.5.1
                                3.17
```

| (VERMONT YANKEE NUCLEAR POWER STAT | ION). |
|--|-------------|
| ARBITRARY CHARLES MACHERIA STRUCK ALL. | 6.1.4.4 |
| | |
| | 6.15.7 |
| | 6.15.9 |
| | 6, 16, 3 |
| | |
| . DE DE C DE MOS (465/4007) | 2.9.3 |
| LBP-87-7, 25 NRC 116(1987) | |
| | 2.9.4.1.2 |
| | |
| LBP-88-19, 28 NRC 145(1988) | 3.1.2.1 |
| | 3.1.2.2 |
| | 6.1.4.4 |
| | |
| | |
| LBP-88-25, 28 NRC 394(1988) | 2.11.1 |
| | 2.11.4 |
| | |
| LBP-80-25A, 28 NRC 435(1988) | 2.11.1 |
| CBE -00 - XDW - XD HWC 4021 (300) | |
| | 2.11.4 |
| | |
| LBP-88-23, 28 NRC 440(1983) | 2.9.5 |
| | 2.9.5.5 |
| | 6.15.4 |
| | |
| | 6.15.7 |
| | |
| LBP-89-6, 29 NRC 127(1989) | 2.9.5 |
| | 2.9.5.5 |
| | 3.15 |
| | |
| | 6.15.4 |
| | 6.15.7 |
| | |
| LBP-90-6, 31 NRC B5(1990) | 2.9.3 |
| COL. SO. S. N. MAN HAR LANKS | 6.1.4.4 |
| | |
| | 6.15.1.1 |
| | |
| | |
| | |
| (VIRGIL C. SUMMER NUCLEAR STATION, | UNIT 1): |
| VINGIL C. DUMPER (1000ERS 211772) | 5.6.1 |
| ALAB-114, 6 AEC 253(1973) | 20 - 10 × 1 |
| | |
| ALAB-642, 13 NRC 881(1981) | 2.9.3.3.3 |
| | 2.9.3.3.4 |
| | 3.1.2.7 |
| | |
| The same of the sa | 3 6 3 3 3 |
| ALAB-643, 13 NRC 898(1981) | 2.9.3.3.3 |
| | 5.7.1 |
| | |
| ALA8-663, 14 NRC 1140(1981) | 3.1.2.1 |
| ALAD DOS. 14 MAY 1 MAY 1 30 1 | 3.12.3 |
| | |
| | 5.12.2 |
| | 6.20.2 |
| | |
| ALAB-694, 16 NRC 958(1982) | 5.13 |
| ALAB-094, 10 NRC 930(1902) | |
| | 4 4 4 |
| ALAB-710, 17 NRC 25(1983) | 3.1.1 |
| | |

| (VIRGI) C. SUMMER NUCLEAR STATION. | UNIT 1), 3.1.2.1 3 12.3 |
|------------------------------------|-------------------------------|
| CLI-80-28, 11 NRC 817(1980) | 6.3.1 |
| | 4.5 6.3.1 |
| CLI-82-10, 15 NRC 1377(1982) | 3.1.2.5 |
| LBP-78-6, 7 NRC 209(1978) | 2.9.3.3.3 |
| LEP-81-11, 13 NRC 420(1981) | 2.9.3.3.3 |
| | 3,1,2,1 4,4,2 5,7,1 |
| | |

| | TEAM ELECTRIC STATION. 6 AEC 261(1973) | UNIT 3). 5.10.2.1 |
|-----------|---|--|
| ALAB-121, | 6 AEC 319(1973) | 5.10.3 |
| ALAB-125, | 6 AEC 371(1973) | 2.9.3 2.9.4.1.4 2.9.5.1 |
| ALAB-168. | 6 AEC 1155(1973) | 2.9.3.4 |
| ALAB-220. | 8 AEC 93(*374) | 3.5.5 5.8.5 |
| ALAB-242. | 8 AEC 847(1974) | 3.6 4.6 5.9 |
| ALAB-258. | 1 NRC 45(1975) | 4.6 |
| ALAB-690. | 16 NRC 893(1382) | 5.4 |
| ALAB-732. | | 2.10.1.2 3.1.1 3.1.2.3 3.11 3.11.1.1 3.12.4 3.13 3.7 4.6 5.10.1 |

5.6.3

| (WATERFORD STEAM ELECTRIC STATION | 0NIT 3), 6.16 1.3 6.20.4 7 5.4.1 |
|---|---|
| ALAB-753, 18 NRC 1321(1983) | 3.5.3 4.4 4.4.1 4.4.2 |
| ALAB-786, 20 NRC 1087(1984) | 4.4.2 6.16.1.2 6.5.4.1 |
| ALAB-792, 20 NRC 1585(1984) | 5.6.1 |
| ALAB-801, 21 NRC 479(1985) | 6.16.1 |
| ALAB-803, 21 NRC 575(1985) | 3.1.2.7 4.4.2 6.16.1 |
| ALAB-812, 22 NRC 5(1985) | 3.7 3.7.1 3.7.3.7 4.4.1 4.4.2 6.16.1 |
| AL48-829, 23 NRC 55(1986) | 6.5.4.1 |
| CLI-86-1, 23 NRC 1(1986) | 2.11.1 3.1.2.3 4.4.1 4.4.2 6.5.4.1 |
| LBP-73-31, 6 AEC 717(1973) | 2.9.3.4 |
| LBP-81-48, 14 NRC 877(1981) | 3.5 3.5.3 |
| LBP-82-100, 16 NRC 1550(1982) | 6.15.3 6.9.1 |
| (WATTS BAR NUCLEAR PLANT, UNITS 1 ALAB-413, 5 NRC 1418(1977) | |

| (WEST CHICAGO RARE ARTHS FACILIT | V) |
|----------------------------------|--|
| ALAB-928, 31 NRC 263(1990) | 5.7.1 |
| ALAB-9 , 33 NRC 81(1391) | 2.11.5.2 3.1.2.1 3.16 3.5.2.3 6.15.3 |
| CLI-82-2, 15 NRC 232(1982) | 2.2 2.5 6.13 6.15.1.2 |
| CLI-82-21, 16 NRC 401(1982) | 2.2 |
| (8P-84-42, 20 NRC 1295(1984) | 3.1.2.1 3.4 6.15.6 |
| LBP-85-1, 21 NRC 11(1985) | 2.11.2 4 |
| LBP-85-0, 21 NRC 244(1985) | 5.12.2 6.15.3 6.16.1 |
| LBP-85-46, 22 NRC 830(1985) | 2.11.1 |
| LBP-86-4, 23 NRC 75(1986) | 2.11.2 2.11.2.8 2.11.4 2.11.5.2 |
| LBP-89-16, 29 NRC 508(1989) | 2.9.5.5 |
| LBP-89-35, 30 NRC 677(1989) | 2.11.5.2 3.1.2.1 3.5.2.3 6.15.3 |

(WEST VALLEY REPAJCESSING PLANT). CLI-75-4, 1 NRC 273(1975)

2,11,1 2,9,3,3,3 2,9,3,3,4 2,9,5,5

(WESTERN NEW YORK MUCLEAR SERVICE CENTER),
CLI-81-29, 14 NRC 940(1981) 5,7.1
LBP-82-36, 15 NRC 1075(1982) 2,9.4.1.1
LBP-83-15, 17 NRC 476(1983) 3,1.2.5

ALAB-128, 6 AEC 623(1973) 6.9.1
ALAB-143, 6 AEC 623(1973) 6.16.1.1
ALAB-669, 15 NRC 453(1982) 3.11.1.1
ALAB-669, 5 NRC 463(1977) 3.17
LBP-77-20, 5 NRC 680(1977) 3.17

CLI-82-36, 16 NRC 1512(1982) 6.4.2 6.4.2 6.4.2 6.4.2 6.4.2.3 CLI-82-40, 16 NRC 1717(1982) 2.9.10.1

(WILLIAM H. ZIMMER NUCLEAR POWER STATION, UNIT 1), CLI-83-4, 17 NRC 75(1983) 6.5.1 LBP-83-58, 18 NRC 640(1983) 2.9.5.5 LBP-84-33, 20 NRC 755(1984) 1.9

(WILLIAM H. ZIMMER NUCLEAR STATION),
ALAB-305, 3 NRC 8(1976) 2 9.5.1
ALAB-595, 11 NRC 860(1980) 2 9.3.3.3
ALAB-633, 13 NRC 94(1981) 5.4

| (WILLIAM H. ZIMMER NUCLEAR STATION | 0. |
|---|------------|
| ALAB-79, 5 AEC 342(1972) | 4.6 |
| | 5.6.1 |
| | |
| 18P-79-17, 9 NRC 723(1979) | 2.9.2 |
| 207-79-17, 9 1980 720(1979) | 4.0.4 |
| 1 00 00 00 10 100 010(1000) | |
| LBP-79-22, 10 NRC 213(1979) | 2.9.5.5 |
| | |
| LBP-79-24, 10 NRC 226(1979) | 3.1.2.1 |
| | 3.1.2.2 |
| | 6.13 |
| | |
| LBP-80-14, 11 NRC 570(1980) | 2.9.3.3.3 |
| | |
| LBP-81-2, 13 NRC 36(1981) | 3.5.3 |
| | |
| | |
| | |
| (WM. H. ZIMMER NUCLEAR POWER STATE | ON UNIT () |
| | 3.14.2 |
| ULI 02 20. 10 MMU 109(1302) | |
| LBP-82-47, 15 NRC 1538(1982) | 2.11.2.2 |
| FDF-62-47, 10 MRC 1030(1902) | 6-11-6-6 |
| | |
| LBP-82-48, 15 NRC 1549(1982) | 4.2.2 |
| | |
| LBP-83-12, 17 NRC 466(1983) | 3.1.2.1 |
| | |
| | |
| | |
| (WOLF CREEK GENERATING STATION, UN | [T 1). |
| ALAB-784, 20 NRC 845(1984) | 2.9.5.6 |
| | 6.8 |
| | |
| LBP-84-1, 19 NRC 29(1984) | 2.9.5 |
| CDF-94-1' 18 MMC S2(1804) | |
| | 2.9.5.1 |
| | 2.9.5.5 |
| | |
| LBP-84-17, 19 NRC 878(1984) | 2.9.3.3 |
| | 2.9.3.3.3 |
| | |
| LBP-84-26, 20 NRC 53(1984) | 3.4.2 |
| | 4.2.2 |
| | 6.16.1.3 |
| | |
| | |
| | |
| (WOLF CREEK NUCLEAR GENERATING STATE | TION). |
| ALAB-279, 1 NRC 559(1975) | 2.9.3.1 |
| ALAN KANA A MANA MANA MANA MANA MANA MANA | 2.9.4.1.1 |
| | A |
| ALAB-321, 3 NRC 293(1976) | 2 1 2 1 |
| PLAD-321, 3 NRC 293(1970) | 3.1.2.1 |
| | 3.1.2.2 |

5.19 6.19.1

| | | | m | | |
|----------|--------|-----|------|-----|---|
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| 18 | | | | | |
| 160 | | | | | |
| | | | | | |
| | | | | | |

(WOLF CREEK MUCLEAR GENERATING STATION, UNIT 1). ALAB-307, 3 NRC 17(1976) 5.7.1 2.9.4.1.1 5.10.2 5.10.3 5.43.4 2 11 2 4 2 11 2 4 3 12 2 5 6 23 3 1 5.2.1 5.8.4 ALAB-327, 3 NRC 408(1976) 3 NRC 771(1976) ALAB-462, 7 MRC 320(1978) ALAB-424, 6 NRC 122(1977) ALAB-477, 7 NRC 766(1978) ALA8-311, 3 NRC 85(1976) ALAB-331.

(WPPSS NUCLEAR PROJECT NG. 1). ALAB-771, 19 NRC 1183(1984)

2.9.4.1.2.6 2.9.3 18 NRC 667(1983) LBP-83-59,

LBP-83-16, 17 NPC 479(1983)

| (WP+ SS NUCLEAR PROJECT NO. 1), | |
|-------------------------------------|-------------|
| LBP-P3-66, 18 NRC 780(1983) | 2.9.5.3 |
| | 2.9.5.5 |
| | |
| LBP-84-9, 19 NRC 497(1984) | 3.4.5 |
| COF D4 3, 15 MAC 431(1204) | |
| | |
| | |
| | |
| (WPPSS NUCLEAR PROJECT NO. 2). | |
| ALAB-571, 10 NRC 687(1979) | 4.6 |
| | 5.6.1 |
| | 5.8.1 |
| | 30 X 10 X X |
| AL 10 700 17 ADC E461 (000) | |
| ALAB-722, 17 NRC 546(1983) | 2.9.5. |
| | 6.16.1 |
| | 6.24 |
| | |
| LBP-79-7, 9 NRC 330(1979) | 2.9.4.1. |
| | 2.9.4.1. |
| | |
| | |
| | |
| CORRECT AND CARE AREA AREA ARE | |
| (WPPSS NUCLEAR PROJECT NO. 3). | |
| ALAB-747, 18 NRC 1167(1983) | 2.9.3.7. |
| | 2.9.5.3 |
| | 6.4.1 |
| | |
| ALAB-767, 19 NRC 984(1984) | 2.9.3.3. |
| | |
| LBP-84-17A, 19 NRC 1011(1984) | 2022 |
| CO. 24 114, 19 340 10111111111 | K-219101 |
| | |
| | |
| | |
| (WPPSS NUCLEAR PROJECT NOS. 1 AND | |
| CLI-82-29, 16 NRC 122(1982) | 3.4.5 |
| | |
| | |
| | |
| (WPPSS NUCLEAR PROJECTS 1 AND 4). | |
| (WFF 33 MUDECHAR PRODECTS 1 RND 4). | |
| ALAB-265, 1 NRC 374(1975) | 4.0 |
| | 5.9 |
| | |
| | |
| | |
| (WPPSS NUCLEAR PROJECTS 3 AND 5). | |
| ALAB-485, 7 NRC 986(1978) | 5.6.3 |
| | 6.18 |
| | |
| ALAR SOL 0 ADC 201/4070) | * ** |
| ALAB-501, 8 NRC 381(1978) | 5.15 |
| | 5.6.1 |
| | |
| CLI-77-11, 5 NRC 719(1977) | 3.1.1 |
| | 6.19.1 |
| | |

| (WPPSS NUCLEAR PROJECTS 3 AND 5). LBP-77-15. 5 NRC 643(1977) | 3.1.2.2 6.19 6.19.1 |
|--|---|
| LBP-77-16, 5 NRC 650(1977) | 2.9.3 |
| (YANKEE ROWE NUCLEAR POWER STATION | 6.24 |
| CLI-91-11, 34 NRC 3(1991) | 6.5.1 |
| (YELLOW CREEK NUCLEAR PLANT, UNITS ALAB-445, 6 NRC 865(1977) | 1 AND 2), 1.7.1 2.5.3 |
| ALAB-515, 8 NRC 702(1978) | 6.15.8.5 |
| (ZIMMER NUCLEAR POWER STATION, UNIT LBP-82-54, 16 NRC 210(1982) | 2.9.3 3.3 2.9.4.1.2 3.14.2 |
| (ZION STATION, UNITS 1 AND 2). ALAB-116, 6 AEC 258(1973) | 2.11.6 5.8.3.1 |
| ALAB-154, 6 AEC 827(1973) | 5.13.1.2 5.4 |
| ALAB-185, 7 AEC 240(1974) | 2.11.2.1 2.11.2.2 |
| ALAS-222, 8 AEC 229(1974) | 3.1.3 3.3.1 3.3.2.3 |
| ALAB-226, 8 AEC 381(1974) | 2.8.1.3 2.9.3.2 2.9.5.10 2.9.9.1 3.1.4.1 3.12.1.1 3.7.2 5.10.1 5.13.1.1 6.46.1.2 |

6.16.1.2

(ZIDN STATION, UNITS 1 AND 2), ALAB-616, 12 NRC 419(1980)

CLI-74-35, 8 AEC 374(1974)

6.15,1,1 3.3.2.3 LBP-80-7, 11 NRC 245(1980)

Citation Index

| CITATI | ON | INDEX | JULY | 1992 | |
|--------|----|-------|----------|------|--|
| | | | | | |

| | PAGE. 1 |
|---|--|
| ALAB-16 NORTHERN STATES POWER CO. (MONTICELLO PLANT, UNIT 1), 4 AEC 435 (1970) | 2.11.2 6.23.3 |
| ALAB-25 TOLEDO EDISON CO. (DAVIS-BESSE NUCLEAR POWER STATION), 4 AEC 633 (1971) | 5.7 |
| ALAB-57 VERMONT YANKEE NUCLEAR POWER CORP. (VERMONT YANKEE NUCLEAR POWER STATION), 4 AEC 946 (1972) | 6.20.4 |
| ALAB-73 WISCONSIN ELECTRIC POWER CO. (POINT BEACH NUCLEAR PLANT), 5 AEC 297 (1972) | 4.6 |
| ALA8-74 BOSTON ED' N CO. (PILGRIM NUCLEAR STATION), 5 AEC 308 (1972) | 5. 10.2. |
| ALAB-75 CONSOLIDATED EDISON CO. OF N.Y. (INDIAN POINT STATION, UNIT 2), 5 AEC 309 (1972) | 3.10 |
| ALAB-77 DETROIT EDISON CO. (ENRICO FERMI ATOMIC POWER PLANT), 5 AEC 315 (1972) | 4.6 |
| ALAB-78 WISCONSIN ELECTRIC POWER CO. (POINT BEACH NUCLEAR PLANT, UNIT 2), 5 AEC 319 (1972) | 3.1.1 3.16 4.2 5.7.1 5.6.3 6.20.4 |
| ALAB-79 CINCINNAT: GAS AND ELECTRIC CO. (WILLIAM H. ZIMMER NUCLEAR STATION), 5 AEC 342 (1972) | 4.6 5.6.1 |

ALAB-81 BOSTON EDISON CO. (PILGRIM NUCLEAR POWER STATION), 5 AEC 348 (1972)

5.7.1

PAGE

| | 100 |
|------------------|---------------------|
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AB-R3 EDSTON EDISON CD. (PILGRIM NUCLEAR STATION). 5 AEC 354 (1972) ALAB-R3

(ARKANSAS NUCLEAR-1, UNIT 2), 6 AEC 25 (1973) ALAB-94

ALAB-39 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION), 6 AEC 83 (1973)

48-101 CCNSUMERS POWER CD (1973) (MIDLAND PLANT, UNITS 1 AND 2), 6 AEC 60 (1973) A1.A8 - 101

ALAB-104 NORTHERN STATES POWER CO. (PRAIRIE ISLAND NUCLEE'S GENERATING PLANT, UNITS ! AND 2), 6 AEC 179 (1973)

AB-105 DUQUESNE LIGHT CO. (8EAVER VALLEY POWER STATION UNIT 1), 6 AEC 181 (1973) ALAB-105

AB-107 NORTHERN STATES POWER CO. (PRAIRIE ISLAND NUCLEAR GENERATING PLANT, UNITS 1 AND 21, 6 AEC 188 (1973) ALAB-107

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AB-108 IDWA ELECTRIC LIGHT AND POWER CO. (DUANE ARNOLD ENERGY CENTER), 6 AEC 195 (1973)

ALAB-108

19

| | | 15 |
|--|--|----|
| | | 65 |
| | | |

48-109 DUQUESNE LIGHT CO. (BEAVER VALLEY POWER STATION, UNIT 1), 6 AEC 243 (1973)

ALAB-109

AB-110 GORTHERN STATES POWER CO. (PRAIRIE ISLAND 2), 6 AEC 247 (1973)

ALAB-110

NB-113 WASHINGTON PUBLIC POWER SUPPLY SYSTEM (HANFORD ND. 2 NUCLEAR POWER PLANT), 6 AEC 251 (1973) ALAB-113

SBUTH CAROLINA ELECTRIC AND GAS CO. SUMMER NUCLEAR STATION, UNIT 1), 6 AEC 253 (1973) (VIRGIL C. ALAB-114

NB-115 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 6 AEC 257 (1975.) ALAB-115

AB-116 COMMONWEALTH EDISON CD. (ZION STATION, UNITS 1 AND 2). 6 AEC 258 (1973) ALAB-116

AB-117 LOUISIANA POWER AND LIGHT CD. (MATERFORD STEAM ELECTRIC STATION, UNIT 3), 6 AEC 261 (1973) ALAB-117

0 10

5.6.4

10.2.2

5.8.3.1

5. 10. 2. 1

- ALAB-118 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 6 AEC 263 (1973)
- ALAB-121 LOUISIANA POWER AND LIGHT CO. (WATERFORD STEAM ELECTRIC STATION, UNIT 3), 6 AEC 319 (1973)
- ALAB-122 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 6 AEC 322 (1973)
- ALAB-123 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 6 AEC 331 (1973)
- ALAB-124 VERMONT YANKEE NUCLEAR POWER CORP. (VERMONT YANKEE NUCLEAR POWER STATION), 6 AEC 358 (1973)
- ALAB-125 LOUISIANA POWER AND LIGHT CO. (WATERFORD STEAM ELECTRIC STATION, UNIT 3), 6 AEC 371 (1973)
- ALAB-126 VERMONT YANKEE NUCLEAR POWER CORP. (VERMONT YANKEE NUCLEAR POWER STATION). 6 AEC 393 (1973)
- ALAB-128 DUKE POWER CO. (WILLIAM B. MCGUIRE NUCLEAR STATION, UNITS 1 AND 21, 6 AEC 399 (1973)

- 5, 10, 3
- + 0+ N

- 293
- 4.8.9.4
- 6 9

| μh | | 000 | 2 | | 1 9.7 | 2 | 2 5 |
|----------------|---|---|---|--|--|--|--|
| JULY 1992 | 423 (1973) 2.6.3 2.9.3 2.9.5 3.5.5 | 2 9.2 2 9.3 2 9.3 | 9 7 2 9 | | 5.9.7 | | 6 AEC 623 (1973) 6 16 1 6 5 4 |
| CITATION INDEX | ALAB-130 MISSISSIPPI POWER AND LIGHT CO. (GRAND GULF NUCLEAR STATION, UNITS 1 AND 2), 6 AEC | ALAB-136 PUBLIC SERVICE ELECTRIC AND GAS CO. (SALEM NUCLEAR GENERATING STATION, UNITS 1 AND 2), | ALAB-137 WISCONSIN ELECTRIC POWER CO. (POINT BEACH NUCLEAR PLANT, UNIT 2), 6 AEC 491 (1973) | ALAB-158 VERMONT VANKEE NUCLEAR POWER COPP. (VERMONT VANKEE NUCLEAR FOWER STATION), 6 AEC 520 (1973) | ALAB-140 MISSISSIPPI POWER AND LIGHT CD. (GRAND GULF NUCLEAR STATION, UNITS 1 AND 2), 6 AEC. | VERMONT YANKEE NUCLEAR POWER CORP. ONT YANKEE NUCLEAR POWER STATION). 6 AEC 576 | ALAB-143 DUKE POWER CO. (WILLIAM B. MCGUIRE NUCLEAR STATION, UNITS 1 AND 2), |

5, 10, 2, 1

ALAB-144 MAINE YANKEE ATOMIC POWER CO. (MAINE YANKEE ATOMIC POWER STATION), 6 AEC 628 (1973).

| | (1973) | | | | | | | | |
|---|--|--|--|--|---|--|---|---|--|
| ALAB-146 VIRGINIA ELECTRIC AND POWER CO (NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2), 6 AEC 631 (1978) | ALAB-148 PENNSYLVANIA POWER AND LIGHT CO. (SUSQUEHANNA STEAM ELESTRIC STATION, UNITS 1 AMD 2), 6 AEC 642 (| ALAB-153 COMMONWEALTH EDISON CD. (LASALLE CDUNTY NUCLEAR STATION, UNITS 1 AND 21, 6 AEC 821 (1973) | ALAB-154 COMMONWEALTH EDISON CO. (210N STATION, UNITS 1 AND 2), 6 AEC 827 (1973) | ALAB-157 TOLEDO EDISON CO. (DAVIS-BESSE NUCLEAR POWER STATION), 6 AEC 858 (1973) | ALAB-158 PHILADELPHIA ELECTRIC CO. (PEACH BOTTOM ATOMIC STATION, UNITS 2 AND 3), 8 AEC 999 (1973) | ALAB-159 CONSCLIDATED EDISON CO. OF N.Y. (INDIAN POINT STATION, (NIT 2), 6 AEC 1001 (1973) | ALÁB-161 MAINE YANKEE ATOMIC POWER CO. (MAINE YANKEE ATOMIC POWER STATION), 6 AEC 1003 (1973) | ALAB-164 IENNESSEE VALLEY AUTHORITY (BELLEFONTE NUCLEAR PLANT, UNITS 1 AND 2), 6 AEC 1143 (1973) | ALAB-165 PHILADELPHIA ELECTRIC CO. (PEACH BOTTOM ATOMIC STATION, UNITS 2 AND 3), 6 AEC 1145 (1973) |

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PAGE

CITATION INDEX --- JULY 1992

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|--------------------------|---|--|--|--|---|
| PAGE | | | | | |
| JULY 1992 | | | | | |
| CITATION INDEX JULY 1992 | (MAINE YANKEE ATOMIC POWER CD. (MAINE YANKEE ATOMIC POWER STATION), 6 AEC 1148 (1973) | AB-168 LOUISIANA POWER AND LIGHT CO. (WATERFORD STEAM ELECTRIC STATION, UNIT 3), 6 AEC 1155 (1973) | 8-172 BUQUESNE LIGHT CO. (BEAVER VALLEY POWER STATION, UNITS 1 AND 2), 7 AEC 42 (1974) | (MAINE YANKEE ATOMIC POWER CO. 7 AEC 62 (1974) | B-179 VERMONT YANKEE NUCLEAR POWER CORP. (1974) |
| | ALAB-166 MAIN (MAINE YANKEE A | ALAB 168 LOUI | ALAB-172 DUGU (BEAVER VALLEY | ALAB-175 MAIN (MAINE YANKEE A | ALAB-179 VERM (VERMONT YANKEE |

ALAB-181 PORTLAND GENERAL ELECTRIC CO. (TROJAN NUCLEAR PLANT), 7 AEC 207 (1974)

ALAB-182 ALABAMA POWER CO., C.D. 7. AEC 210 (1974)

ALAB-183 GULF STATES UTLITTES CO. (RIVER BEND STATION, UNITS 1 AND 21, 7 AEC 222 (1974)

ALAB-184 CAROLINA POWER AND LIGHT CO. (SHEARON HARRIS NUCLEAR PLANT, UNITS 1-4), 7 AEC 229 (1974)

6.5.3.2

3.4.2 5.6.6 6.16.1.3

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| CITATION INDEX JULY 1992 | PAGE 8 |
|---|-----------------------------|
| ALAS-184 CAROLINA POWER AND LIGHT CD. | 6.5.3.2 |
| ALAB-185 COMMONWEALTH EDISON CD. (ZION STATION, UNITS 1 AND 2), 7 AEC 240 (1974) | 2.11.2.1 2.11.2.2 |
| ALAB-188 CONSOLIDATED EDISON CO. DF N.V. (INDIAN POINT STATION, UNIT 2), 7 AEC 323 (1974) | 6.16.2 |
| ALAB-191 BOSTON EDISON CD. (PILGRIM NUCLEAR STATION, UNIT 1), 7 AEC 417 (1974) | 3.5.1.2 6.1.4.3 |
| ALAB-192 NORTHERN INDIANA PUBLIC SERVICE CO. (BAILLY GENERATING STATION, NUCLEAR-1), 7 AEC 420 (1974) | 5.7 5.7.9 |
| ALAB-194 VERMONT YANKEE NUCLEAR POWER CORP. (VERMONT YANKEE NUCLEAR POWER STATION), 7 AEC 431 (1974) | 6.16.1 6.161 6.20.1 |
| ALAB-195 MISSISSIPPI POWER AND LIGHT CO. (GRAND GULF NUCLEAR STATION, UNITS 1 AND 2), 7 AEC 455 (1974) | 5.13.1.* 5.4 |
| ALAB-199 SOUTHERN CALIFORNIA EDISON CO. (SAN ONOFRE NUCLEAR GENERATING STATION, UNITS 2 AND 3), 7 AEC 478 (1974) | 5.7.1 |
| ALAB-204 NORTHERN INDIANA PUBLIC SERVICE CB. (BAILLY GENERATING STATION, NUCLEAR-1), 7 AEC 835 (1974) | 5.10.3 5.8.13 6.4.1.1 |

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ALAB-207 NORTHERN INDIANA PUBLIC SERVICE CO. (1974) (BAILLY GENERATING STATION, MUCLEAR-1), 7 AEC 957 (1974)

ALAB-209 CONSOLIDATED EDISON CO. OF N.Y. (1974)

18-212 SOUTHERN CALIFORNIA EDISON CO (SAN ONOFRE NUCLEAR GENERATING STATION, UNITS 2 AND 3), 7 AEC 986 (1974) ALAB-212

ALAB-216 PHILADELPHIA ELECTRIC CO. (PEACH BOTTOM ATOMIC STATION, UNITS 2 AND 3), 8 AEC 13 (1974)

ALAB-217 VERMONT YANKEE NUCLEAR POWER CORP. (VERMONT YANKEE NUCLEAR POWER STATION), 8 AEC 61 (1974)

79 (1974) AB-218 POINT NUCLEAR GENERATING STATION, UNITS 1 AND 2), 8 AEC ALAB-218

ALAB-220 LOUISIANA POWER AND LIGHT CO. (WATERFORD STEAM ELECTRIC STATION, UNIT 3), 8 AEC 93 (1974)

ALAB-221 PHILADELPHÍA ELECTRIC CO. (PEACH BOTTOM ATOMIC STATION, UNITS 2 AND 3), 8 AEC 95 (1974)

ALAB-222 COMMONWEALTH EDISON CO. (210N STATION, UNITS 1 AND 2). 8 AEC 229 (1974)

PAGE 9

2.0.7

5 13 2

6, 16, 3

5.9.5.1

10

ŁŞ.

3.3

6.16.2

11

2.9.5.6 2.9.5.7 6.9.4

5.7.3

E 6

ALAB-222

8 AEC 241 (1974) (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 4 AND 21. ALAB-223

AB-22- NGRTHERN INDIANA PUBLIC SERVICE CO. (8AILLY GENERATING STATION, NUCLEAR-1), 8 AEC 244 (1974) ALAB-224

48-225 DEFROIT EDISON CO. 'GREENWOOD ENERGY CENTER, UNITS 2 AND 3), 8 AEC 379 (1974) ALAB-225

ALAB-225 COMMONWEALTH EDISON CO. (ZION STATION, UNITS 1 AND 2), 8 AEC 381 (1974)

ALAB-227 NORTHERN INDIANA PUBLIC SERVICE CD. (1971)

(NERMONT YANKEE NUCLEAR POWER CORP. (1974) ALA8-229

100 tN. (19) 100

60 2.9.3

ev es

B. 4. 9.

3.14.3

3.16.1

ALAB-231 BOSTON FOISON CO. (PILGRIM NUCLEAR STATION, UNIT 1), 8 AEC 633 (1974)

AB-235 CONSUMERS POWER CD. (MIDLAND PLANT, UNITS 1 AND 2), 8 AEC 645 (1974)

ALAB-235

6.14.2.

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(5)

0

AB-245 VERMONT YANKEE NUCL. R. POWER CORP. (VERMONT YANKEE NUCLEAR POWER T. A. COM). 8 ACC 873 (1974) ALAB-245

AB-237 TENNESSEE VALLEY AUTHORITY (SELLEFUNTE NUCLEAR PLANT, UNITS : AND 2), 8 AEC 654 (1974)

ALAB-237

AB-238 BOSTON EDISON CO. (PILGRIM NUCLEAR STATION, UNIT 2), 8 AEC 656 (1974) ALA8-238

AB-242 LOUISIANA POWER AND LIGHT CO. (WATERFORD STEAM ELECTRIC STATION, UNIT 3), 8 AEC 847 (1974) ALAB-242

48-243 CONSO: IDATED EDISON CO. DF N Y. (1974) AL AR-243

UB-244 NORTHERN STATES POWER CO. (PRAIRIE ISLAND NUCLEAR GENERATING PLANT, UNITS 1 AND 2), 8 AEC 857 (1974) ALAB-244

5 4 2

| CITATION INDEX JULY 1992 | PAGE | 12 |
|---|------|------------------------------------|
| ALAB-247 DETROIT EDISON CO. (GREENWOOD ENERGY CENTER, UNITS 2 AND 3), 8 AEC 936 (1974) | | 6.15 6.15.8.2 |
| ALAB-249 NORTHERN INDIANA PUBLIC SERVICE CD. (BAILLY GENERATING STATION, NUCLEAR 1), B AEC 980 (1974) | | 3,13,3 3,3,1,2 4,4,2 |
| ALAB-251 PUBLIC SERVICE ELECTRIC AND GAS CO. (HOPE CREEK GENERATING STATION, UNITS 1 AND 2), 8 AEC 993 (1974) | | 5.2 |
| ALAB-252 NORTHERN STATES POWER CO. (PRAIRIE ISLAND NUCLEAR GENERATING PLANT, UNITS 1 AND 2), 8 AEC 1175 (1974) | | 2.9.9.2.1 3.13.1 5.5 |
| ALAB-254 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNIT 2), 8 AEC 1184 (19)1) | | 3.16 3.8.1 4.3 5.6.3 |
| ALAB-256 VIRGINIA ELECTRIC AND POWER CO. (NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2), 1 NRC 10 (1975) | | 2.9.1 3.16 3.7 3.8 4.3 |
| ALAB-258 LCUISIANA POWER AND LIGHT CO. (WATERFORD STEAM ELECTRIC STATION, UNIT 3), 1 NRC 45 (1975) | 4 | ā 6 |
| ALAB-260 TEXAS UTILITIES GENERATING CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 1 NRC 51 (1975) | | 5.6.3 |

NB-262 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 1 NRC 163 (1975)

ALAB-262

18-264 NIAGARA MOHAWK POWER CORP. (1975) 4 NRC 347 (1975)

ALA8-264

PAGE

43

00

47 UI

3 4 3 5 6 4 6 16 1 6 15 3

5. 10. 1 5. 10. 3 5. 13. 2

12.2.1 m in

P ŧŝ.

AB-271 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROLK STATION, UNITS 1 AND 2), 1 NRC 478 (1975) ALAB-271

48-270 CONSUMERS FOWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 1 NRC 473 (1975)

ALA8-270

AB-273 PORTLAND GENERAL ELECTRIC CO. (1975) (1975) (PERBLE SPRI'SS PERLEAR PLANT, UNITS : AND 21, 1 NRC 492 (1975) ALAB-273

AB-268 SOUTHERN CALIFORNIA EDISON CO. (SAN ONDERE NUCLEAR GENERATING STATION, UNITS 2 AND 3), 1 NRC 383 (1975)

ALAB-268

(WPPSS NUCLEAR PROJECTS 1 AND 4), 1 NRC 374 (1975)

ALAB-265

ALA 269 BOSTON EDISON CO. (ILGRIM NUCLEAR STATION, UNIT 2), 1 NRC 411 (1975)

| | 7 | | |
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| C 497 (1975) ON, UNITS 1 AND 2), 1 NRC 539 ON, UNITS 1 AND 2), 1 NRC 539 (1975) | |
| C 497 (1975) ON, UNITS 1 AND 2), 1 NRC 539 ON, UNITS 1 AND 2), 1 NRC 539 (1975) | |
| C 497 (1975) ON, UNITS 1 AND 2), 1 NRC 539 ON, UNITS 1 AND 2), 1 NRC 539 (1975) | |
| C 497 (1975) ON, UNITS 1 AND 2), 1 NRC 539 ON, UNITS 1 AND 2), 1 NRC 539 (1975) | |
| C 497 (1975) ON, UNITS 1 AND 2), 1 NRC 539 ON, UNITS 1 AND 2), 1 NRC 539 (1975) | |
| C 497 (1975) ON, UNITS 1 AND 2), 1 NRC 539 ON, UNITS 1 AND 2), 1 NRC 539 (1975) | |
| C 497 (1975) ON, UNITS 1 AND 2), 1 NRC 539 ON, UNITS 1 AND 2), 1 NRC 539 (1975) | |
| C 497 (1975) ON, UNITS 1 AND 2), 1 NRC 539 ON, UNITS 1 AND 2), 1 NRC 539 (1975) | |
| C 497 (1975) ON, UNITS 1 AND 2), 1 NRC ON 1 NRC 559 (1975) C 3 (1975) (1975) | (1975) |
| C 497 (1975) ON, UNITS 1 AND 2), 1 (3 (1975) | 197 |
| C 497 (1975) ON, UNITS 1 AND ON, UNITS 1 AND (3 (1975) | 2 NRC |
| C 497 (1975) ON, UNITS 1 A ON (1975) C 3 (1975) | 6 |
| 1 NO NO 1 1 NO 1 N | dNA t |
| LAND GENERAL ELECTRIC CO. EAR PLANT, UNIT 2), 1 'NRC 4 MAC ELECTRIC POW.R CD. NUCLEAR GENERAT NG STATION. LEAR GENERATING STATION. TAIDATED EDISON CD. OF N Y. ATION. UNIT 3), 2 NRC 6 (1) MERS POWER CD. UNITS: AND 2), 2 NRC 9 (1) | ONITS |
| LAND GENERAL ELECTRIC EAR PLANT, UNIT 2), 1 EAR PLANT, UNIT 2), 1 EAR GENERATING STATIO LEAR GENERATING STATIO LEAR GENERATING STATIO TO BE STATIO LEAR GENERATING STATIO LEAR GENERATIO LEAR GENERATING STATIO LEAR GENER | |
| LAND GENERAL ELECTOR FOR PLANT, UNIT 2 EAR PLANT, UNIT 2 EAR PLANT, UNIT 2 EAR GENERATING 5 EAR POWER CG. UNITS : AND 2), MERS POWER CG. | CO. |
| LAND GENERAL TO POWER AN THE PLANT, US TO GAS AND E TEAR GENERAT TO BAND E TO BAND | POWER |
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| PORT NUCLI N | NORTHERN STATES POWER |
| CREEK WO PLA | B-234 NORTHERN STATES POWER CG. (PRAIRIE ISLAND NUCLEAR GENERATING PLANT |
| ALAB-273 ALAB-277 (DDUGL) (DDUGL) (MDLA) ALAB-287 (INDIA) (INDIA) (MIDLA) ALAB-283 | ALAB-234 (PRAIR) |
| ALAB-274 (DDUG (DDUG (MOLF (MDL (MDL (MDL ME-283 (MDL ME-283 | ALAB |

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| PAGE 15 | 0.10 | 16. | 2 6 3 3 | 9 44 | 4 4 6 4 4 6 | 6.54 | 2 2 2 2 |
|--------------------------|--|---|--|--|---|------|--|
| CITATION INDEX JULY 1992 | ALAB-286 PUERTO RICO WATER RESOURCES AUTHORITY (NORTH COAST NUCLEAR PLANT, UNIT 1), 2 NRC 213 (1975) | ALAB-288 MORTHERN STATES POWER CO. (PRAIRIE ISLAMD NUCLEAR GENERATING PLANT, UNITS 1 AND 2), 2 NRC 390 (1975) | ALAB-289 VIRGINIA ELECTRIC AND POWER CO. (NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2), 2 NRC 395 (1975) | ALAB-290 TOLEDO EDISON CO. (1975) 2 NRC 401 (1975) | ALAB-291 GEORGIA POWER CO. (ALVIN W. VOGTLE NUCLEAR PLANT, UNITS + AND 2), 2 NRC 404 (1975) | | ALAB-292 LONG ISLAND LIGHTING CO. (JAMESPORT NUCLEAR STATION, UNITS 1 AND 2), 2 NPC 631 (1975) |

3.3.3

00000 000 ALAB-293 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 2 NRC 660 (1975)

F 97 19

m m m

ALAB-294 CLEVELAND ELECTRIC ILLUMINATING CO. (1975) (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 2 NRC 663 (1975)

ALAB-295 PUBLIC SERVICE CD. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 2 NRC 668 (1975)

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48-296 ALLIED-GENERAL MUCLEAR SERVICES (1975) 2 NRC 671 (1975) ALA8-296

(DAVIS-BESSE NUCLEAR POWER STATION, UNIT 1), 2 NRC 727 (1975) ALAB-297

(PERRY MICLEAR POWER PLANT, UNITS 1 AND 2), 2 NRC 730 (1975) ALAB-238

AB-300 TOLEDO EDISON CO. (OAVIS-BESSE NUCLEAR POWER STATION), 2 NRC 752 (1975) ALAB-300

AB-301 HOUSTON LIGHTING AND POWER CO. (ALLENS CREEK NUCLEAR GENERATING STATION, UNITS 1 AND 2), 2 NRC 853 (1975) ALAB-301

AB-302 DUKE POWER CD. (PERKINS NUCLEAR STATION, UNITS 1, 2 AND 3), 2 NRC 856 (1975) ALAB-302

AB-303 NORTHERN INDIANA PUBLIC SERVICE CO. (1975) (BAILLY GENERATING STATION, NUCLEAR-1), 2 NRC 858 (1975) ALAB-303

48-304 CONSOLIDATED EDISON CD. OF N.Y. (INDIAN POINT NICLEAR STATION, UNITS 1, 2 AND 3), 3 NRC 1 (1976) ALAB-304

100 PAGE

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CONSOLIDATED EDISON CD. OF N.Y. ALAB-304

ALAB-305 CINCINNATI GAS AND ELECTRIC CO. (WILLIAM H. ZIMMER NUCLEAR STATION), 3 NRC 8 (1976)

ALAB-307 KANSAS GAS AND ELECTRIC CO. (WOLF CREEK NUCLEAR GENERATING STATION, UNIT 1), 3 NRC 17 (1976)

ALAB-310 DUQUESNE LIGHT CD. (BEAVER VALLEY POWER STATION, UNIT 1), 3 NRC 33 (1976)

ALAB-311 KANSAS GAS AND ELECTRIC CO. (WOLF CREEK NUCLEAR GENERATING STATION, UNIT 1), 3 NRC 85 (1976).

ALAB-313 PUERTO RICO WATER RESOURCES AUTHORITY (NORTH COAST NUCLEAR PLANT, UNIT 1), 3 NRC 8 / (1975)

ALAB-314 TOLEDO EDISON CO. (DAVIS-BESSE NUCLEAR POWER STATION, UNIT 1), 3 NRC 38 (1976)

ALAB-315 CONSUMERS POWER CG. (MIDLAND PLANT, UNITS 1 AND 2), 3 NRC 101 (1976)

AB-316 PUBLIC SERVICE CG. OF INDIANA (MARBLE HILL NUCLEAR GENERAT) G STATION, UNITS 1 AND 2), 3 NRC 167 (1976) ALAB-3*6

ALAB-317 GULF STATES UTILITIES CD. (RIVER BEND STATION, UNITS 1 AND 2), 3 NRC 175 (1976)

PAGE

and the

16

卓

2 0 5

5.7.1

5.4

2.3

12.2

6,24.5

2 - B B - B

AB-318 LONG ISLAND LIGHTING CO. (JAMESPORT MUCLEAR POWER STATION, UNITS 1 AND 2). 3 NRC 186 (1976). ALAB-318

(INDIAN POINT STATION, UNITS 1, 2 AND 3), 3 NRC 188 (1976) ALAB-319

(WOLF CREEK NUCLEAR GENERATING STATION), 3 NRC 293 (1976) KANSAS GAS AND ELECTRIC CO. ALAB-321

AB-322 PUBLIC SERVICE CO. OF INDIANA (1976) (MARSLE HILL NUCLEAR GENERATING STAT: ON, UNITS I AND 2). 3 NRC 328 (1976) ALAH 322

48-323 TOLEDO EDISON CO. (DAVIS-BESSE NUCLEAR POWER STATION, UNIT +), 3 NRC 33+ (+976) ALAB-323

48-324 VIRGINIA ELECTRIC AND POWER CO. (1976) ALAB-324

(B.326 PROJECT MANAGEMENT CORP., 2 NRC 406 (1976) ALAB-326

ALAB-327 KANSAS GAS AND ELECTRIC CO., UNIT 1). 3 MRC 408 (1976)

NB-328 ALLIED-GENERAL NUCLEAR SERVICES (BARNWELL FUEL RECEIVING AND STORAGE STATION), 3 NRC 420 (1976) ALAB-32B

82

32

3.1.2.3

9. A 5.

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AB-331 KANSAS GAS AND ELECTRIC CO. (1976) (WOLF CREEK NUCLEAR GENERATING STATION, UNIT 4), 3 NRC 771 (1976)

ALAB-331

AB-332 TOLEDO EDISON CO. (DAVIS-BESSE NUCLEAR POWER STATION), 3 MRC 785 (1976)

ALAB-332

(CLINCH RIVER BREEDER REACTOR PLANT), 3 NRC 613 (1976)

ALAB-330

AB-329 GULF STATES UTILITIES CO. (1976) (RIVER BEND STATION, UNITS 1 AND 2), 3 NRC 607 (1976)

ALAB-329

- 5.8.10
- r *********
- = N B

- 2.9.4.1.1
- 3.11.12

AB-334 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 3 NRC 809 (1976)

ALAB-334

AB-335 FLORIDA POWER AND LIGHT CO. (1976) (ST. LUCIE NUCLEAR PLANT, UNIT 2), 3 NRC 830 (1976)

ALAB-335

68-333 PORTLAND GENERAL ELECTRIC CO. (PEBBLE SPRINGS NUCLEAR PLANT, UNITS 1 AND 2), 3 NRC 804 (1976)

ALAB-333

- 4.4
- 5.10.1
- **(**9) 12

48-336 ARIZONA PUBLIC SERVICE CO. (PALO VERDE NUCLEAR GENERATING STATION, UNITS 1, 2 AND 3), 4 NRC 3 (1975) ALAB-336

1

70.74

0.00

(8-338 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNIT, 1 AND 2), 4 NRC 10 (1976) ALAB-338

(MARBLE HILL NUCLEAR GENERA ING STATION, UNITS 1 AND 2), 4 NRC 20 (1976) ALAE-339

(CLINTON POWER STATION, UNITS + AND 2), 4 NRC 27 (1976) ALAB-340

AB-341 TENNESSEE VALLEY AUTHORITY (BROWNS FERRY NUCLEAR PLANT, UNITS 1 AND 2), 4 NRC 95 (1976) ALAB-341

AB-342 VIRGINIA ELECTRIC AND POWER CO. (NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2), 4 NRC 98 (1976) ALAB-342

(PRAIRIE ISLAND NUCLEAR GENERATING STATION, UNITS 1 AND 2), 4 NRC 169 (1976) ALAB-343

NB-344 CONSUMERS POWER CO. (1976) (MIDLAND PLANT, UNITS 1 AND 2), 4 NRC 207 (1976) ALAB-344

(CLINCH RIVER BREEDER REACTOR PLANT), & NRC 212 (1977) ALAB-345

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5.8.2

e-gr

ALAB-355 DUKE POWER CO. (CATAWBA NUCLEAR STATION, UNITS : AND 2), 4 NRC 397 (1976)

3.11.1.1.1 5.10.3 5.6.3 6.16.3

2.9.5.1 2.9.7.1 2.9.9.2.1 5.2

| CITATION INDEX JULY 1992 | PAGE 22 |
|--|---|
| ALAB-356 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 4 NRC 525 (1976) | 5.6.1 5.7 |
| ALAB-357 CONSOLIDATED EDISON CO. OF N.Y. (INDIAN POINT STATION, UNITS 1, 2 AND 3), 4 NRC 542 (1976) | 6.1.5 |
| ALAS 358 GULF STATES UTILITIES CO. (RIVER BEND STATION, UNITS 1 AND 2), 4 NRC 558 (1976) | 2.9.4.1.8 3.e |
| ALAB-359 DUKE POWER CU. (CATAWBA NUCLEAR STATION, UNITS 1 AND 2), 4 NRC 619 (1976) | 4.4.1 4.4.2 5.10.1 |
| ALAB-366 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2). 5 NRC 39 (1977) | 6.1F 7.1 |
| ALAB-367 TENNESSEE VALLEY AUTHORITY (HARTSVILLE NUCLEAR PLANT UNITS 14,24,18,28), 5 NRC 92 (1977) | 3.11 3.11.1.1.1 3.13.1 5.10.1 5.10.3 5.6.3 |
| ALAB-369 CONSOLIDATED EDISON CO. OF N.Y. (INDIAN POINT STATION, UNIT 2), 5 NRC 129 (1977) | 5.2 |
| ALAB-370 PUBLIC SERVICE CO. OF OKLAHOMA (BLACK FOX STATION, UNITS 1 AND 2), 5 NRC 131 (1977) | 4.5 5.8.3.2 5.8.4 |
| ALAB-371 PUBLIC SERVICE CO. OF INDIANA (MARBLE) ICLEAR GENERATING STATION, UNITS 1 AND 2), 5 NRC 409 (1977) | 3.3.1 |

ALAB-371 PUBLIC SERVICE CO. OF INDIANA

5.12.2.1

ALAS-374 PUBLIC SERVICE CO. OF INDIANA (MARSLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), 5 NRC 417 (1977)

4.6 5.12.2.1.2

ALAB-376 DETROIT EDISON CO. (GREENWOOD ENERGY CENTER, UNITS 2 AND 3), 5 NRC 426 (1977)

2.9.4.1.1 2.9.7

3.1.2.4 5.4 5.8.1

ALAL-377 CONSOLIDATED EDISON CO. OF N.Y. (INDIAN POINT STATION, UNITS 1, 2 AND 3), 5 NRC 430 (1977)

2.6 3.3.3

ALAB-378 TOLEOU EDISON CO. (DAVIS-BESSE NUCLEAR POWER STATION, UNITS 1,2,3), 5 NRC 557 (1977)

3.17 6.4.2.2

ALAB-379 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 5 NRC 565 (1977)

3.12 3.12.2

ALAB-380 TENNESSEE VALLEY AUTHORITY (HARTSVILLE NUCLEAR PLANT UNITS 1A,2A,1B,2B), 5 NRC 572 (1977)

3.1.2.3 6.15.8.1 6.19.2 6.9.1

HOUSTON LIGHTING AND POWER CO. ALAB-381 (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 5 MRC 582 (1977)

3.1.2.1.1 3.1.2.5

4.4

6.16.1 6.3.1

| CITATION INDEX JULY 1992 | PAGE 24 |
|--|------------------------------|
| ALAB-382 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 5 NRC 603 (1977) | 2.9.10.2 3.12.3 |
| ALAB-383 GULF STATES UTILITIES CO. (RIVER BEND STATION, UNITS 1 AND 2), 5 NRC 609 (1977) | 5.6.1 |
| ALAB-384 METPOPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 2), 5 NRC 612 (1977) | 2.9.3.3.3 |
| ALAB-385 TOLEDO EDISON CO. (DAVIS-BESSE NUCLEAR POWER STATION, UNITS 1,2,3), 5 NRC 621 (1977) | 5.6.3 5.7 5.7.1 6.3 |
| ALAB-388 PUBLIC SERVICE CO. OF OKLAHOMA (BLACK FOX STATION, UNITS 1 AND 2), 5 NRC 640 (1977) | 5.10.3 |
| ALAB-389 PHILADELPHIA ELECTRIC CO. (PEACH BOTTOM ATOMIC STATION, UNITS 2 AND 3), 5 NRC 727 (1977) | 3.1.2.1.1 5.19.1 |
| ALAB-390 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 5 NRC 733 (1977) | 6.20.5 |
| ALAB-392 VERMONT YANKEE NUCLEAR POWER CORP. (VERMONT YANKEE NUCLEAR POWER STATION), 5 NRC 759 (1977) | 6.15.6 |
| ALAB-393 PUBLIC SERVICE CD. OF INDIANA (MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), 5 NRC 767 (1977) | 5,12,2,1 |
| ALAB-394 PUBLIC SERVICE ELECTRIC AND GAS CO. (HOPE CREEK GENERATING STATION, UNITS 1 AND 2), 5 NRC 769 (1977) | 5.10.3 |

ALAB - 395 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 5 NRC 772 (1977) 5.15.2 5.18 5.19.3 5.6.2 5.7 5.7.1 6. 15. 3. 2 ALAB-399 CONSOLIDATED EDISON CO. OF N.Y. (INDIAN POINT STATION, UNIT 2), 5 NRC 1156 (1977) 6.15.8.1 ALAB-400 PACIFIC GAS AND ELECTRIC CO. (STANISLAUS NUCLEAR PROJECT, UNIT 1), 5 NRC 1175 (1977) 2.9.3 3.1.2.2 3.5.2.1 5.8.5 ALAB-404 FLORIDA POWER AND LIGHT CO. (ST. LUCIE NUCLEAR PLANT, UNIT 2), 5 MRC 1185 (1 5.7.1 ALAB-405 PUBLIC SERVICE CO. OF INDIANA (MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), 5 NRC 1190 (1977) 3.15 5.12.2.1 ALAB-408 DUQUESNE LIGHT CO. (BEAVER VALLEY POWER STATION, UNIT 1), 5 NRC 1383 (1977) 3.1.2.5 4.6 6.16.1 ALAB-409 TENNESSEE VALLEY AUTHORITY (HARTSVILLE NUCLEAR PLANT UNITS 1A.2A.1B.2B), 5 NRC 1391 (1977) 5.13.4 ALAB-410 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 5 NRC 1398 (1977) 2.11.2.4 3.12.4 6.20.4

(INDIAN POINT STATION, UNIT 21, 5 NRC 1425 (1977) ALAB-414

ALAB-415 FLORIDA POWER AND LIGHT CO 5 NRC 1435 (1977)

(MIDLAND PLANT, UNITS 1 AND 2), 5 NRC 1442 (1977) ALAB-417

AB-418 TENNESSEE VALLEY AUTHORITY (HARTSVILLE NUCLEAR PLANT UNITS 14,24,78,28), 6 MRC 1 (1977) ALAB-418

(PRAIRIE ISLAND NUCLEAR GENERATING PLANT, UNITS 1 AND 2), 8 NRC 3 (1977) ALAB-419

ALAB-420 FLORIDA POWER AND LIGHT CO. (ST. LUCIE NUCLEAR PLANT, UNIT 2). 6 NRC 8 (1977)

(VERMONT YANKEE NUCLEAR POWER CORP. (1977) ALAB-421

5 7 5

5.7.4

5, 12, 1

3 4 5

ALA8-422 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 6 NRC 33 (1977)

3.1.1 3.1.4.3 3.1.5 3.12.1 3.13.1 3.16 3.16.1 4.2 4.3 4.4 5.6.1 5.6.3 6.1.4 6.15 6.15.4.1 6.15.4.2 6.15.5 6.15.8.2

ALAB-423 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 6 NRC 115 (1977)

4.3 5.6.5

ALAB-424 KANSAS GAS AND ELECTRIC CO. (WOLF CREEK NUCLEAR GENERATING STATION, UNIT 1), 6 NRC 122 (1977)

2.9.4.1.1

5.10.2 5.10.3 5.13.4

5.4

FLORIDA POWER AND LIGHT CO. ALA8-428 (ST. LUCIE PLANT, UNIT 1: TURKEY POINT PLANT, UNITS 3 AND 4), 6 NRC 221 (1977)

6.3 6.3.1

ALAB-430 TO! FOO EDISON CO. AND CLEVELAND ELECTRIC ILLUMINATING CO. (DAVIS-BESSE STATION, UNITS 1, 2, 3; PERRY PLANT, UNITS 1 AND 2), 6 NRC 457 (1977)

4.4 5.10.3

ALAB-431 DUKE POWER CO. (PERKINS NUCLEAR STATION, UNITS 1, 2 AND 3), 6 NRC 460 (1977)

2.9.3.3.3

| CITATION INDEX JULY 1992 | PAGE 28 |
|---|--|
| ALAB-432 SOUTHERN CALIFORNIA EDISON CO. AND SAN DIEGO GAS AND ELECTRIC CO. (SAN ONOFRE NUCLEAR GENERATING STATION, UNITS 2 AND 3), 6 NRC 465 (1977) | 5.6.1 |
| ALAE-433 DUKE POWER CO. (PERKINS NUCLEAR STATION, UNITS 1, 2 AND 3), 6 NRC 469 (1977) | 5.12.2 5.2 |
| ALAB-434 POWER AUTHORITY OF THE STATE OF NEW YORK (GREENE COUNTY NUCLEAR PLANT), 6 NRC 471 (1977) | 2.9.7 |
| ALAB-435 FLORIDA POWER AND LIGHT CO. (ST. LUCIE NUCLEAR PLANT, UNIT 2), 6 NRC 541 (1977) | 5.10.1 6.15.4 6.15.4.1 6.23.3.1 |
| ALAB-437 PUBLIC SERVICE CO. OF INDIANA (MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), 6 NRC 630 (1977) | 5.7.1 |
| ALAB-438 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 6 NRC 638 (1977) | 2.11.6 5.12.2.1 |
| ALAB-439 POWER AUTHORITY OF THE STATE OF NEW YORK (GREENE COUNTY NUCLEAR PLANT), 6 NRC 640 (1977) | 5.12.2.1 |
| ALAB-440 DUKE POWER CO. (CHEROKEE NUCLEAR STATION, UNITS 1, 2 AND 3), 6 NRC 642 (1977) | 2.9.2 2.9.3.3.3 |
| ALAB-441 PITTSBURGH-DES MOINES STEEL CO. 6 NRC 725 (1977) | 5.12.2 5.8.12 |
| ALAB-443 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 6 NRC 741 (1977) | 3.1.2.1 |

ALAB-443 CLEVELAND ELECTRIC ILLUMINATING CO.

3.1.2.6 3.14.2 3.5.2.3 3.5.3 5.6.4

ALAB-444 GULF STATES UTILITIES CO. (RIVER BEND STATION, UNITS 1 AND 2), 6 NRC 760 (1977)

> 2.9.5.7 3.1.2.5 3.12.1.2 3.4.2

2.10.2

2.9.3.3.3

3.4.2 3.7.3.4 6.16.2 6.20.3 6.9.2.1

ALAB-445 TENNESSEE VALLEY AUTHORITY (YELLOW CREEK NUCLEAR PLANT, UNITS 1 AND 2), 5 NRC 865 (1977)

1.7.1

ALAB-446 PUGET SOUND POWER AND LIGHT CC. (SKAGIT NUCLEAR PROJECT, UNITS 1 AND 2). 6 NRC 870 (1977)

6.19:1

ALAB-447 EXXON NUCLEAR CO. (NUCLEAR FUEL RECOVERY AND RECYCLING CENTER), 6 NRC 877 (1977)

2.10.2

ALAB-451 PORTLAND GENERAL ELECTRIC CO. (TROJAN NUC'EAR PLANT). 6 NRC 889 (1977)

3.1.2.5 6.1.6 6.16.1

ALAB-453 CUNSOLIDATED EDISON CO. OF N.Y. (INDIAN POINT STATION, UNIT 2), 7 NRC 31 (1978)

6.15.8.1

ALAB-454 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 2), 7 NRC 39 (1978)

2.10.1.2

7 MRC 41 (1978) AB-455 NORTHERN STATES POWER CO. (PRAIRIE ISLAND NUCLEAR GENERATING PLANT, UNITS 1 AND 2), ALAB-455

AB-456 METROPOLITAN EDISON CO. (1978), 7 NRC 63 (1978) ALAB-456

NB-457 DUKE POWER CD. (CHEROKEE NUCLEAR STATION, UNITS 1, 2 AND 3), 7 NRC 70 (1978) ALAB-457

(MIDLAND PLANT, UNITS 1 AMD 2), 7 NRC 155 (1978) ALAB-458

AB-459 PUBLIC SERVICE CD. OF INDIANA (1978) + MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), 7 NRC 179 (1978) ALAB 459

AB-460 PUBLIC SERVICE ELECTRIC AND GAS CO. (1978) (HOPE CREEK GENERATING ST-710M, UNITS 1 AND 2), 7 NRC 204 (1978)

7 NRC 313 (1978) (MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), ALAB-461

30

DV.

10

3, 16

6 13 1

2.9.5.6

17 10

17

in 3.1.2

5.5

| CITATION INDEX JULY 1992 | PAGE 31 |
|--|---|
| ALAB-461 PUBLIC SERVICE CO. OF INDIANA | 3.1.2.7 3.13.1 5.10.1 5.4 5.5 5.8.7 6.16.1 |
| ALAB-462 KANSAS GAS AND ELECTRIC CO. (WOLF CREEK NUCLEAR GENERATING STATION, UNIT 1), 7 NRC 320 (1978) | 3.14.3 3.7.3.2 3.7.3.4 3.7.3.5 4.4.1 4.4.2 |
| ALAB-463 TENNESSEE VALLEY AUTHORITY (HARTSVILLE NUCLEAR PLANT UNITS 14,24,18,28), 7 NRC 341 (1978) | 3.1.2.7 3.11.4 3.13.1 5.14.3 3.16 3.7.2 4.3 4.4 5.3.1 6.7.1 6.7.2 |
| ALAB-464 NORTHERN STATES POWER CO. (TYRONE ENERGY PARK, UNIT 1), 7 NRC 372 (1978) | 3.1.2.6 4.4.1.1 |
| ALAB-466 DETROIT EDISON CO. (ENRICO FERMI ATOMIC POWER PLANT, UNIT 2), 7 NRC 457 (1978) | 5.6.1 5.8.14 6.24.3 |
| ALAB-467 TENNESSEE VALLEY AUTHORITY (HARTSVILLE NUCLEAR PLANT UNITS 1A,2A,18,2B), 7 NRC 459 (1978) | 4.5 5.1 5.4 5.5 |

| CITATION INDEX JULY 1992 | PAGE 32 |
|--|--|
| ALAB-467 TENNESSEE VALLEY AUTHORITY | 5.6.1 5.8.15 |
| ALAB-468 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 7 NRC 464 (1978) | 3.3.4 5.8.2 |
| ALAB-469 DETROIT EDISON CO. (ENRICO FERMI ATOMIC POWER PLANT, UNIT 2), 7 NRC 470 (1978) | 5.9 6.14 |
| ALAB-470 DETROIT EDISON CO. (ENRICO FERMI ATOMIC POWER PLANT, UNIT 2), 7 NRC 473 (1978) | 2.9.4.1.1 2.9.4.1.2 2.9.4.1.4 2.9.4.2 3.1.2.5 6.16.1 |
| ALAB-471 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 7 NRC 477 (1978) | 3.11.1.5 3.16 3.7.2 3.7.3.6 6.15.4 6.15.4.1 6.15.4.2 6.15.6.1.2 |
| ALAB-472 DETROIT EDISON CO. (CREENWOOD ENERGY CENTER, UNITS 2 AND 3), 7 NRC 570 (1978) | 2.9.7 5.4 5.8.1 |
| ALAB-473 NUCLEAR ENGINEERING CO. (SHEFFIELD, ILL. LOW-LEVEL RADIOACTIVE WASTE DISPOSAL SITE), 7 NRC 737 (1978) | 2.9.4.1.1 2.9.4.1.4 2.9.4.2 2.9.5.3 2.9.7 5.8.1 |

| ALAB-489 OFFSHORE POWER SYSTEMS (FLOATING NUCLEAR POWER PLANTS), 8 NRC 194 (1978) | 1.8 3.1.2.5 3.3.1 6.15.7 6.16.1 6.16.1.1 6.18 6.20.4 |
|--|---|
| ALAB-490 CAROLINA POWER AND LIGHT CO. (SHEARON HARRIS NUCLEAR PLANT, UNITS 1-4), B NRC 234 (1978) | ~ 7.3.2 6.15.5 |
| ALAB-491 VIRGINIA ELECTRIC AND POWER CO. (NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2), 8 NRC 245 (1978) | 5.5.1 5.6.1 6.9.2.2 |
| ALAB-492 NORTHERN STATES POWER CO. (TYRONE ENERGY PARK, UNIT 1), 8 NRC 251 (1978) | 2.9.5.13 5.8.1 |
| ALAE-493 PUBLIC SERVICE CO. OF INDIANA (MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2). 8 NRC 253 (1978) | 2 7 3 1 2 6 3 6 4 5 5 12 1 5 15 1 5 18 5 19 4 5 7 1 6 18 6 5 1 6 5 2 |
| ALAB-494 NUCLEAR ENGINEERING CO. (SHEFFIELD, ILL. LOW-LEVEL RADIOACTIVE WASTE DISPOSAL SITE), 8 NRC 299 (1978) | 3 1.4.1 3.1.4.2 |

ALAR-495 PUBLIC SERVICE CO. OF NEW HAMPSHIRE 6 15 4 (SEABROOK STATION, UNITS 1 AND 2), 8 NRC 304 (1978) PORTLAND GENERAL ELECTRIC CO. ALAR-496 2.9.9.2.2 (TROJAN NUCLEAR PLANT), 8 NRC 308 (1978) 5.8.4.1 ALAB-497 DAIRYLAND POWER COOPERATIVE 3.1.4.1 ILA CROSSE BOILING WATER REACTOR), 8 NRC 312 (1978) PUBLIC SERVICE CD. OF NEW HAMPSHIRE ALAS-499 6.15.4 (SEABROOK STATION, UNITS 1 AND 2), 8 NRC 319 (1978) ALAB-500 OFFSHORE POWER SYSTEMS 5.14 (FLOATING NUCLEAR POWER PLANTS), 8 NRC 323 (1978) WASHINGTON PUBLIC POWER SUPPLY SYSTEM ALAB-501 5 15 (WPPSS NUCLEAR PROJECTS 3 AND 5), 8 NRC 381 (1978) 5.6.1 ALAB-502 ROCHESTER GAS AND ELECTRIC CORP. 3.7.3.2 (STERLING POWER PROJECT, UNIT 1), 8 NRC 383 (1978) 5 1 6.15.4.1 6.15.4 PACIFIC GAS AND ELECTRIC CO. AL AB-504 (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 8 NRC 406 (1978) 3.16 5.12.2 5.12.2.1 PUBLIC SERVICE CO. OF OKLAHOMA ALAS-505 5.7.1 (BLACK FOX STATION, UNITS 1 AND 2), 8 NRC 527 (1978) 6.4.1

| | CITATION INDEX JULY 1992 | PAGE 36 |
|--|----------------------------|---------------------------|
| ALAB-506 TENNESSEE VALLEY AUTHORITY (PHIPPS BEND NUCLEAR PLANT, UNITS 1 AND 2). | . 8 NRC 533 (1978) | 6.15 |
| ALAB 507 ROCHESTER GAS AND ELECTRIC CORP. (STERLING POWER PROJECT, UNIT 1). B NRC 55 | | 6.13 |
| ALAB-513 PUBLIC SERVICE CO. OF NEW HAMPSH (SEABROOK STATION, UNITS 1 AND 2). 8 NRC 69 | | 3.1.2.1 5.6.1 |
| ALAB-514 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS | 1 AND 2). 8 NRC 697 (19 7) | 5.12.2.1 |
| ALAB-515 TENNESSEE VALLEY AUTHORITY (YELLOW CREEK NUCLEAR PLANT, UNITS 1 AND 2) |), 8 NRC 702 (1978) | 6.15.8.5 |
| ALAB-516 DELMARVA POWER AND LIGHT CO. (SUMMIT POWER STATION, UNITS 1 AND 2), 9 NR | RC 5 (1979) | 1.3 6.2 |
| ALAB-518 PUBLIC SERVICE ELECTRIC AND GAS (HOPE CREEK GENERATING STATION, UNITS 1 AND | | 4,3 6,15,1,2 6,16,4 |
| ALAB-519 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 | 1 AND 2), 9 NRC 42 (1979) | 2.11.5.1 |
| ALAB-520 PUBLIC SERVICE CO. OF NEW HAMPSH (SEABROOK STATION, UNITS 1 AND 2), 9 NRC 48 | | 3, 11, 1, 1, 3, 11, 1, 6 |
| ALAB-522 VIRGINIA ELECTRIC AND POWER CO. (NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2) |), 9 NRC 54 (1979) | 2.9.4.1.1 2.9.7.1 |

| CITATION INDEX JULY 1992 | PAGE 37 |
|--|--|
| PUGET SOUND POWER AND LIGHT CO. IT NUCLEAR PROJECT, UNITS 1 AND 2), 9 NRC 58 (1979) | 2.9.3.3.3 2.9.3.3.4 |
| PORTLAND GENERAL ELECTRIC CD. AN NUCLEAR PLANT). 9 NRC 65 (1979) | 5.7.1 |
| METROPOLITAN EDISON CO. E MILE ISLAND NUCLEAR STATION, UNIT 2), 9 NRC 111 (1979) | 3.14.1 |
| CARDLINA POWER AND LIGHT CO. RON HARRIS NUCLEAR PLANT, UNITS 1-4), 9 NRC 122 (1979) | 2.9.12 2.9.3.3.3 5.19.1 |
| DUKE POWER CO. EE NUCLFAR STATION AND MCGUIRE NUCLEAR STATION), 9 NRC 146 (1979) | 2 9.3.3.3 2 9.4.1.2 2 9.4.2 2 9.6 |
| PUBLIC SERVICE CO. OF INDIANA E HILL NUCLEAR GENERATING STATION, UNITS 1 AMD 2), 9 NRC 261 (1979) | 4.4 |
| PORTLAND GENERAL ELECTRIC CO. IN NUCLEAR PLANT), 9 NRC 263 (1979) | 6.15 6.15.4 6.15.9 6.27 |
| PHILADELPHIA ELECTRIC CO. BOTTOM ATOMIC POWER STATION, UNIT 3), 9 NRC 279 (1979) | 4.1 6.15.8.5 |
| PORTLAND GENERAL ELECTRIC CO. IN NUCLEAR PLANT), 9 NRC 287 (1979) | 2.5.1 3.4 |

| | CITATION INDEX JULY 1992 | PAGE 38 |
|--|---------------------------|--------------------|
| ALAB-534 PORTLAND GENERAL ELECTRIC CO. | | 5.1.3.1 6.1.4.4 |
| ALAR-535 HOUSTON LIGHTING AND POWER CO. (ALLENS CREEK NUCLEAR GENERATING STATION, | | 2.9.7 |
| ALAB-539 HOUSTON LIGHTING AND POWER CO. (ALLENS CREEK NUCLEAR GENERATING STATION, | UNIT 1). 9 NRC 422 (1979) | 3.4.4 |
| ALAB-540 PHILADELPHIA ELECTRIC CO. (PEACH BOTTOM ATOMIC STATION, UNITS 2 AND | 3), 9 NRC 428 (1979) | 5.5.4 |
| ALAB-541 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 9 NRC 436 | (1979) | 5.12.2.1 5.8.2 |
| ALAB-542 IN RE ATLANTIC RESEARCH CORP. 9 NRC 611 (1979) | | 6.10.1.1 |
| ALAB-544 HOUSTON LIGHTING AND POWER CO. (ALLENS CREEK NUCLEAR GENERATING STATION, | UNIT 1), 8 NRC 630 (1979) | 5.12.1 |
| ALAB-546 PHILADELPHIA ELECTRIC CU. (PEACH BOTTOM ATOMIC STATION, UNITS 2 AND | 3), 9 NRC 636 (1979) | 5.5.4 |
| ALAB-547 HOUSTON LIGHTING AND POWER CO. (ALLENS CREEK NUCLEAR GENERATING STATION, | UNIT 1), 9 NRC 638 (1979) | 5.4 |
| ALAB 548 PUBLIC SERVICE CO. OF NEW HAMP (SEABROOK STATION, UNITS 1 AND 2), 9 NRC | | 5.15.2 |

| | CITATION INDEX JULY 1992 | PAGE | 29 |
|--|--------------------------|------|------------------|
| ALA8-549 HOUSTON LIGHTING AND POWER CO. | | | |
| (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 9 NRC | 644 (1979) | | 2.9.3.3.3 |
| | | | 2.9.4.1.2 |
| | | | * |
| | | | |
| ALAS-350 PACIFIC GAL AND ELECTRIC CD. | | | |
| (STANISLAUS NUCLEAR PROJECT, UNIT 1), 9 NRC | 683 (1979) | | 2.11.2 |
| | | | 2.11.5 |
| | | | 2.11.6 |
| | | | |
| ALAB-551 "IRGINIA ELECTRIC AND POWER CO. | | | |
| (NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2) | . 9 NRC 704 (1979) | | 4.6 |
| | | | 5.19.1 |
| | | | 5.5.1 |
| | | | 5.6.1 6.5.4.1 |
| | | | |
| | | | |
| ALAB-552 PUGET SOUND POWER AND LIGHT CO. | | | |
| (SKAGIT NUCLEAR PROJECT, UNITS 1 AND 2), 10 | NRC 1 (1979) | | 2.9.3.3.3 |
| | | | |
| | | | |
| ALAB-553 FLORIDA POWER AND LIGHT CO. (ST. LUCIE NUCLEAR PLANT, UNIT 2), 10 NRC 1. | 2 [1979] | | |
| (ST. COULE MODERN FERM), WHIT 27, TO THE I | | | 3.3.2.4 |
| | | | |
| ALAB-554 TENNESSEE VALLEY AUTHORITY | | | |
| (HARTSVILLE NUCLEAR PLANT UNITS 14.24, 18.28 |), 10 NRC 15 (1979) | | 3.5 |
| | | | |
| | | | |
| ALAB-555 VIRGINIA ELECTRIC AND POWER CO. | | | |
| (NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2). | . 10 NRC 23 (1979) | | 3.12.4 |
| | | | 3.16 |
| | | | |
| ALAB-556 PUGET SOUND POWER AND LIGHT CO. | | | |
| 'SKAGIT NUCLEAR PROJECT, UNITS 1 AND 21, 10 | NRC 30 (1979) | | 3.1.4.1 |
| | | | 3.1.4.2 |
| | | | 1.2 |
| | | | |
| ALA8-557 PUBLIC SERVICE CO. OF NEW HAMPSHI | IDE | | |
| (SEAF YORK STATION, UNITS 1 AND 2), 10 NRC 15 | | | 5. 15. 4 |
| | | | |

| CITATION INDEX JULY 1992 | PAGE | 40 |
|--|------|-----------------------------------|
| ALAB-559 PUGET SOUND POWER AND LIGHT CO. (SKAGIT NUCLEAR PROJECT, UNITS 1 AND 2), 10 NRC 162 (1979) | | 2.9.3.3.3 |
| ALAB-560 TOLEDO EDISON CO. (DAVIS-BESSE NUCLEAR POWER STATION, UNITS 1,2,3), 10 NRC 265 (1979) | | 6.3 |
| ALAB-562 PHILADELPHIA ELECTRIC CO. (PEACH SOTTOM ATOMIC STATION, UNITS 2 AND 3), 10 NRC 437 (1979) | | 6.15.1.2 6.15.8.1 |
| ALAB-565 HOUSTON LIGHTING AND POWER CO. (ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1), 10 NRC 521 (1979) | | 2.9.5 2.9.5.3 3 1.1 6.14 |
| ALAB-566 PHILADELPHIA ELECTRIC CO. (PEACH BOTTOM ATOMIC STATION, UNITS 2 AND 3), 10 NRC 527 (1979) | | 3.3.5.2 3.7.1 6.9.1 |
| ALAB-567 IN THE MATTER OF RADIATION TECHNOLOGY, INC. 10 NRC 533 (1979) | | 5.2 6.10 6.10.1 |
| ALAB-568 VIRGINIA ELECTRIC AND POWER CO. (NORTH ANNA NUCLEAR STATION, UNI'S 1 AND 2), 10 NRC 554 (1979) | | 5.10.2 |
| ALAB-569 CAROLINA POWER AND LIGHT CO. (H. B. ROBINSON, UNIT 2), 10 NRC 557 (1979) | | 6.15.6.1 6.15.8.5 |
| ALAB-571 WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECT NO. 2), 10 NRC 687 (1979) | | 4.6 5.6.1 5.8.1 |

| 20 12 12 12 12 12 12 12 12 12 12 12 12 12 | |
|---|---|
| ALAB-572 PUGET SOUND POWER AND LIGHT CO. (SKAGIT NUCLEAR PROJECT, UNITS 1 AND 2), 10 NRC 693 (1979) | 3.15 |
| ALAB-573 PUBLIC SERVICE CO. OF OKLAHOMA (BLACK FOX STATION, UNITS 1 AND 2), 10 NRC 775 (1979) | 3.5 5.1 5.10.3 6.15.3 |
| ALAB-574 HOUSTON LIGHTING AND POWER CD. (ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1). 11 NRC 7 (1980) | 1.7.1 2.5.2 2.5.3 2.9.3.1 2.1.3.3.1 2.3.5 3.1.2.4 |
| ALAB-575 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 11 NRC 14 (1980) | 3.17 |
| ALAB-577 CAROLINA POWEP AND LIGHT CO. (SHEARON HARRIS NUCLEAR PLANT, UNITS 1-4), 11 NRC 18 (1980) | 3.1.2.1.1 3.16 3.3.1 3.3.1.1 3.4 3.7.3.7 4.3 6.19.1 5.2 5.5 5.6.1 6.16.1 |
| ALAB-578 VIRGINIA ELECTRIC AND POWER CD. (NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2), 11 NRC 189 (1980) | 4.6 5.15 |
| ALAB-579 FLORIDA POWER AND LIGHT CO. (ST. LUCIE NUCLEAR PLANT, UNIT 2), 11 NRC 223 (1930) | 4.4.1.1 |

| CITATION INDEX JULY 1992 | PAGE | 42 |
|--|------|---|
| ALAB-579 FLORIDA POWER AND LIGHT CO. | | 5.12.1 6.24 |
| ALAB-580 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 11 NRC 227 (1980) | | 3.1.2.1 3.14.3 3.3.7 4.6 5.6.3 |
| ALAB-581 CAROLINA POWER AND LIGHT CO. (SHEARON HARRIS NUCLEAR PLANT, UNITS 1-4), 11 NRC 233 (1980) | | 1.8 3.1,2.1.1 3.3.1 3.7.3.7 5.6.3 |
| ALAB-582 HOUSTON LIGHTING AND POWER CO. (ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1), 11 NRC 239 (1980) | | 2.9.3.3.3 2.9.4.1.4 5.10.3 5.5.1 |
| ALAB-583 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 11 NRC 447 (1980) | | 2 10.2 5.2 |
| ALAB-584 VIRGINIA ELECTRIC AND COWER CO. (NORTH ANNA NUCLEAR STATION, UNITS 1 AND 2), 11 NRC 451 (1980) | | 3.1.1 3.3.2.4 3.5.2.3 3.5.4 3.5.5 5.5 5.8.2 6.15.4 |
| ALAB-585 HOUSTON LIGHTING AND POWER CO. (ALLENS CREEK NUCLEAR GENERATING STATION, UNITS 1 AND 2), 11 NRC 469 (1980) | | 5.5 |

| | | 4 | | , | |
|--|------|------|----|-----|-----|
| CITATION INDEX JULY 1992 | PAGE | | 4 | 3 | |
| ALAB-586 HOUSTON LIGHTING AND POWER CO. (ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1), 11 NRC 472 (1980) | | | 9. | | |
| ALAB-588 PUBLIC SERVICE ELECTRIC AND GAS CO. (SALEM NUCLEAR GENERATING STATION, UNIT 1), 11 NRC 533 (1980) | | 5, | 12 | .2 | 1 |
| ALAB 590 HOUSTON LIGHTING AND POWER CO. (ALLENS CREEK NUCLEAR GENERATING STATION, UNIT .,, 11 NRC 542 (1980) | | 2.3. | | 3.1 | |
| ALAB-591 DUKE POWER CO (PERKINS NUCLEAR STATION, UNITS 1, 2 AND 3), 11 NRC 741 (1980) | | 10 | 1 | 2.1 | |
| ALAB-592 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 11 NRC 744 (1980) | | | | 6.1 | |
| ALAB-593 PENNSYLVANIA POWER AND LIGHT CO. AND ALLEGHENY ELECTRIC COOPERATIVE INC. (SUSQUEHANNA STEAM ELECTRIC STATION, UNITS 1 AND 2), 11 NRC 761 (1980) | | 5 | 12 | . 2 | |
| ALAB-594 IN RE ATLANTIC RESEARCH CORP. 11 NRC 841 (1980) | | 6 | 10 | | , |
| ALAB-595 CINCINNATI GAS AND ELECTRIC CO. (WILLIAM H. ZIMMER NUCLEAR STATION), 11 NRC 860 (1980) | | | 9. | 3.3 | 1.0 |
| ALAB-596 ROCHESTER GAS AND ELECTRIC CORP. (STERLING POWER PROJECT, UNIT 1), 11 NRC 867 (1980) | | 1. | 9 | | |

5.6.5 5.8.10

ALAB-597 DUKE POWER CO.

(PERKINS NUCLEAR STATION, UNITS 1, 2 AND 3), 11 MRC 8"0 (1980)

| CITATION INDEX JULY 1992 | PAGE 44 |
|--|--|
| ALAB-5U8 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2). 11 NRC 876 (1980) | 4.4.2 |
| ALAB-600 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 12 NRC 3 (1980) | 2.10.2 2.11.2.5 |
| ALAB-601 COMMONWEALTH EDISON CO. (CARROL COUNTY SITE). 12 NRC 18 (1980) | 6.6.1 |
| ALAB-604 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 12 NRC 149 (1980) | 3.12.1.2 |
| ALAB-605 PUERTO RICO ELECTRIC POWER AUTHORITY (NORTH COAST NUCLEAR PLANT, UNIT 1), 12 NRC 153 (1980) | 1.10 |
| ALAB-606 NUCLEAR ENGINEERING CO. (SHEFFIELD, ILL: LOW-LEVEL RADIOACTIVE WASTE DISPOSAL SITE), 12 NRC 156 (1980) | 5.4 6.15.1.1 |
| ALAB-607 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 12 NRC 165 (1980) | 3.12.3 |
| ALAB-611 NORTHERN STATES POWER CO. (MONTICELLO PLANT, UNIT 1), 12 NRC 301 (1980) | 4.6 |
| ALAB-613 PENNSYLVANIA POWER AND LIGHT CD. (SUSQUEHANNA STEAM ELECTRIC STATION, UNITS 1 AND 2), 12 NRC 317 (1980) | 2.11.2 2.11.2.8 2.11.3 2.11.4 2.11.6 |
| ALAB-614 DAIRYLAND POWER COOPERATIVE (LA CROSSE BOILING WATER REACTOR), 12 NRC 347 (1980) | 3.1.4.2 |

5.12.2.1

| | CITATION INDEX JULY 1992 | PAGE | 45 |
|---|-----------------------------|------|---|
| ALAB-616 COMMONWEALTH EDISON CO. (ZION STATION, UNITS 1 AND 2), 12 NRC 419 (19 | 980) | | 2.5.1 3.1,2.1 3.4 5.13.2 |
| ALAB-619 NORTHERN INDIANA PUBLIC SERVICE CO (BAILLY GENERATING STATION, NUCLEAR-1), 12 NR | | | 2.5.1 2.9.4.1.4 3.1.2.1 3.4 3.4.5 6.24 6.24.1.1 6.24.1.2 |
| ALAB-620 NORTHERN STATES POWER CO. (MONTICELLO PLANT, UNIT 1), 12 NRC 574 (1980) | | | 3.4.3 |
| ALAB-621 TEXAS UTILITIES GENERATING CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS | 1 AND 2), 12 NRC 578 (1980) | | 3_15 |
| ALAB-622 TOLEDO EDISON CO. (DAVIS-BESSE NUCLEAR POWER STATION, UNITS 2 AM | IND 3), 12 NRC 667 (1980) | | 3.18.1 3.18.2 |
| ALAB-623 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 12 NRC 670 | | | 6.26 |
| ALAB-629 HOUSTON LIGHTING AND POWER CO. (ALLENS CREEK NUCLEAR GENERATING STATION, UNI) | T 1), 13 NRC 75 (1981) | | 3.5 3.5.2.3 3.5.5 6.15.1.2 |
| ALAB-630 HOUSTON LIGHTING AND POWER CO. (ALLENS CREEK NUCLEAR GENERATING STATION, UNIT | T 1), 13 NRC 84 (1981) | | 3.1.4.1 3.15 |

AL. AB-631

(WILLIAM H. ZIMMER NUCLEAR STATION), 13 NRC 94 (1981) ALAB-633

B-634 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 13 NRC 96 (1981) ALAB-634

AB-635 HOUSTON LIGHTING AND POWER CO. (ALLENS CREEK NUCLEAR GENERATING STATION, UNIT !), 13 NRC 309 (1981) ALAB-635

(BIG ROCK POINT PLANT), 13 NRC 312 (1981) ALAB-636

AB-639 HOUSTON LIGHTING AND POWER CO. (1981) (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 13 NRC 469 (1981) ALAB-639

ALAB-640 PHILA. ELEC. CO., MET. EDISON CO., PUB. SERVICE ELEC. AND GAS CO. (PEACH BOTTOM UNITS 2,3; ISLAND UNIT 2; HOPE CREEK UNITS 1,2), 13 NRC 487 (1981)

18-641 PENNSYLVANIA POWER AND LIGHT CO. AND ALLEGHENY ELECTRIC COOPERATIVE INC. (SUSQUEHANNA STEAM ELECTRIC STATION, UNITS 1 AND 2), 13 NRC 550 (1981) ALAB-641

SOUTH CAROLINA ELECTRIC AND GAS CO. SUMMER NUCLEAR STATION, UNIT 1), 13 NRC 881 (1981) (VIRGIL C. ALAB-642

46

製

7.7

CV 12 12.2 6

3 1.2.5 5.10.2.2 6.15.1 2 6.15.9

2, 11, 2, 4 5, 12, 2, 1 5, 8, 3, 2 6, 23, 3, 1

(n. 49 (7) (7) 2.9.3 ALAB-642 SOUTH CAROLINA ELECTRIC AND GAS CO.

3.1.2.7

ALAB-643 SOUTH CAROLINA ELECTRIC AND GAS CO. (VIRGIL C. SUMMER NUCLEAR STATION, UNIT 1), 13 NRC 898 (1981)

2.9.3.3.3 5.7.1

ALAB-644 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 13 NRC 903 (1981)

3.1.4.2 3.16

5.1 5.15

ALAB-650 PUBLIC SERVICE ELECTRIC AND GAS CO. (SALEM NUCLEAR GENERATING STATION, UNIT 1), 14 NRC 43 (1981)

4.2

4.4.2 5.10.1 5.10.3

5.5.1 6.15.1.2 6.15.9

ALAB-652 TOLEDO EDISON CO. (DAVIS-BESSE NUCLEAR POWER STATION, UNITS 2 AND 3), 14 NRC 627 (1981)

5.6.1

ALAB-655 SACRAMENTO MUNICIPAL UTILITY DISTRICT (RANCHO SECO NUCLEAR GENERATING STATION), 14 NRC 799 (1981)

2.9.5.7

4.6 5.6.3

ALA8-657 PHILADELPHIA ELECTRIC CO. (FULTON GENERATING STATION, UNITS 1 AND 2), 14 NRC 967 (1981)

1.3 1.9

3.1.2.1.1 3.4.3

COMMONWEALTH EDISON CO. ALAB-659 (BYRON NUCLEAR POWER STATION, UNITS 1 AND 2), 14 NRC 983 (1981)

4.3.1

5.4

| ALAB-660 FLORIDA POWER AND LIGHT CO. (TURKEY POINT PLANT, UNITS 3 AND 4), 14 NRC 987 (.381) | 3.5.2.3 6.15.4 6.15.4.2 |
|---|---------------------------------------|
| ALAB-66! FLORIDA POWER AND LIGHT CO. (ST. LUCIE NUCLEAR PLANT, UNIT 2), 14 NRC 1117 (1981) | 2.5.1 6.3.1 |
| ALAB-662 PUERTO RICO ELECTRIC POWER AUTHORITY (NORTH COAST NUCLEUR PLANT, UNIT 1), 14 NRC 1125 (1981) | 1.3 |
| ALAB-663 SOUTH CAROLINA ELECTRIC AND GAS CD. (VIRGIL C. SUMMER NUCLEAR STATION, UNIT 1), 14 NRC 1140 (1981) | 3.1.2.1 3.12.3 5.12.2 6.20.2 |
| ALAB-665 FLORIDA POWER AND LIGHT CO. (ST. LUCIE PLANT, UNIT NO. 2), 15 NRC 22 (1982) | 2.9.3.6 6.3 6.3.2 |
| ALAB-666 WISCONSIN ELECTRIC POWER CD. (PDINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 15 NRC 277 (1982) | 5.11 5.11.1 5.11.2 |
| ALAB-668 DUKE POWER CO. (PERKINS NUCLEAR STATION, UNITS 1, 2 AND 3), 15 NRC 450 (1982) | 1.9 |
| ALAB-669 DUKE POWER CO. (WILLIAM B. MCGUIRE NUCLEAR STATION, UNITS 1 AND 2), 15 NRC 453 (1982) | 3.11,1.3 4.4.2 5.10.3 5.6.1 |

5.5.1 5.6.3 5.7 5.7 6.16.1 6.5.1

ALAB-680 SOUTHERN CALIFORNIA EDISON CO.

(SAN ONOFRE NUCLEAR GENERATING STATION, UNITS 1 AND 2). 16 NEC 127 (1982).

| | | | | | 62) |
|--------------------------|---|---|--|---|---|
| CITATION INDEX JULY 1992 | ALAB-682 ARMED FORCES RADIOBIOLOGY RESEARCH INSTITUTE (COBALT-60 STORAGE FACILITY), 16 NRC 150 (1982) | ALAB-683 PUGET SOUND POWER AND LIGHT CD. (SKAGIT/HANFORD NUCLEAR POWER PROJECT, UNITS 1 AND 2), 16 NRC 16G (1982) | ALAB-684 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS † AND 2), 16 NRC 162 (1982) | ALAB-685 METRUPOLITAL EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT NO. 1), 15 NRC 449 (1982) | ALAB-686 OFFSHORE POWER SYSTEMS (MANUFACTURING LICENSE FOR FLOATING NUCLEAR POWER PLANTS), 13 NRC 454 (1982) |

385

8.4

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护

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10

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50

PAGE

48-688 U.S. DEPT. OF ENERGY, PROJECT MANAGEMENT CORP., TENNESSEE VALLEY AUTHORITY (CLINCH RIVER BREEDER REACTOR PLAST), '6 NRC 471 (1982) ALAB-688

48-687 DUKE POWER CG. (1927) 16 NRC 460 (1927)

ALAB-687

5, 12, 2, 6, 19, 2, 1

AB-689 OFFSHORE POWER SYSTEMS (MANUFACTURING LICENSE FOR FLOATING NUCLEAR POWER PLANTS), 16 NRC 887 (1982) ALAB-689

16 ARC 893 (1982) AB-690 L'AUISIANA FOWER AND LIGHT CO. (WATERFORD 'TEAM ELECTRIC STATION, UNIT 3). ALAB 690

NI S

40

| | CITATION INDEX JULY 1992 | PAGE | 51 |
|---|--------------------------|----------------------------|---|
| ALAB-691 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 16 NRC 897 | [1982] | | 1.5.2 3.1.2 3.7.1 4.2 4.2.2 4.6 5.1 5.5.1 6.4.1 |
| ALAB-693 PENNSYLVANIA POWER AND LIGHT CO. (SUSQUEHANNA STEAM ELECTRIC STATION, UNITS | | | 3.7.7 5.10.3 6.16.1 |
| ALAB-694 SOUTH CAROLINA ELECTRIC AND GAS (VIRGIL C. SUMMER NUCLEAR STATION, UNIT 1). | | | 5. 13 |
| ALAE-696 WISCONSIN ELECTRIC POWER CO. (POINT BEACH NUCLEAR PLANT, UNIT 1), 16 NRC | 1245 (1982) | 10 to 10 to 10 to 10 to 10 | 2 11 1 3 1 2 4 3 1 2 7 3 3 2 4 3 3 4 3 5 3 5 2 1 4 6 5 13 2 |
| ALAB-697 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT NO. | 1), 16 NRC 1265 (1982) | | 2.9.9.1 3.7 |
| ALAB-698 METROPOLITAN EDISON CO. THREE MILE ISLAND NUCLEAR STATION, UNIT NO. | 1), 16 NRC 1290 (1932) | e | 5.20.3 |
| ALAB-699 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT NO. | 1), 16 NRC 1324 (1982) | | 3.1.2.2 |

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(GRAND GULF NUCLEAR STATION, UNITS 1 AND 2), 16 NRC 1725 (1982) ALAS-704

48-705 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT NO. 1), 16 NRC 1733 (1982) ALAB-705

(PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 16 NRC 1754 (1982) ALAB-706

(ENRICO FERMI ATOMIC POWER PLANT, UNIT 2), 16 NRC 1760 (1982) ALAB-707

48-709 DETROIT EDISON CO. (ENRICO FERMI ATOMIC POWER PLANT, UNIT 2), 17 NRC 17 (1983) ALAB-709

SOUTH CAROLINA ELECTRIC AND GAS CO. SUMMER NUCLEAR STATION, UNIT 1), 17 NRC 25 (1983) (VIRGIL C. ALAB-710

2.9 4.1.2

12, 1.2 ų. 64 + 64 + W 10 10 10

| PAGE 53 | 2.9.7 | 40.00 | 50 50 50 50 50 50 50 50 50 | 5.4 | #* t* 100 | 80 ** * | EFFR NO |
|-------------------------|--|---|--|---|---|---|---------|
| CITATION INDEX JUL 1992 | ALAB-712 PUGET SOUND POWER AND LIGHT CO. (SKAGIT/HANFORD NUCLEAR POWER PROJECT, UNITS 1 AND 2), +7 NRC 81 (1983) | ALAB-713 ARIZONA PUBLIC SERVICE CO. (PALO VERDE NUCLEAR GENERATING STATION, UNITS 1, 2 AND 3), 17 NRC 83 (1983) | ALAB-714 TEXAS UTILITIES GENERATING CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS + AND 2), (NRC 86 (1983) | ALAB-715 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 17 NRC 102 (1983) | ALAB-716 TEXAS UTILITIES GENERATING CO. (COMANCHE PEJK STEAM ELECTRIC STATION, UNITS \$ AND 2), 17 NRC 341 (1983) | ALAB-717 SOUTHERN CALIFORNIA EDISON CO. (SAN ONDERE NUCLEAR GENERATING STATION, UNITS 2 AND 3), 17 NRC 346 (1983) | |

ALAB-719 WISCONSIN ELECTRIC POWER CO. (1983) (POINT BEACH NUCLEAR PLANT, UNIT 1), 17 NRC 387 (1983)

 $\hat{\mathcal{M}}_{i}$

5.6.6

ALAB-720 GENERAL ELECTRIC CO. (VALLECITOS NUCLEÁR CENTER-GENERAL ELECTRIC TEST REACTOR, OPERATING LICENSE TR-1), 17 NRC 397 (1983)

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ALA8-722 WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECT NO. 2), 17 NRC 546 (1983)

ALAB-725 CONSUMERS POWER CO. (1983) (1983)

ALAB-726 PHILADELPHIA ELECTRIC CO. (17 WRC 735 (1983)

ALAB-728 PACIFIC GAS AND FLECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 17 NAC 777 (1983)

0 4 W ex m un

£D. 10 m

ALAB-730 DETROIT EDISON CO. (ENRICO FERMI ATOMIC POWER PLANT, UNIT 2), 47 NRC 4057 (1983)

ALAB-729 METROPOLITAN EDISON CO. (714REE MILE ISLAND MUCLEAR STATION, UNIT +1, 17 NRC 8+4 (+983)

A8-732 LDUISIANA POWER AND LIGHT CO. (1983) (17 NRC 1076 (1983)

ALAB-732

(SEABROOK STATION, UNITS 1 A:D 2), 17 NRC 1073 (1983)

ALAB-731

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ALAB-735 COMMONWEALTH EDISON CO. (8YRON NUCLEAR POWER STATION, UNITS 1 AND 2), 18 NRC 19 (1983)

18-734 PUBLIC SERVICE CO OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 18 NRC 11 (1983)

ALAB-734

18-736 CLEVELAND ELECTRIC ILLUMINATING CO. (1983) (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 18 NRC 165 (1983)

ALAB-736

AB-737 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 18 NRC 168 (1983)

ALAB-737

100 to th 0.40

3.5.5

AB-738 METROPOLITAN EDISON CO. (THRLE MILE ISLAND NUCLEAR STATION, UNIT 1), "8 NRC :77 (1983)

ALA8-738

METROPOLITAN EDISON CO.

ALAE-738

5.10.3

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24.54 5 12

12

ALAB-739 WISCONSIN ELECTRIC POWER CD. (20INT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 18 NRC 335 (1983)

AB-740 UNION ELECTRIC CG. (1983) (CALLOWAY PLANT, UNIT 1), 18 MRC 343 (1983) ALAB-740

A8-741 VIRGINIA ELECTRIC AND POWER CO. (1983) (1983) ALA8-741

AB-742 ARIZONA PUBLIC SERVICE CO, (PALO VERDE NUCLEAR GENERATING STATION, UNITS 2 AND 3), 18 NRC 380 (1983) ALAB-742

AB-743 LONG ISLAND LIGHTING CO. (SHOREHAM MUSICAR POWER STATION, UNIT 1), 18 NRC 387 (1983) ALAB-743

AB-747 WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS FLUCLEAR PROJECT NO. 3), 18 NRC 1167 (1983) 素L. 查包一了每7

(SEABROOK STATION, UNITS 1 AND 2), 18 NKC 1184 (1983) ALAS-748

| 0 | PAGE 57 | 3 1 4 2 | 3 1 2 1 8 24 8 5 5 4 1 | 3 1 4 2 3 | 5.6.4.1 | 00 0 00 00 00 00 00 00 00 | | 6.19 | 8 54 |
|---|--------------------------|---|---|--|---|---|--|---|--|
| | CITATION INDEX JULY 1992 | A. AB-749 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 18 NRC 1195 (1983) | ALAB-750 UNION ELECTRIC CD. (1983) (CALLAWAY PLANT, UNIT 1), 18 NRC 1205 (1983) | ALAB-751 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 18 NRC 1313 (1983) | ALAB-752 TENNESSEE VALLEY AUTHORITY (PHIPPS BEND NUCLEAR PLANT, UNITS 1 AND 2), 18 NRC 1318 (1983) | ALAB-753 LOUISIANA POWER AND LIGHT CO. (WATERFORD STEAM ELECTRIC STATION, UNIT 3), 18 NRC 1321 (1983) | ALAB-754 UNION ELECTRIC CO. (CALLAWAY PLANT, UNIT 1), 18 NRC 1333 (1983) | ALAB-755 U.S. DEPT. OF ENERGY, PROJECT MANAGEMENT CORP., TENNESSEE VALLEY AUTHORITY (CLINCH RIVER BREEDER REACTOR PLANT), 18 NRC 1337 (1983) | ALAB-756 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS ! AND 2), 18 NRC 1340 (1983) |

3.1.4.3

ALAB-757 PUBLIC SERVICE CO, OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 18 NRC 1356 (1983)

| CITATION INDEX JULY 1992 | PAGE 58 |
|---|---|
| ALAB-759 PUBLIC SERVICE ELECTRIC AND GAS CO. (HOPE CREEK GENERATING STATION, UNIT 1), 19 NRC 13 (1984) | 3,1,4,1 3,1,4,2 3,17 |
| ALAB-761 U.S. DEPT. OF ENERGY, PROJECT MANAGEMENT CORP., TENNESSEE VALLEY AUTHORITY (CLINCH RIVER BREEDER REACTOR PLANT), 19 NRC 487 (1984) | 3.1.1 3.1.2 6.19.2 |
| ALAB-762 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2) 19 NRC 565 (1984) | 5.12.2.1 |
| ALAB-763 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 19 NRC 571 (1984) | 3.8 |
| ALAB-764 CONSUMERS POWER CD. (MIDLAND PLANT, UNITS 1 AND 2), 19 NRC 633 (1984) | 2 11.2 2 11.2 4 2 11.2 5 2 11.6 |
| ALAB-765 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 19 NRC 645 (1984) | 2 2 2 9 5 5 3 1 2 1 3 4 1 6 13 6 5 4 1 |
| ALAB-766 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 15 NRC 981 (1984) | 5.19 5.19.2 |
| ALAB-767 WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECT NO. 3), 19 NRC 984 (1984) | 2,9,3,3,3 |

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19 NRC 988 (1984) ALAB-768 DUKE POWER CO. (CATAWBA NUCLEAR STATION, UNITS 1 AND 2).

48-769 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 19 NRC 995 (1984) ALAB-769

NB-770 COMMONWEALTH EDISON CO. (BYRON NUCLEAR POWER STATION, UNITS 1 AND 2), 19 NRC 1163 (1984) ALAB-770

(MPPSS NUCLEAR PROJECT NO. 1), 19 NRC 1183 (1984) ALAB-771

18-772 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT +), 19 NRC 1193 (1984) ALAB -772

NB-773 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 19 NRC 1333 (1984) ALAB-773

AB-774 METROPOLITAN EDISON CO. (1984) (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 19 NRC 1350 (1984) ALAB-774

PAGE

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192

2.9.3.3.

Ċij 11 ON

| | CITATION INDEX JULY 1992 | PAGE 60 |
|--|--------------------------------|---------------------|
| | | |
| ALAB-775 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNIT: | 5 1 AND 2) 10 NPC 1261 (1984) | 3.14.2 |
| to and the second of the secon | 2 / 700 27, 12 100 1001 (1300) | 4.4.1 |
| | | 4,4,1,1 |
| | | 4.4.2 |
| | | |
| ALAB-776 PACIFIC GAS AND LECTRIC CO. | | |
| (DIABLO CANYON NUCLEAR POW PLANT, UNIT | S 1 AND 2), 19 NRC 1373 (1984) | 3.1.2 |
| | | |
| | | |
| ALAB-777 LONG ISLAND LIGHTING CO. | | |
| (SHOREHAM NUCLEAR POWER STATION, UNIT 1) | , 20 NRC 21 (1984) | 3.1.4.1 |
| | | |
| | | |
| ALAB-778 PHILADELPHIA ELECTRIC CO. | | |
| (LIMERICK GENERATING STATION, UNITS 1 AND | D 2), 20 NRC 42 (1984) | 5.5.1 |
| | | 5.8.11 6.13 |
| | | 6.16,1 |
| | | |
| | | |
| ALAB-780 LONG ISLAND LIGHTING CO. | 20 NOC 278 (284) | |
| (SHOREHAM NUCLEAR POWER STATION, UNIT 1). | , 20 NRC 318 (184) | 5.12.2.1 5.8.3.1 |
| | | |
| | | |
| ALAB-781 PACIFIC GAS AND ELECTRIC CO. | | |
| (DIABLO CANYON NUCLEAR POWER PLANT, UNITS | S 1 AND 2), 20 NRC 819 (1984) | 3.4 5.10.1 |
| | | 5.6.3 |
| | | 6.15.7 |
| | | |
| | | |
| ALAB-782 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS | S 1 AND 2), 20 NPC 838 (1984) | 5.6.1 |
| | | 6.24 |
| | | |
| | | |
| ALAB-784 KANSAS GAS AND ELECTRIC CO. | 20 MPC 045 (4004) | |
| (WDLF CREEK GENERATING STATION, UNIT 1). | 20 NRC 843 (1984) | 2.9.5.6 6.8 |
| | | |
| | | |

AB-785 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 'ND 2). 20 NRC 848 (1744)

ALA8-785

6.16.1.2

84 Ž, sh.

2.9.4.1.5 5.7.3 6.26

5.1

3.5.3

5.6

AB-792 LOUISIANA POWER AND LIGHT CO. (WATERFORD STEAM ELECTRIC STATION, UNIT 3), 20 NRC 1585 (1984) ALAB-792

AB-766 LOUISIANA POWER AND LIGHT CD. (4984) (4984) ALAB-786

AB-787 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 20 NRC 1097 (1984) ALAB-787

188-788 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 20 NRC 1102 (1984) ALA8-788

ALAB-789 PHILADELPHIA ELECTRIC CG. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 20 NRC 1443 (1984)

48-790 VIRGINIA ELECTRIC AND POWER CO. (1984) (NORTH ANNA POWER STATION, UNITS 1 AND 2), 20 NRC 1450 (1984) ALAB-790

48-791 METROPOLITAN EDISON CO. (1984) (1984) (1984) ALAB-791

(BYRON NUCLEAR POWER STATION, UNITS 1 AND 2), 20 NRC 1731 (1984) COMMONWEALTH EDISON CO. ALAB-793

18-794 DUKE POWER CO. (1984) (CATAMBA NUCLEAR STATION, UNITS 1 AND 2), 20 NRC 1630 (1984) ALAB-794

AB-795 CGNSUMERS POWER CO. (1985) (BIG ROCK POINT PLANT), 21 NRC 1 (1985) ALAB-795

18-796 PORTLAND GENERAL ELECTRIC CO (TROJAN NUCLEAR PLANT), 21 NRC 4 (1985) ALA8-796

48-799 HOUSTON LIGHTING AND POWER CO. (1985) (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 21 NRC 360 (1985) ALA8-799

AB-801 LOUISTANA POWER AND LIGHT CG. (WATERFORD STEAM ELECTRIC STATION, UNIT 3), 21 MRC 479 (1985) ALAB-801

A8-802 CLEVELAND ELECTRIC fLLUMINATING CD. (1985) (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 21 NRC 490 (1985) ALAB-802

18-803 LOUISIANA POWER AND LIGHT CO. (WATERFORD STEAM ELECTRIC STATION, UNIT 3), 21 MRC 575 (1985) ALAB-803

622

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6.16.1

3.1.2.7

| - | | | |
|-----------------------|--|------|--|
| | CITATION INDEX JULY 1992 | PAGE | 63 |
| ALAB-803 | LOUISIANA POWER AND LIGHT CD. | | 8.4.2 6.16.1 |
| | PHILADELPHIA ELECTRIC CO. K GENERATING STATION, UNITS 1 AND 2), 21 NRC 587 (1985) | | 2.9.5 2.9.5.1 3.1.2.1.1 |
| | CLEVELAND ELECTRIC ILLUMINATING CO. CLEAR POWER PLANT, UNITS 1 AND 2), 21 NRC 596 (1985) | | 5.12.2 5.12.2.1 |
| | PHILADELPHIA ELECTRIC CO. (GENERATING STATION, UNITS + AND 2), 21 NRC 1183 (1985) | | 2.9.5.4 2.9.5.13 2.9.5.5 2.9.5.8 |
| | METROPOLITAN EDISO CO. LE ISLAND NUCLEAR STI ION, UNIT 1), 21 NRC 1195 (1985) | | 2, 9, 10, 1 3, 3, 7 1, 5, 5 1, 4, 2 3, 2, 3, 1 |
| | PHILADELPHIA ELECTRIC CO. GENERATING STATION, UNITS 1 AND 2), 21 NRC 1595 (1985) | | 1.9.9.2.2 1.11.1.1 1.7.1 1.16.1.3 |
| | LONG ISLAND LIGHTING CO. NUCLEAR POWER STATION, UNIT 1), 21 NRC 1616 (1985) | | 1,7,1 |
| ALAB-811 (DIABLO C | PACIFIC GAS AND ELECTRIC CO. ANYON NUCLEAR POWER PLAY. UNITS 1 AND 2). 21 NRC 1622 (1985) | | 1.16 |

22 NRC 5 (1985)

ALAB-812 LOUISIANA POWER AND LIGHT CO. (WATERFORD STEAM ELECTRIC STATION, UNIT 2),

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(8-813 DUKE POWER CO. UNITS 1 AND 2), 22 NRC 59 (1885) AL48-813

22 MRC 191 (1985) (C.814 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2). ALAE -814

NB-815 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 22 NRC 198 (1985) ALAB-815

ALAB-816 BOSTON EDISON CO. (PILGRIM NUCLEAR POWER STATION), 22 NRC 461 (1985)

(BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 22 NRC 470 (1985) ALAB-817

ALAB-819 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS + AND 2), 22 NPC 681 (1985)

PHILADELPHIA ELECTRIC CO.

ALAB-819

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AB-820 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 22 NRC 743 (1985) ALAB-820

ALAB-821 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 22 NRC 750 (1985)

NE-823 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 4 AND 2), 22 NRC 773 (1985) ALAE-523

AB-825 DUKE POWER CU. (CATAWEA NUCLEAR STATION, UNITS 1 AND 2), 22 NRC 785 (1985) ALAB-825

22 NRC 893 (:985) AB-826 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1). ALAB-826

48-827 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER . ATION, UNIT !), 23 NRC 9 (1986) ALAB-827

| CITATION INDEX JULY 1992 | PAGE 66 |
|---|---|
| ALAB-828 PHILADELFHIA ELECTRIC CO. (LIMERICK GENE_ATING STATION, UNITS 1 AND 2), 23 NRC 13 (1986) | 2.9.3.3.3 2.9.5.5 3.14.2 4.4.1 4.4.1.1 5.10.3 5.4 5.5.1 5.8.1 |
| ALAB-829 LOUISIANA FOWER AND LIGHT CD. (WATERFORD STEAM ELECTRIC STATION, UNIT 3), 23 NRC 55 (1986) | 6.5.4.1 |
| ALAB-830 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 23 NRC 59 (1986) | 9.1.2.1 |
| ALAB-831 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 23 NRC 62 (1986) | 6.27 |
| ALAB-832 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 23 NRC 135 (1986) | 2.11.1 2.9.5.6 5.1 5.2 5.6.3 |
| ALAB-833 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNIT 1), 23 NRC 257 (1986) | 2.9.5.1 |
| ALAB-834 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 23 NRC 263 (1986) | 4.4.1.1 |
| ALAB-835 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNIT 1), 23 NRC 267 (1986) | 5.7.1 |

19

ALAB 836 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2). 22 MRC 479 (1986)

AB-837 CAROLINA POWER AND LIGHT CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (SHEARON HARRIS NUCLEAR POWER PLANT), 23 NRC 525 (1986) ALAB-837

AB-838 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATIUN, UNITS 1 AND 2), 23 NRC 585 (1986) ALAB-838

ALAS-839 PUBLIC SERVICE CO OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 21, 24 NRC 45 (1986)

ALAB-840 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 24 NRC 54 (1986)

NB-841 CLEVELAND ELECTRIC ILLUMINATING CD. (PERRY NUCLEAR POWER PLANT, UNITS f AND 2), 24 NRC 64 (1986) ALAB-841

| 6667 10 4 3 3 2 2 3 5 5 5 5 5 5 5 5 5 5 5 5 5 5 5 | 16.10 | 4 10 1 | # 0 0 0 + + # m m ex |
|---|-------|--------|-------------------------|
|---|-------|--------|-------------------------|

5.9.7

5 12.2.

ALAB-841

16 120

> AB-842 CONSUMERS POWER CO. (1986) (MIDLAND PLANT, UNITS 1 AND 2), 24 NRC 197 (1986) ALAB-842

(5) N 0 0

0 0

EN EN

18-843 CAROLINA POWER AND LIGHT CO. AND NGRTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (SHEARON HARRIS NUCLEAR POWER PLANTY, 24 NRC 200 (1885) ALAB-843

ALAB-845 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 24 NRC 220 (1986)

GEORGIA POWER CD. VOGILE ELECTRIC GENERATING PLANT, UNITS 4 AND 2), 24 NRC 529 (1986) ALAB-851 (ALVIN W. ALAB-852 CAROLINA POWER AND LIGHT CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (SHEARON HARRIS NUCLEAR POWER PLANT), 24 NRC 532 (1986)

SD. 80

(SEABROOK STATION, UNITS 1 AND 2), 24 NRC 783 (1986) ALAB-854

| CITATION INDEX JULY 1992 | PACE 69 |
|---|-----------------|
| | |
| ALAE-855 LONG ISLAND LIGHTING CO. | |
| (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 24 NRC 792 (1986) | 5.6.3 |
| | |
| | |
| ALAB-856 CAROLINA POWER AND LIGHT CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY | |
| (SHEARON HARRIS NUCLEAR POWER PLANT), 24 NRC 802 (1986) | 2.11.5.2 |
| | 2.9.5.t |
| | 3.1.1 5.10.3 |
| | 5.5.1 |
| | 5.6.3 |
| | 6.16.1.2 |
| | |
| | |
| ALAB-857 PHILADELPHIA ELECTRIC CU. | |
| (LIMERICK GENERATING STATION, UNITS 1 AND 2), 25 NRC 7 (1987) | 1.8 |
| | 3.1.1 |
| | 5,19,1 |
| | |
| | |
| ALAB-858 PUBLIC SERVICE CO. OF NEW HAMPSHIRE | |
| (SEABROOK STATION, UNITS 1 AND 2), 25 NEC 17 (1987) | 5.12.2 |
| | 5.12.2.1 |
| | 5.8.2 |
| | |
| | |
| ALAB-859 GEORGIA POWER CO | |
| (ALVIN W. VOGTLE ELECTRIC GENERATING PLANT, UNITS 1 AND 2), 25 NRC 23 (1987) | 4.6 |
| | 5.6.1 |
| | |
| ALAD GCO DUBLIC CEDUTES ON OF AIRW MARKETER | |
| ALAB-860 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 25 NRC 63 (1987) | 5.12.2.1 |
| | 5.8.2 |
| | 6.20.4 |
| | |
| | |
| ALAB-861 LDNG ISLAND LIGHTING CO. | |
| (SHORFHAM NUCLEAR POWER STATION, UNIT 1), 25 NRC 129 (1987) | 1.8 |
| | 5. 12. 2 |
| | 5.12.2.1 |

ALA: 0" PUBLIC SERVICE CO. OF NEW HAMPSHIRE
"" " STATION, UNITS 1 AND 2), 25 NRC 144 (1987)

2.10.2

3.1.2.6 5.40.4

PUBLIC SERVICE CO. OF NEW HAMPSHIRE ALA8-862 AB-863 PHILADELPHIA ELECTRIC CO. (1987) (1987) ALA8-863

AB-864 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 25 NRC 417 (1987) ALAB-864

A8-865 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEARRODK STATION, UNITS 1 AND 2), 25 NRC 430 (1987) ALA8-865

&8-866 U.S. ECOLOGY, INC. (SHEFFIELD, ILL. LOW-LEVEL RADIDACTIVE WASTE DISPOSAL SITE), 25 NRC 897 (196 ALAB-866

AB-867 KERR-WCGEE CHEMICAL CORP. (1987) (KRESS CREEK DECONTAMINATION), 25 NRC 900 (1987) ALAB-867

AB-868 TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNIT 1), 25 NRC 912 (1987) ALA8-868

48-869 VERMONT YANKEE NUCLEAR POWER CORP. (1987) (VERMONT YANKEE NUCLEAR POWER STATION), 26 NRC 13 (1987) ALAB-869

5.8.2

ES No. 10

Æ 3. 1. 2

| | CITATION INDEX JULY 1992 | PAGE 71 |
|------------|--|--------------------|
| ALAB-869 | VERMONT YANKEE NUCLEAR POWER CORP. | 6.16.3 |
| | | 1000 |
| | | |
| | TEXAS UTILITIES ELECTRIC CO. PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 26 NRC 71 (1987) | 2.11.2.2 |
| COMMISCITE | TEAN STEAN CLUSTER STATES AND | 5, 12.2.1 |
| | | |
| ALAR-872 | GEORGIA POWER CO. | |
| | VOGTLE ELECTRIC GENERATING PLANT, UNITS 1 AND 2), 26 NRC 127 (1987) | 2.9.5.4 3.5.2.2 |
| | | 4,4,2 |
| | | 5.10.3 5.5.1 |
| | | |
| | Alleger and the reserve of | |
| | PACIFIC GAS AND ELECTRIC CO. ANYON NUCLEAR POWER PLANT, UNITS 1 AND 2). 26 NRC 154 (1987) | 2.9.5.13 |
| | | |
| ALAR-878 | COMMONWEALTH EDISON CO. | |
| | NUCLEAR POWER STATION, UNITS 1 AND 2), 26 NRC 156 (1987) | 3,1,2,1 |
| | | |
| ALAB-875 | PUBLIC SERVICE CO. OF NEW HAMPSHIRE | |
| (SEABROOK | STATION, UNITS 1 AND 2), 26 NRC 251 (1987) | 6.15.1.1 |
| | | 6.20.4 |
| | | |
| ALAB-876 | VERMONT VANKEE NUCLEAR POWER CORP. | |
| (VERMONT Y | YANKEE NUCLEAR POWER STATION), 26 NRC 277 (1987) | 2.9.5 |
| | | 3.1.2.6 |
| | | 3,17 |
| | | 5 12.2 5 14 |
| | | 6.1.4.4 |
| | | 6.15.7 6.15.2 |
| | | 6.16.3 |
| | | |
| ALAB-877 | PACIFIC GAS AND ELECTRIC CO. | |
| (DIABLO CA | MYDN NUCLEAR POWER PLANT, UNITS 1 AND 2), 26 NRC 287 (1987) | 2.9.5 |

PACIFIC GAS AND ELECTRIC CO.

ALAB-877

| | | RN. | | |
|--|----|------|-----|--|
| | ** | 6. 1 | 5.0 | |
| | 6 | 10 | 0 | |
| | | | | |
| | | | | |

| | | 14,2 | A. A. |
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|--|--|-----|---|
| | | 10 | i |
| | | (0) | d |
| | | SN | į |
| | | | |

AB-880 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 26 NRC 449 (1987)

ALAB-880

AB-879 PUBLIC SERVICE CO. OF NEW HAMDSHIRE (SEABROOK STATION, UNITS 1 AND 2), 26 NRC 410 (*987)

ALAB-879

| | | g-c | 100 | | |
|---|-----|-------|-----|----|-----|
| | | 9.5.7 | * | 20 | |
| | 1D | 327 | 24 | | 200 |
| | | | | 0 | |
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| | | | | | |

6.15.7

| | 40 | |
|--|-----|---|
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| | 104 | g |
| | - | ý |
| | | N |
| | | |

AB-881 GENERAL PUBLIC UTILITIES NUCLEAR CORP. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 26 NKC 465 (1987)

ALAB-881

AB-383 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 27 NRC 43 (1988)

ALAB-883

| ij | | EV: |
|----|---|-----|
| | | |
| | | 相 |
| | | |
| | ŧ | mt |

18-888 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 27 NRC 257 (1988)

ALAB-988

SEABSOOK STATION, UNITS 1 AND 2), 27 NRC 74 (1988)

ALAB-385

XB-884 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 27 NRC 56 (1988)

ALAB-884

B-889 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 27 77 265 [1988]

ALAE -889

PUBLIC SERVICE CO. OF NEW HAMPSHIRE

ALAB-889

SE ø

5 42 7

un.

0 71

5.6.3

AB-900 LONG ISLAMD LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 28 NRC 275 (1988) ALAB-900

AB-892 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 4 AND 2), 27 NRC 485 (1988) ALAB-892

(SEABROOK STATION, UNITS + AND 2), 27 NRC 241 (1988)

ALAB-891

AB-893 FLORIDA POWER AND LIGHT CO. (57 LUCIE NUCLEAR POWER PLANT, UNIT 1), 27 NRC 527 (1984) ALAB-893

A8-894 PUSLIC SERVICE CO. DF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 27 NRC 632 (1988) ALA8-894

AB-895 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 28 NRC 7 (1988) #LAB-895

AB-896 PUBLIC SERVICE CO. OF NEW HAMPSFIRE (SEARROOK STATION, UNITS ! AND 2), 28 NRC 27 (*988) ALAB -896

18-899 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 28 NRC 93 (1988) 41.48-899

| 0 | | | | |
|--------------------------|--|--|--|--|
| Ø. | | | | |
| | | | | |
| * | | | | |
| 2 | | | | |
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| 100 | | | | |
| 2 | EV. | .75 | 266 | 101 |
| 6 | 302 | E 23 | 18) | (f) |
| M1110N | 302 | #23 | 988) | un un |
| Talion | RC 302 | RC 423 | (1988) | RC 5 55 |
| CITATION | NRC 302 | NRC 423 | RE (1988) | NRC 515 |
| CITATION INDEX JULY 1992 | 28 NRC 302 | 28 NRC 423 | 41RE 509 (1988) | 28 NRC 515 |
| CITATION | 28 NRC 302 | 28 NRC 423 | SHIRE : 509 (1988) | 28 NRC 515 |
| CITATION |), 28 NRC 302 |), 28 NRC 423 | MPSHIRE RC 509 (1988) |), 28 NRC 515 |
| CITATION | 43, 28 NRC 302 | 1), 28 NRC 423 | HAMPSHIRE NRC 509 (1988) | 1), 28 NRC 515 |
| CITATION | IT +3, 28 NRC 302 | IT 1), 28 NRC 423 | * HAMPSHIRE 28 NRC 509 (1988) | IT 1), 28 NRC 515 |
| | MIT 13, 28 NRC 302 |) JNIT 1), 28 NRC 423 | Z8 NRC 509 (1988) |), 28 NRC 515 |
| | CO. UNIT 13, 28 NRC 302 | CO. UNIT 1), 28 NRC 423 | NEW HAMPSHIRE), 28 NRC 509 (1988) | CB. UNIT 1), 28 NRC 515 |
| | G CO. N, UNIT 13, 28 NRC 302 | G CO. N, UNIT 1), 28 NRC 423 | OF NEW HAMPSHIRE 2), 28 NRC 509 (1988) | G CB. N. UNIT 1), 28 NRC 515 |
| | ING CO. ION, UNIT +3, 28 NRC 302 | ING CO. ION, UNIT 1), 28 NRC 423 | OF NEW HAMPSHIRE ND 2), 28 NRC 509 (1988) | ING CO. ION, UNIT 1), 28 NRC 515 |
| | 472NG CO. XTION, UNIT 43, 28 NRC 302 | HING CO. MICN, UNIT 1), 28 NRC 423 | CO. OF NEW HAMPSHIRE AND 21, 28 NRC 509 (1988) | HING CD. HIDN, GMIT 1), 28 NRC 515 |
| | GHTING CO. TATION, UNIT 43, 28 NRC 302 | GHTING CO. | CO. OF NEW HAMPSHIRE 1 AND 2), 28 NRC 509 (1988) | GHTING CD. TATION, UNIT 1), 28 NRC 515 |
| LIGHTING CO. | LIGHTING CO. STATION, UNIT +), 28 NRC 302 | LIGHTING CO. STATION, UNIT 1), 28 NRC 423 | CE CO. OF NEW HAMPSHIRE S 1 AND 2), 28 NRC 509 (1988) | LIGHTING CD. STATION, UNIT 1), 28 NRC 515 |
| LIGHTING CO. | D LIGHTING CO. ER STATION, UNIT +), 28 NRC 302 | D LIGHTING CO. ER STATION, UNIT 1), 28 NRC 423 | VICE CO. OF NEW HAMPSHIRE ITS 1 AND 2), 28 NRC 509 (1988) | D LIGHTING CD. ER STATION, UNIT 4), 28 MRC 515 (1988) |
| LIGHTING CO. | AND LIGHTING CO. DWER STATION, UNIT 4), 28 NRC 302 | AND LIGHTING CO. DWER STATION, UNIT 1), 28 MRC 423 | RVICE CO. OF NEW HAMPSHIRE JNITS 1 AND 21, 28 NRC 509 (1988) | AND LIGHTING CD. WER STATION, UNIT 1), 28 MRC 515 |
| LIGHTING CO. | LAND LIGHTING CO. POWER STATION, UNIT 4), 28 NRC 302 | LAND LIGHTING CO. POWER STATION, UNIT 1). 28 MRC 423 | SERVICE CO. OF NEW HAMPSHIRE UNITS 1 AND 21, 28 NRC 509 (1988) | LAND LIGHTING CD. POWER STATION, UNIT 1), 28 NRC 515 |
| LIGHTING CO. | ISLAND LIGHTING CO. R POWER STATION, UNIT +1, 28 NRC 302 | ISLAND LIGHTING CO. R POWER STATION, UNIT 1), 28 MRC 423 | C SERVICE CO. OF NEW HAMPSHIRE N. UNITS 1 AND 21, 28 NRC 509 (1988) | ISLAND LIGHTING CD. R POWER STATION, UNIT 1), 28 MRC 515 |
| LIGHTING CO. | S ÍSLAND LIGHTING CO. EAR POWER STATION, UNIT +1, 28 NRC 302 | S ISLAND LIGHTING CO. EAR POWER STATION, UNIT 1), 28 MRC 423 | IC SERVICE CO. OF NEW HAMPSHIRE ION, UNITS 1 AND 2), 28 NRC 509 (1988) | S ISLAND LIGHTING CD 28 MRC 515 |
| LIGHTING CO. | MG ISLAND LIGHTING CO. LEAR POWER STATION, UNIT +), 28 NRC 302 | NG ISLAND LIGHTING CO. LEAR POWER STATION, UNIT 1), 28 MRC 423 | MELIC SERVICE CO. OF NEW HAMPSHIRE TION, UNITS 1 AND 2), 28 NRC 509 (1988) | NG ISLAND LIGHTING CD. LEAR POWER STATION, UNIT 1), 28 MRC 515 |
| LIGHTING CO. | LONG ISLAND LIGHTING CO. UCLEAR POWER STATION, UNIT 43, 28 NRC 302 | LONG ISLAND LIGHTING CO. UCLEAR POWER STATION, UNIT 1), 28 MRC 423 | PUBLIC SERVICE CO. OF NEW HAMPSHIRE TATION, UNITS 1 AND 21, 28 NRC 509 (1988) | LONG ISLAND LIGHTING CD. UCLEAR POWER STATION, UNIT 1), 28 NRC 515 |
| | LONG ISLAND LIGHTING CO. NUCLEAR POWER STATION, UNIT 43, 28 NRC 302 | LONG ISLAND LIGHTING CO. NUCLEAR POWER STATION, UNIT 1), 28 NRC 423 | FUBLIC SERVICE CO. OF NEW HAMPSHIRE STATION, UNITS 1 AND 2), 28 NRC 509 (1988) | LONG ISLAND LIGHTING CD. NUCLEAR POWER STATION, UNIT 1), 28 NRC 515 |
| LONG ISLAND LIGHTING CO. | LONG ISLAND LIGHTING CO. AM NUCLEAR POWER STATION, UNIT 43, 28 NRC 302 | LONG ISLAND LIGHTING CO. NM NUCLEAR POWER STATION, UNIT 1), 28 NRC 423 | PUBLIC SERVICE CO. OF NEW HAMPSHIRE PK STATION, UNITS 1 AND 2), 28 NRC 509 (1988) | LONG ISLAND M MUCLEAR POWER |
| LONG ISLAND LIGHTING CO. | LONG ISLAND LIGHTING CO | LONG ISLAND LIGHTING CO. HAM NUCLEAR POWER STATION, UNIT 1), 28 NRC 423 | PUBLIC SERVICE CO. OF NEW HAMPSHIRE NODE STATION, UNITS 1 AND 2), 28 NRC 509 (1988) | LONG ISLAND M MUCLEAR POWER |
| LONG ISLAND LIGHTING CO. | H LONG ISLAND LIGHTING CO. REHAM NUCLEAR POWER STATION, UNIT 43, 28 NRC 302 | 2 LONG ISLAND LIGHTING CO. REHAM MUCLEAR POWER STATION, UNIT 1), 28 NRC 423 | WE PUBLIC SERVICE CO. OF NEW HAMPSHIRE BROOK STATION, UNITS 1 AND 21, 28 NRC 509 (1988) | LONG ISLAND M MUCLEAR POWER |
| LONG ISLAND LIGHTING CO. | 901 LONG ISLAND LIGHTING CO. HOREHAM NUCLEAR POWER STATION, UNIT 43, 28 NRC 302 | 902 LONG ISLAND LIGHTING CO. HOREHAM MUCLEAR POWER STATION, UNIT 1), 28 NRC 423 | 904 PUBLIC SERVICE CO. OF NEW HAMPSHIRE EABRODK STATION, UNITS 1 AND 21, 28 NRC 509 (1988) | LONG ISLAND M MUCLEAR POWER |
| LONG ISLAND LIGHTING CO. | 2-901 LONG ISLAND LIGHTING CO. SHOREHAM NUCLEAR POWER STATION, UNIT 43, 28 NRC 302 | 3-902 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 28 NRC 423 | SEABROOK STATION, UNITS 1 AND 21, 28 NRC 509 (1988) | LONG ISLAND M MUCLEAR POWER |
| LONG ISLAND LIGHTING CO. | LONG ISLAND HAM NUCLEAR POWER | 2 | S SOOK S | LONG ISLAND M MUCLEAR POWER |
| LIGHTING CO. | ALAE-901 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 4), 28 NRC 302 | ALAB-902 LONG ISLAMD LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 28 NRC 423 | ALÁB-904 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABRODK STÁTION, UNITS 1 AND 2), 28 NRC 509 (1988) | ALAB-905 LONG ISLAND LIGHTING CD. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 28 NRC 515 |

ALAB-SO6 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 28 NRC 615 (1988)

ALAB-907 LONG ISLAND LIGHTING CG. (5HDREHAM NUCLEAR FOWER STATION, UNIT 1). 28 NRC 620 (1988)

NB-908 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 28 NRC 626 (1988) ALAB-908

(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 29 NRC 247 (1989)

ALAB-914 GENERAL PUBLIC UTILITIES NUCLEAR CORP. (1989) (THREE MILE ISLAND NUCLEAR STATION, UNIT 2), 29 NRC 357 (1989)

έşi 5.6.4 91 45

100

PAGE

10 54

36

40

e: A 00 00 A 49 5, 42

3.5.4.2

5 14

30

10 N

3 12 4

| CLIATION INDEX JULY 1992 | PAGE 75 |
|---|---|
| ALAB-915 PUBLIC SERV.CE CO. OF NEW HAMPSHIRE (SEABROOK STATION, NITS 1 AND 2), 29 NRC 427 (1989) | 3.17 4.4.1 6.15.7 |
| ALAB-916 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 29 NRC 434 (1989) | 5, 12, 2, 1 |
| ALAB-918 PUBLIC SERVICE CC. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS : AND 2), 29 NRC 473 (1989) | 2.9.5.13 2.9.5.4 2.9.5.5 3.1.2.1 4.1 4.4.2 6.16.1 |
| ALAB-919 VERMONT VANKEE NUCLEAR POWER CORP. (VERMONT VANKEE NUCLEAR POWER STATION), 30 NRC 29 (1989) | 2 9 5 2 9 5 5 3 15 6 15 4 6 15 7 |
| ALAB-920 PUBLIC SERVICE CC. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 30 NRC 121 (1989) | 5.4 6.8 |
| ALAB-921 FLORIDA POWER AND LIGHT CO. (ST. LUCIE NUCLEAR POWER PLANT, UNIT 1), 30 NRC 177 (1989) | 5.10.3 5.6.3 6.16.1 |
| ALAB-923 MAURICE P. ACOSTA, JR. (REACTOR OPERATOR LICENSE FOR SAN ONOFRE NUCLEAR GENERATING STATION, UNITS 2 AND 3), 30 NRC 261 (1989) | 4.6 |
| ALAB-924 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 30 NRC 331 (1989) | 1.8 |

A8-925 ROCKWELL INTERNATIONAL CORP. (ROCKETDYNE DIVISION), 30 NRC 709 (1989)

ALAB-925

130 40 ŚŅ 5 12

48-926 GENERAL PUBLIC UTILITIES NUCLEAR CORP. (THREE MILE ISLAND NUCLEAR STATION, UNIT 2), 31 NRC 1 (1990) 48-929 ADVANCED MEDICAL SYSTEMS (ONE FACTORY ROW, GENEVA, DHID 44041), 31 NRC 2.1 (1990) 48-928 KERR-MCGEE CHEMICAL CORP.
(WEST CHICAGO RARE EARTHS FACILITY), 31 NRC 263 (1990) 48-927 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 31 NRC (37 (1990) NB-930 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 31 NRC 343 (1990) ALAB-926 AL AB - 927 ALAB-928 ALAB-930 ALAB-929

(BLODMSBURG SITE DECONTAMINATION), 31 NRC 350 (1990)

ALAB-931

ALAB-932 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 31 NRC 371 (1990)

ALAB-932

PUBLIC SERVICE CO. OF NEW HAMPSHIRE

5.6.3

ALAB 933 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABRI DK STATION, UNITS 1 AND 2), 31 NRC 491 (1990)

5.4

ALAB-934 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 32 NRC 1 (1990)

2.10.2 2 9.3.5 2.9.9.5

3.6 4.4.1.1 4.4.2

PUBLIC SERVICE CO. OF NEW HAMPSHIRE ALAB-936 (SEABROOK STATION, UNITS 1 AND 2), 32 NRC 75 (1990)

2 9.5.5

2 ... %

ALAB-937 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 32 NRC 135 (1990)

1.8

3.1.2.5

3.10 3.11.4

3.14.3

5.5 6.16.1.3

ALAB-938 VERMONT YANKES NUCLEAR POWER CORP. (VERMONT VANKEE NUCLEAR POWER STATION), 32 NRC 154 (1990)

2.9.5 2.9.5.5

3.15 6.15.4

6.15.7

PUBLIC SERVICE CO. OF NEW HAMPSHIRE ALAB-940 (SEABROOK STATION, UNITS 1 AND 2), 32 NRC 225 (1990)

2.2 2.9.5.1

3.17 4.4.2

| ALAB-941 PUBLIC SERVICE CD. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 32 NRC 337 (1990) | 1.8 3.1.2.5 3.10 3.11.4 6.16.1.3 |
|--|---|
| ALAB-942 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 32 NRC 3 5 (1990) | 2.9.5.1 2.9.5.10 2.9.5.11 3.17 |
| ALAB-943 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 33 NRC 11 (1991) | 5.4 |
| ALAB-944 KERR-MCGEE CHEMICAL CORP. (WEST CHICAGO RARE EARTHS FACILITY), 33 NRC 81 (1991) | 2.11.5.2 3.1.2.1 3.16 3.5.2.3 6.15.3 |
| ALAB-946 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 33 NRC 245 (1991) | 2.9.5.13 2.9.5.4 2.9.5.5 3.1.2.1 4.4.1 4.4.2 6.16.1 |
| ALAB-947 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 33 NRC 299 (1991) | 1.8 2.9.5.1 3.1.2 3.1.2.5 3.10 3.11.4 5.10.3 5.6.3 6.16.1.3 |

3.5.1

AB-950 FLORIDA POWER AND LIGHT CO. (TURKEY POINT NUCLEAR GENERATING PLANT, UNITS 3 AND 4), 33 NRC 492 (1991) ALAB-950

WRANGLER LABORATORIES, LARSEN LABS, ORION CHEMICAL ..., AND JOHN P. LARSEN 33 NRC 505 (1991) ALAB-951

48-952 FLORIDA POWER AND LIGHT CO. (TURKEY POINT NUCLEAR GENERATING PLANT, UNITS 3 AND 4), 33 NRC 521 (1991) ALAB-952

78-3 PITTSBURGH-DES MOINES STEEL CO 8 NRC 649 (1978) ALU-78-3

ALU-78-4 RADIATION TECHNOLOGY, INC. 8 NRC 655 (1978)

(PALISADES NUCLEAR PLANT), 12 NRC 117 (1980) ALU-80-1

CLI-73-12 NOZTHERN STATES POWER CO. (PRAIRIE ISLAND NUCLEAR GENERATING PLANT, UNITS 1 AND 2), 6 AEC 241 (1973)

(2)

16.2 000

10.1

9 9

w

2.11.2.4 2.11.3 6.23.1

2.9.5.11

| | CITATION INDEX JULY 1992 | PAGE BO |
|---|----------------------------|-------------------------------|
| CLI-73-12 NORTHERN STATES POWER CO. | | 3.5 |
| CLI-73-16 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNITS | 1 AND 2), 5 AEC 391 (1973) | 2.9.3 |
| CLI-73-B COMMONWEALTH EDISON CO. (LASALLE COUNTY NUCLEAR STATION, UNITS 1 | AND 2), 6 AEC 169 (1973) | 2.8.1.1 3.1.4.1 |
| CLI-74-12 ALABAMA POWER CO. (JOSEPH M. FARLEY NUCLESE PLANT, UNITS 1 | AND 2), 7 ASC 203 (1974) | 3.17 5.6.2 |
| CLI-74-16 LIRGINIA ELECTRIC AND POWER CO (NORTH ANNA NUCLEAR STATION, UNITS 1 AND | | 2,11.3 |
| CLI-74-2 MAINE VANKEE ATOMIC POWER CO. (MAINE VANKEE ATOMIC POWER STATION), 7 AE | C 2 (1974) | 3.7.2 3.9 |
| .I-74-23 CONSOLIDATED EDISON CO. OF N.Y (IND*AN POINT STATION, UNIT 2), 7 AEC 947 | | 2.9.5.9 6.16.1.3 6.16.2 |
| CLI-74-28 CONSOLIDATED EDISON CO. OF N.Y (INDIAN POINT STATION, UNIT 3), 8 AEC 7 (| | 3.4.2 |
| CLI-74-29 CONSUMERS POWER CO. (QUANICASSEE PLANT, UNITS 1 AND 2), 8 AEC | 10 (1974) | 1,9 |
| CLI-74-3 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 7 AEC 7 (| 1974) | 6.24.4 |

3.9

6.15.8.1

CLI-75-11 CONSOLIDATED EDISON CO. OF N.Y.

(INDIAN POINT STATION, UNIT 3), 2 NRC 835 (1975)

| | CITATION INDEX JULY 1992 | PAGE 82 |
|---|------------------------------|---|
| CLI-75-2 WISCONSIN ELECTRIC POWER CD. (KOSHKONONG NUCLEAR POWER PLANT, UNITS | | 3.3.2.2 |
| CLI-75-4 NUCLEAR FUEL SERVICES, INC. (WEST VALLEY REPROCESSING PLANT), 1 NRC | 273 (1975) | 2.11.1 2.9.3.3.3 2.9.3.3.4 2.9.5.5 |
| CLI-75-8 CONSOLIDATED EDISON CO. OF N (INDIAN POINT STATION, UNITS 1, 2 AND 3 | | 6.24.1 6.24.3 |
| CLI-76-1 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNI | TS 1 AND 2), 3 NRC 73 (1976) | 5.4 5.8.11 |
| CLI-76-13 USERDA (CLINCH RIVER BREEDER REACTOR PLANT), 4 | NRC 67 (1976) | 5.12.2.1 5.15 6.15.1 |
| CLI-76-14 VEPMONT YANKEE NUCLEAR POWER (VERMONT YANKEE NUCLEAR POWER STATION). | | 5.6.2 6.21.1 |
| CLI-76-17 PUBLIC SERVICE CO. OF NEW HA (SEABROOK STATION, UNITS 1 AND 2), 4 NR | | 6,16,1 |
| CLI-76-2 NATURAL RESOURCES DEFENSE CO 3 NRC 76 (1976) | UNCIL | 5.15.2 |
| CLI-76-22 VIRGINIA ELECTRIC AND POWER (NORTH ANNA NUCLEAR STATION, UNITS 1 AN | | 1.5.2 6.5.4.1 |

| CITATION JNDEX JULY 1992 | PAGE 83 |
|---|--|
| | |
| CLI-76-23 NUCLEAR REGL: NTORY COMMISSION (FINANCIAL ASSISTANCE TO PARTICIPANTS IN COMMISSION PROCEEDINGS), 4 NRC 494 (1976) | 2.9.10.1 |
| CLI-76-26 PORTLAND GENERAL ELECTRIC CD. (PEBBLE SPRINGS NUCLEAR PLANT, UNITS 1 AND 2), 4 NRC 608 (1976) | 3.3.6 |
| CLI-76-27 PORTLAND GENERAL ELECTRIC CO. (PEBBLE SPRINGS NUCLEAR PLANT, UNITS 1 AND 2), 4 NRC 610 (1976) | 2.7.4 2.9.4.1.1 2.9.4.2 |
| CLI-76-6 EDLOW INTERNATIONAL CO. 3 NRC 563 (1976) | 2.9.4.1.3 |
| CLI-77-1 KANSAS GAS AND ELECTRIC CO. (WOLF CREEK NUCLEAR GENERATING STATION), 5 NRC 1 (1977) | 3.1.2.1 3.1.2.2 6.15.8.3 6.19 6.19.1 |
| CLI-77-11 WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECTS 3 AND 5), 5 NRC 719 (1977) | 3.:.1 6.19.1 |
| CLI-77-13 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 5 NRC 1303 (1977) | 3.17 6.3.1 |
| CLI-77-16 EDLOW INTERNATIONAL CO. (APPLICATION TO EXPORT SPECIAL NUCLEAR MATERIALS), 5 NRC 1327 (1977) | 3.3.6 |
| CLI-77-18 BABCOCK AND WILCOX (APPLIC. FOR CONSID. OF FACILITY EXPORT LICENSE), 5 NRC 1332 (1977) | 2.9.4.1.3 |

| CITATION INDEX JULY 1992 | PAGE 84 |
|---|--|
| CLI-77-2 CONSOLIDATED EDISON CO. OF N.Y. (INDIAN POINT STATION, UNITS 1, 2 AND 3), 5 NRC 13 (1977) | 3.7 6.5.4.1 |
| CLI-77-22 TOLEDO EDISON CO. AND CLEVELAND ELECTRIC ILLUMINATING CO (DAVIS-BESSE STATION, UNITS 1, 2, 3; PERRY PLANT, UNITS 1 AND 2), 6 NRC 451 (1977) | |
| CLI-77-24 IN THE MATTER OF TEN APPLICATIONS 6 NRC 525 (1977) | 2,9.4.1.3 |
| CLI-77-25 PUBLIC SERVICE CO. DF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 6 NRC 535 (1977) | 2.10.2 5.15 |
| CLI-77-3 LICENSE TO TRANSP. STRATEGIC QUANTITIES OF SPECIAL NUCLEAR MATERIALS 5 NRC 16 (1977) | 6.24.3 |
| CLI-77-31 EXXON NUCLEAR CO. (LOW ENRICHED URANIUM EXPORTS TO EURATOM MEMBER NATIONS), 6 NRC 849 (1977) | 2.9.10.1 |
| CLI-77-4 CONSOLIDATED EDISON CO. OF N.Y. (INDIAN POINT STATION, UNITS 1, 2 AND 3), 5 NRC 31 (1977) | 6.1.5 |
| CLI-77-8 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 5 NRC BO3 (19/7) | 1.2.1.1 15 19.3 |
| | 6.15.2 6.15.3.1 6.15.4.1 6.15.4.2 |
| CLI-78-1 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS † AND 2), 7 NRC 1 (1978) | 3.17 5.12.3 |
| | |

(THREE MILE ISLAND NUCLEAR STATION, UNIT 2), 7 NRC 307 (1978)

CLI-78-4 EDLOW INTERNATIONAL CO.

(APPLICATION TO EXPORT SPECIAL NUCLEAR MATERIALS), 7 NEC 311 (1978)

3.3.6

5.7

| CITATION INDEX JULY 1992 | PAGE 86 |
|---|---|
| CLI-78-5 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 7 NGC 397 (1978) | 6.3 |
| CLI-78-6 PETITION FOR EMERGENCY AND REMEDIAL ACTION 7 NRC 4CD (1978) | 1.8 6.16.2 6.16.3 6.20.3 6.26 |
| CLI-78-7 NORTHERN INDIANA PUBLIC SERVICE CO. (BAILLY GENERATING STATION, NUCLEAR-1), 7 NRC 429 (1978) | 6.24 6.24.2 6.24.3 6.24.6 |
| CLI 79-10 CAROLINA POWER AND LIGHT CO. (SHEARON HARRIS NUCLEAR PLANT, UNITS 1-4), 10 NRC 675 (1979) | 4,4.2 |
| CLI-79-3 CONSUMERS POWER CO. (MIDLAND FLANT, UNITS 1 AND 2), 9 NRC 107 (1979) | 6.4.2.2 |
| CLI-79-5 CAROLINA POWER AND LIGHT CO. (SHEARON HARRIS NUCLEAR PLANT, UNITS 1-4), 9 NRC 607 (1979) | 3.1.2.1 4.4.2 |
| CLI-79-6 NUCLEAR ENGINEERING CO. (SHEFFIELD, ILL. LOW-LEVEL RADIOACTIVE WASTE DISPOSAL SITE), 9 NRC 673 (1979) | 6.24.3 6.24.4 |
| CLI-79-8 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 10 NRC 141 (1979) | 2.11.2.2 2.11.4 |
| CLI-80-1 NUCLEAR ENGINEERING CO. (SHEFFIELD, ILL. LOW-LEVEL RADIOACTIVE WASTE DISPOSAL SITE), 11 NRC 1 (1980) | 3.1.1 3.1.4.2 4.4.2 |

| CITATION INDEX | JULY 1992 PAG | E | 8 | 7 |
|---|---------------|---------------|-------------------------|-------------------------------|
| CLI-80-1 NUCLEAR ENGINEERING CO. | | 5 6 | .5 .15 .16 .24 | . 1 |
| CLI-80-10 PUBLIC SERVICE CO. OF INDIANA (MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2). 11 NRC | 438 (1980) | 2 2 6 | 9. | 3.1 4.1. 4.2 |
| CLI-80-11 PACIFIC GAS AND ELECTRIC CD. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 11 NRC 511 (| 1980) | | 6. | 4.2 |
| CLI-80-12 CAROLINA POWER AND LIGHT CO. (SHEARON HARRIS NUCLEAR PLANT, UNITS 1-4), 11 NRC 514 (1980) | | 2333333455555 | 1.1 | 1 2 1 1 2 5 1 1 1 1 1 3 7 . 1 |
| CLI-80-14 WESTINGHOUSE ELECTRIC CORP. (EXPORTS TO THE PHILLIPINES), 11 NRC 631 (1980) | | 6. | 29. | 2.1 |
| CLI-80 15 WESTINGHOUSE ELECTRIC CORP. (EXPORTS TO THE PHILLIPINES), 11 NP 672 (1980) | | | 15. 29. | 1.1 |

-80-17 PENNSYLVANIA POWER AND LIGHT CO. (SUSQUEHANNA STEAM ELECTRIC STATION, UNITS : AND 2), 11 NRC 678 (1980) CLI-80-17

CLI-80-19 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 11 MRC 700 (1980)

CLI-80-20 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 11 NRC 705 (1980)

CLI-80-21 IN RE PETITION FOR EMERGENCY AND REMEDIAL ACTION 11 NRC 707 (1980)

CLI-BO-22 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 2), 11 NRC 724 (1980)

CLI-80-23 ROCHESTER GAS AND ELECTRIC CORP. (STERLING POWER PROJECT, UNIT 1), 11 NRC 731 (1980)

1-80-24 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 11 NRC 775 (1980) CLI-80-24

CLI-80-27 NUCLEAR FUEL SERVICES, INC. (ERWIN, TENNESSEE), 11 MRC 799 (1980)

CLI-80-28 SOUTH CARGLINA ELECTRIC AND GAS CO. (VIRGIL C. SUMMER NUCLEAR STATION, UNIT 13, 11 NRC 817 (1980)

ω ο 4 5 2.9.10.1

2.9.10.1

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2.11.5

6.15.4

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| CITATION INDEX JULY 1992 | PAGE 89 |
|--|-----------------------------|
| CLI-80-3 DUKE POWER CO. (AMENDMENT TO MATERIALS LIC. SNM-1773), 11 NRC 185 (1980) | 3.3.7 |
| CLI-80-30 WESTINGHOUSE ELECTRIC CORP. (EXPORT TO SOUTH KORFA), 12 NRC 253 (1980) | 2.9.4.1.3 3.2.1 3.4.6 |
| CLI-80-31 PUBLIC SERVICE CO. OF OKLAHOMA (BLACK FOX STATION, UNITS 1 AND 2), 12 NRC 264 (1980) | 3.4 6.15.2 |
| CLI-80-32 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 12 NRC 281 (1980) | 2.2 |
| CLI-80-34 PUGET SOUND POWER AND LIGHT CO. (SKAGIT NUCLEAR PROJECT, UNITS 1 AND 2), 12 NRC 407 (1980) | 2.9.3.3.5 |
| CLI-80-35 PUBLIC SERVICE CD. DF DKLAHOMA (BLACK FOX STATION, UNITS 1 AND 2), 12 NRC 409 (1980) | 6.23.1 |
| CLI-80-36 NORTHERN STATES POWER CO. (TYRONE ENERGY PARK, UNIT 1), 12 HRC 523 (1980) | 2.9.4.1.4 |
| CLI-80-38 WISCONSIN ELECTRIC POWER CO. (POINT BEACH NUCLEAR PLANT, UNIT 1), 12 NRC 547 (1980) | 2.9.4.1.1 |
| CLI-80-4 VIRGINIA ELECTRIC AND POWER CO. (SURRY NUCLEAR POWER STATION, UNITS 1 AND 2), 11 NRC 405 (1980) | 6.15.1.1 |
| CLI-80-41 FLORIDA POWER AND LIGHT CO. (ST. LUCIE NUCLEAR PLANT, UNIT 2), 12 NRC 650 (1980) | 5.17 |

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| | | |
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PAGE 90

| P. Ca-TiO | |
|---|---|
| (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 11 NRC 408 (1980) | 3,7,3,7 |
| -80-6 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 11 NRC 411 (1980) | 3, 16, 1 |
| 80-7 ATLANTIC RESEARCH CORP. | 6.10.1.1 |
| -80-9 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS (AND 2), 11 NRC 436 (1980) | 3.7.4.1 |
| -81-1 CONSOL'DATED EDISON CO, OF N.Y., POWER AUTHORITY OF THE STATE OF N.Y. (LADIAN POINT, UNIT 2); (INDIAN POINT, UNIT 3), 13 NRC 1 (1981) | 5.16.7 |
| (EXPORTS TO TAIMAN), 13 NRC 67 (1981) | 3.2.1 |
| CLI-81-23 CONSOLIDATED EDISON CO. OF N.Y.; POWER AUTHORITY OF THE STATE OF N.Y. (INDIAN POINT, UNIT 2); (INDIAN POINT, UNIT 3), 14 NRC 610 (1981) | 10 to |
| -81-24 TEXAS UTILITIES GENERATING CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 14 NRC 614 (1981) | 3,4,2 |
| (DRESDEN NUCLEAR POWER STATION, UNIT 1), 14 NRC 516 (1981) | 6 0 0 0 0 0 0 0 0 0 0 0 0 0 0 0 0 0 0 0 |

3.12

| CLI-81-26 CENTRAL ELECTRIC PO (VIRGIL C. SUMMER NUCLEAR STAT | DWER COOPERATIVE, INC. (ION, UNIT 1), 14 NRC 787 (1981) | 4.5 |
|--|--|---|
| | | 6,3.1 |
| CLI-81-27 ALABAMA POWER CO. (JOSEPH M. FARLEY NUCLEAR PLAN | NT, UNITS 1 AND 2), 14 NRC 795 (1981) | 5,7.1 |
| | CES, INC. AND N.Y.S. ENERGY RESEARCH AND DEVELOPMENT ALVICE CENTER), 14 NRC 940 (1981) | STHORIT 5.7.1 6.1.4 |
| CLI-81-31 FLORIDA POWER AND L (TURKEY POINT PLANT, UNITS 3 A | | 2.9.3 2.9.3.1 |
| CLI-81-32 CONSUMERS POWER CO. (BIG ROCK POINT PLANT), 14 NRC | 962 (1981) | 2.9.3 2.9.3.1 |
| CLI-81-36 TEXAS UTILITIES GEN (COMANCHE PEAK STEAM ELECTRIC | ERATING CO. STATION, UNITS 1 AND 2), 14 NRC 1111 (1981) | 3.1.2.3 3.4.2 |
| CLI-81-4 ENVIRONMENTAL RADIA 13 NRC 298 (1981) | TION PROTECTION STDS. FOR NUCLEAR POWER OPERATIONS, 40 |) CFR 190 5.7.1 |
| CLI-81-6 PACIFIC GAS AND ELEC (DIABLO CANYON NUCLEAR POWER PI | CTRIC CO. LANT, UNITS 1 AND 2), 13 NRC 443 (1981) | 3.1.2.1 6.24.1 |
| CLI-81-8 STATEMENT OF POLICY 13 NRC 452 (1981) | ON CONDUCT OF LICENSING PROCEEDINGS | 2.11.1 2.11.2.8 2.9.9.2.2 2.9.9.4 3.1.2.7 |

| | CITATION INDEX JULY 1992 | PAGE | | 92 |
|----------|--|------|-----|---------------------------|
| CLI-81-8 | STATEMENT OF POLICY ON CONDUCT OF LICENSING PROCEEDINGS | | 3. | 13.1 3.2.4 1 2.2 |
| | SOUTH CAROLINA ELECTRIC AND GAS CO. SUMMER NUCLEAR STATION, UNIT 1), 15 NRC 1377 (1982) | | 3 | 1.2.5 |
| | SOUTHERN CALIFORNIA EDISON CD. RE NUCLEAR GENERATING STATION, UNITS 2 AND 3), 15 NRC 1383 (1982) | | 3. | 9.9.4 13.1 12.3 |
| | CONSOLIDATED EDISON CO. OF N.Y.; POWER AUTHORITY OF THE STATE OF N.Y. DINT, UNIT 2); (INDIAN POINT, UNIT 3), 16 NRC 27 (1982) | | | 3.3 1.2.7 |
| | BOSTON EDISON CD. NUCLEAR POWER STATION). 16 NRC 44 (1982) | | | 3.3.1 24.1.3 |
| | KERR-MCGEE CORP. CAGO RARE EARTHS FACILITY), 15 NRC 232 (1982) | | | |
| | CINCINNATI GAS AND ELECTRIC CO. IMMER NUCLEAR POWER STATION, UNIT 1), 16 NRC 109 (1982) | | 3.1 | 4.2 |
| | KERR-MCGEE CORP. CAGO RARE EARTHS FACILITY). 16 NRC 401 (1982) | | 2.2 | |
| | U.S. DEPT. OF ENERGY, PROJECT MANAGEMENT CORP., TENNESSEE VALLEY AUTHORITY IVER BREEDER REACTOR PLANT), 16 NRC 412 (1982) | | | 17 1.4 15.8 |

| 보냈게 하는 생각하는 경험을 하는데 하는데 하는데 하는데 하는데 하는데 하는데 하는데 되었다. | | |
|--|------------------|----------------------|
| CITATION INDEX JULY | 1992 P | PAGE 93 |
| CLI-82-23 U.S. DEPT. OF ENERGY, PROJECT MANAGEMENT CORP., TENNESSEE | VALLEY AUTHORITY | 6.19 |
| CLI-82-26 TENNESSEE VALLEY AUTHORITY (BROWNS FERRY NUCLEAR PLANT, UNITS 1, 2 AND 3), 16 NRC 880 (1982) | | 5, 15 |
| CLI-82-14 WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPS) NUCLEAR PROJECT NOS. 1 AND 2), 16 NRC 122 (1982) | | 3.4.5 |
| CLI-82-31 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT NO. 1), 16 NRC 1236 (1982) | | 3,1,2,1, 6,10,1,1 |
| CL1-82-36 CINCINNATI GAS AND ELECTRIC CO. (WILLIAM H. ZIMMER NUCLEAR POWER STATION, UNIT NO. 1), 16 NRC 1512 (| 1982) | 6.4.2 6.4.2.3 |
| CLI-82-37 OFFSHORE POWER SYSTEMS (MANUFACTURE GLICENSE FOR FLOATING NUCLEAR POWER PLANTS), 16 NRC 16 | 91 (1982) | 4.3 |
| CLI-82-39 PACIFIC GAS AND ELECTRIC CD. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 16 NRC 1712 (198: | 2) | (-,4,4 4,4,1 |
| CLI-82-40 CINCINNATI GAS AND ELECTRIC CO. (WILLIAM H. ZIMMER NUCLEAR POWER STATION, UNIT NO. 1), 16 NRC 1717 (| 1982) | 2.9.10.1 |
| CLI-82-41 CONSOLIDATED EDISON CO. OF N.Y.; POWER AUTHORITY OF THE ST (INDIAN POINT, UNIT 2); (INDIAN POINT, UNIT 3), 16 NRC 1721 (1982) | TATE OF N.Y. | 1.8 6.5.3.1 |
| CLI-82-5 PACIFIC GAS AND ELECTRIC CO. (STANISLAUS NUCLEAR PROJECT, UNIT 1), 15 NPC 404 (1982) | | 1.9 |

| PAGE 94 | 5.17 | 3.4.4.2 | 6. 19 | 5.2 | 6.10.4 | 2222 | 4. th | 6, 10, 1 |
|--------------------------|---|--|---|--|--|---|---|---|
| CITATION INDEX JULY 1992 | CLI-82-8 U.S. DEPT. OF ENERGY, PROJECT MANAGEMENT CORP., TENNESSEE VALLEY AUTHORITY (CLINCH RIVER BREEDER REACTOR PLANT), 15 NRC 109 (1982) | CLI-82-9 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 15 NRC 136 (1982). | CLI-83-1 U.S. DEPT. OF ENERGY, PROJECT MANAGEMENT CORP., TENNESSEE VALLEY AUTHORITY (CLINCH RIVER BREEDER REACTOR PLANT), 17 NRC 1 (1983) | CLI-83-15 ROCKWELL INTERNATIONAL CORP. (ENERGY SYSTEMS GROUP SPECIAL NUCLEAR MATERIALS LICENSE ND. SMM-21), 17 NRC 1001 (1983) | CLI-83-16 CONSOLIDATED EDISON CO. OF N. V.; POWER AUTHORITY OF THE STATE OF N. V. (INDIAN POINT, UNIT 2); (INDIAN POINT, UNIT 3), 17 NRC 1006 (1983) | CLI-83-19 DUKE POWER CO. (CATAWBA NUCLEAR STATION, UNITS 1 AND 2), 17 NRC 1041 (1983) | CLI-83-2 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 17 NRC 69 (1983) | CLI-83-21 MAINE YANKEE ATOMIC POWER CO. (1983) (MAINE YANKEE ATOMIC POWER STATION), 18 NRC 157 (1983) |

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| | | |

O. OF NEW HAMPSHIRE .ND 2), 18 NRC 311 (1983) CLI-83-23 PUBLIC SERVICE (SEABROOK STATION, UNITS CLI-83-25 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR SQATION, UNIT 1), 18 NRC 327 (1983)

... GUIDELINES UNDER NUCLEAR WASTE POLICY ACT OF 1982 CLI-83-26 NRC CONCURRENCE IN 18 NRC 1139 (1983)

CLI-83-3 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 17 NRC 72 (1983)

-83-31 DUKE POWER CO. (CATAWBA NUCLEAR STATION, UNITS 1 AND 2), 18 NRC 1303 (1983) CLI-83-31

CLI-83-32 PACIFIC GAS AND ELECTRIC CO. (DIABLD CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 18 NRC 1309 (1983)

ur: 01 (7) un 95 16. Ø1 9 9 N PAGE

6.5.4

17

rv

6.5

1-83-4 CINCINNATI GAS AND ELECTRIC CO. (WILLIAM H. ZIMMER NUCLEAR POWER STATION, UNIT 1), 17 NRC 75 (1983) CLI-83-4

| CITATION INDEX JULY 1992 | -83-5 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 17 NRC 331 (1983) | -83-6 TEXAS UTILITIES GENERATING CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 17 NRC 333 (1983) | -84-11 METROPOLITAN EDISGN CO. (1984) (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 20 NRC 1 (1984) | -84-17 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 20 NRC 801 / 1984) | -84-19 MISSISSIPPI POWER AND LIGHT CO (GRAND GULF NUCLEAR STATION, UNIT 1), 20 NRC 1055 (1984) | -84-20 LDMG ISLAND LIGHTING CO (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 20 NRC 1061 (1984) | -84-21 LONG ISLAND EIGHTING CO. (S-OREHAM NUCLEAR POWER STATION, UNIT 1), 20 NRC 1437 (1984) | -84-5 PACIFIC GAS AND ELECTRIC CG. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS + AND 2), 19 NRC 953 (1984) |
|--------------------------|--|---|--|--|--|---|--|--|
| | CLI-83-5 | CLI-83-6 (CDMA | CLI-84-11 | CLT-84-17 (THREE | CLI-84-19 (GRAND | CLI-84-20 (SHORE) | CLI-84-21 (SHORE | CLI-84-5 (DIA8 |

2.9.5.7 3.4.1 5.6.1

96

PAGE

6.5.1

5.7

5.7.1

6.1

3.1.4.1

5.7.4

. . .

CLI-84-8 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 19 NRC 1154 (1984)

CLI-84-6 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNIT 2), 19 NRC 975 (1984)

| CITATION INDEX GULY 1992 | |
|--|---|
| CLI-84-9 LONG ISLAND LIGHTING CD. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 19 NRC 1323 (1984) | 6.15.1.1 |
| CLI-85-10 SOUTHERN CALIFORNIA EDISON CO. (SAN ONOFRE NUCLEAR GENERATING STATION, UNIT 1), 21 NRC 1569 (1985) | 6.26 |
| CLI-85-12 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION). 21 NRC 1587 (1985) | 6.15.1.1 |
| CLI-85-13 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 22 NPC 1 (1985) | 5.7 |
| CLI-85-14 PACIFIC GAS AND ELECTRIC CD. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 2 NRC 177 (1985) | 58 5.7.1 |
| CLI-85-15 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 22 NRC 184 (1985) | 2.11.1 2.9.5 3.1.4.1 5.7 |
| CLI-85-2 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 21 NRC 282 (1985) | 2.11.5.2 2.2 2.9.10.1 2.9.2 2.9.4.1.1 2.9.9 3.1.2.5 3.11.1.1 3.12 3.12.3 3.12.4 3.14.2 3.4.4 3.7 3.7.1 3.7.2 3.7.3.7 4.2.2 |

CLI-85-2

| | | | - | |
|---|--|----|----|----|
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| | | 12 | 70 | 3 |
| | | | | |
| | | 32 | 82 | 41 |
| | | | | |

6.24 -85-4 GENERAL PUBLIC UTILITIES NUCLEAR CORP. (THREE MILE ISLAND NUCLEAR STATION), 21 NRC 561 (1985) CL.1-85-4

(*14REE MILE ISLAND NUCLEAR STATION, UNIT 1), 21 NRC 568 (1985) CLI-85-5

1-85-7 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 4), 21 NRC 1104 (1985) CL1-85-7

-85-8 METROPOLITAN EDISON CO. (THREE MICE ISLAND NUCLEAR STATION, UNIT 1), 21 NRC 1111 (1985) CLI-85-8

(1985-9 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT +), 21 NRC +118 (1985) CLI-85-9

1-86-1 LOUISIANA POWER AND LIGHT CO. (WATERFORD STEAM ELECTRIC STATION, UNIT 3), 23 NRC 1 (1986) CLI-86-1

CLI-86-12 PACIFIC GAS AND ELECTRIC CG., (1986). 24 NRC 1 (1986)

(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 24 MRC 22 (1986) CL1-86-13

EV.

3.1.4

1.45

3.7.3.7

1- +

+ 8

| CITATION INDEX JULY 1992 | PAGE 99 |
|--|----------------------------------|
| CLI-86-15 TEXAS ILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNIT 1), 24 NRC 397 (1986) | 3,4,5 |
| CLI-86-17 SEQUOYAH FUELS CORP. (SEQUOYAH UP6 TO UF4 FACILITY). 24 NRC 48% (1986) | 2.2 |
| CLI-86-18 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 24 NRC 501 (1986) | 4.4.2 5.6.1 6.4.2 6.5.1 |
| CLI-86-19 SEQUOYAH FUELS CCRP. (UF6 PRODUCTION FACILITY), 24 NRC 508 (1986) | 6.24.1.3 |
| CLI-86-20 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 24 NRC 518 (1986) | 2.10.2 |
| CLI-86-21 COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 24 NRC 681 (1986) | 4.7 |
| CLI-86- 2 CLEVELAND ELECTRIC ILLUMINATING CO. (FERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 24 MRC 685 (1986) | 1.8 5.15.1 |
| CLI-86-23 AMERICAN NUCLEAR CORP. (REVISION OF ORDERS TO MODIFY SOURCE MATERIALS LICENSES), 24 NRC 704 (1986) | 6.20.4 |
| CLI-86-24 CAROLINA POWER AND LIGHT CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (SHEARON HARRIS NUCLEAR POWER PLANT), 24 NRC 769 (1986) | 2.2 |
| CLI-86-4 TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNIT 1), 23 NRC 113 (1986) | 3.4.5 5.7.1 6.1.4 |

| CITATION INDEX JULY 1992 | PAGE 100 |
|---|---|
| CLI-86-6 PHILAGELPHIA ELECTRIC CD. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 23 NRC 130 (1986) | 4.4.1 4.4.2 |
| CLI-86-7 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLAN), UNITS 1 AND 2), 23 NRC 233 (1986) | 3.14.2 4.4.2 4.4.4 |
| CLI-86-8 COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 23 NRC 241 (1986) | 2.9.5 2.9.5.1 2.9.5.4 2.9.5.5 3.13.1 3.17 6.5.4.1 |
| CLI-87-1 CAROLINA POWER AND LIGHT CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (SHEARON HARRIS NUCLEAR POWER PLANT), 25 NRC 1 (1987) | 5.7 |
| CLI-87-12 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 26 NRC 383 (1987) | 2.11.1 2.9.5.6 5.1 5.2 5.6.3 |
| CLI-87-5 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 25 NRC 884 (1987) | 4.4.2 |
| CLI-87-6 BRAUNKOHLE TRANSPORT, USA (IMPORT OF SOUTH AFRICAN URANIUM ORE CONCENTRATE), 25 NRC 891 (1987) | 2.9.4.1.3 3.3.6 |
| CLI-87-8 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 26 NRC 6 (1987) | 6.10 |

| 등 전문 경기 사람이 있었다면서 하다면 하게 되었다. 그런 사람들은 사람들은 사람들은 사람들은 사람들은 사람들은 사람들은 사람들은 | |
|---|-----------------------|
| CLI-88-10 PUBLIC SERVICE CO. DF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 28 NRC 573 (1988) | 6.20.4 6.8 |
| CLI-88-11 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 28 NRC 603 (1988) | 2.11.5.2 |
| CLI-88-12 TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 28 NRC 605 (1988) | 2.9.3.3.3 |
| CLI-88-3 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1). 28 NRC 1 (1988) | 4.4.3 4.4.2 4.5 |
| CLI-88-6 STATE OF ILLINOIS (SECTION 274 AGREEMENT), 28 NRC 75 (1988) | 3.1.2.6 |
| C'I-88-7 PUBLIC SERVICE CO. DF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 28 NRC 271 (1988) | 6.8 |
| CLI-88-8 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 28 NRC 419 (1988) | 2 9.5.5 4.4.2 |
| CLI-88-9 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 28 NRC 567 (1988) | 3.3.1.1 |
| CLI-89-1 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1). 29 NRC 89 (1989) | 4,4,2 |
| CLI "9-10 PHILADELPHIA ELECTRIC CO. [MERICK GENERATING STATION, UNITS 1 AND 2), 30 NRC 1 (1989) | 6.15.1.1 |

| ON INDEX JULY 1992 | | |
|--------------------|-----|--|
| ON INDEX JULY 1 | | |
| ON INDEX JULY 1 | ĸ | |
| ON INDEX JULY 1 | 00 | |
| ON INDEX JULY | ÷ | |
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| VESTIGATION 2.11.5 | U. MACKTAL. | J. MACKTAL. | J. MACKTAL. B. 16.1 | ELPHIA ELECTRIC CO. STATION, UNITS 1 AND 21, 30 NRC 96 (1989) 6.15.1.1 | ELPHIA ELECTRIC CO. INC. 105 (1989) | | J. MACKTAL S. 16.1 | 29 NRC 211 (1989) | 29 NRC 211 (1989) 29 NRC 211 (1989) 2-31 (1989) |
|--|---|-------------|---|--|-------------------------------------|---|---|--|--|
| CLI-89-11 OIA INVESTIGATION 30 MRC 11 (1989) | CLI-89-12 JÖSEPH J. MACKTAL 30 NRC 19 (1989) | | CLI-89-14 JOSEPH J. MACKTAL 30 NRC 85 (1983) | | CLI-89-17 PHILADELPHIA ELECTRIC CO. | (LIMERICK GENERATING STATION, UNIT 2), 30 | (LIMERICK GENERATING STATION, UNIT 2), 30 CLI-89-18 JOSEPH J. MACKTAL 30 NRC 167 (1989) | CLI-89-18 JOSEPH J. MACKTAL 30 NRC 167 (1989) CLI-89-2 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1). | CLI-89-18 JOSEPH J. MACKTAL 30 NRC 167 (1989) CLI-89-2 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 29 N CLI-89-20 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 30 NRC 231 |

| CITATION INDEX JULY 1992 | PAGE | 103 |
|--|------|--|
| CLI-89-3 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2). 29 NRC 234 (1989) | | 2.9.5.1 2.9.5.4 4.5 6.20.4 6.8 |
| CLI-89-4 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 29 NRC 243 (1989) | | 5.8.2 |
| CLI-89-6 TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 29 NRC 348 (1989) | | 2.9.3.3.3 4.5 |
| CLI-89-7 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 29 NRC 395 (1989) | | 6.8 |
| CLI-89-8 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 29 NRC 399 (1989) | | 5.7.1 6.15.1.+ 6.20.4 |
| CLI-90-10 PUBLIC SERVICE CO. DF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 32 NRC 218 (1990) | | 4.4.2 |
| CLI-90-11 STATE OF ILLINOIS 32 NRC 333 (1990) | | 2.2 |
| CLI-90-3 FUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 31 NRC 219 (1990) | | 3.1.2 5.15 5.7.1 |
| CLI-90-4 VERMONT YANKEE NUCLEAR POWER CORP. (VERMONT YANKEE NUCLEAR POWER STATION), 31 NRC 333 (1990) | | 2.9.5 2.9.5.5 3.45 6.15.4 |

(RDCKETDYNE DIVISION), 31 NRC 337 (1990)

CLI-90-5

10 W 2.9.3 3.1.2.5 5.12.7

4.4.1.4

-90-8 LONG ISLAND LIGHTING CG. (SHOREHAM NUCLEAR POWER STAILON, UNIT 1), 32 NRC 201 (1990)

8-06-I70

STATE OF ILLINOIS

CLI-90-9 STATE OF 32 NRC 210 (1990)

1-90-7 VERMONT YANKEE NUCLEAR POWER CORP. (VERMONT YANKEE NUCLEAR POWER STATION), 32 NRC 129 (1990)

CLI-90-7

CLI-90-6 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 31 NRC 483 (1990)

-91-1 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 33 NRC 1 (1991)

CLI-91-1

(YANKEE ROWE NUCLEAR POWER STATION), 34 NRC 3 (1981)

C* I-91-11

6.15.

2.2

6, 15, 1, 1

6.24

2295

2 AND 3), 34 MRC 149 (1991) ARIZONA PUBLIC SERVICE CO.

DE NUCLEAR GENERATING STATION, UNITS 4.

CLI-91-15

(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 33 NRC 61 (1991) CLI-91-2

CLI-91-3 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 33 7 .C 76 (1991)

1-91-4 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 33 NRC 223 (1991) CEI-91-4

(TURKEY POINT NUCLEAR GENERATING PLANT, UNITS 3 AND 4), 33 NRC 238 (1991) CLI-91-5

CLI-91-8 LONG ISLAND LIGHTING CD. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 33 NRC 461 (1931)

CLI-91-9 RICHARD E. 33 NRC 473 (1991)

LBP-73-29 TENNESSEE VALLEY AUTHORITY (BROWNS FERRY NUCLEAR PLANT, UNITS 1, 2 AND 3), 6 AEC 682 (1973)

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LBP-73-41 MISSISSIPPI POWER AND LIGHT CO. (GRAND GULF NUCLEAR STATION, UNITS # AND 2-), 6 AEC 1057 (1973)

(CATAWBA NUCLEAR STATION, UNITS 1 AND 2), 7 AEC 659 (1974) LBP-74-22

(BEAVER VALLEY POWER STATION, UNIT 2), 7 AEC 711 (1974) LBP-74-25

(NINE MILE POINT NUCLEAR STATION, UNIT 2), 7 AEC 758 (1974) LBP-74-26

LBP-74-36 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 7 AEC 877 (1974)

(CATAMBA NUCLEAR STATION, UNITS 1 AND 2), 7 AEC 82 (1974) LBP-74-5

0-74-54 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 8 AEC (12 (1974) LBP-74-54

(PILGRIM NUCLEAR STATION, UNIT 2), 8 AEC 330 (1974) LBP-74-63

LBP-74-74 GULF STATES UTILITIES CO. (RIVER BEND STATION, UNITS 1 AND 2), 8 AEC 669 (1974)

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| (ATLANTIC GENERATING STATION, UNITS 1 AND 2), 2 NRC 702 (1975) (ATLANTIC GENERATING STATION, UNITS 1 AND 2), 2 NRC 702 (1975) 2 11.5. (ANAUGRACTURING LICENSE FOR FLOATING MUCLEAR POWER PLANTS), 2 NRC 813 (1975) 2 9 2 7 3 3 2 7 3 3 2 7 4 5 7 10 10 10 10 10 10 10 10 10 10 10 10 10 |
|---|
| ** HAMPSHIRE 1 NRC 243 (1975) 1 AMD 2), 3 NRC |
| AUTHORITY UNITS 1 AND 23, 3 NRC 209 (1976) |
| |

2.9.4.1.2

LBP-76-8 TOLEDG EDISON CO. (DAVIS-BESSE MUCLEAR POWER STATION, UNITS 1,2,3), 3 NRC 199 (1976)

LBP-77-11 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 5 NRC 4F1 (1977)

LBP-77-13 ALLIED-GENERAL NUCLEAR SERVICES (BARNWELL FUEL RECEIVING AND STORAGE STATION), 5 MRC 489 (1977)

LBP-77-14 TENNESSEE VALLEY AUTHORITY (PHIPPS BEND NUCLEAR PLANT, UNITS 1 AND 2), 5 NRC 484 (1977)

LBP-77-15 WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECTS 3 AND 5), 5 NRC 643 (1977)

LBP-77-16 WASHINGTON PUBL " POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECTS " 37, 5), 5 NRC 650 [1977]

LBP-77-17 PUBLIC SERVICE CO. OF DKLAYOMA (BLACK FOX STATION, UNITS 1 AND 2), 2 NRC 657 (1977)

LBP-77-18 PUBLIC SERVICE CO. OF OKLAHOMA (1977) (BLACK FOX STATION, UNITS 1 AND 2), 5 NFC 671 (1977)

LBP-77-20 DUKE POWER CO. (WILLIAM B. MCGUIRE NUCLEAR STATION, UNITS 1 AND 2), 5 NRC 680 (1977)

LBP-77-21 LONG ISLAND LIGHTING CO. (JAMESPORT NUCLEAR STATION, UNITS 1 AND 2), 5 NRC 684 (1977)

LBP-77-23 FLORIDA POWER AND LIGHT CD. (ST. LUCIE NUCLEAR PLANT UNITS 1 AND 2; TURKEY POINT, UNITS 3 AND 4), 5 NRC 789 (1977)

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DETROIT EDISON CO. LBP-78-11 P-78-13 DETROIT EDISON CO. (ENRICO FERMI ATOMIC FOWER PLANT, UNIT 2), 7 MRC 583 (1978) LBP-78-13

0-78-15 PUBLIC SERVICE ELECTRIC AND GAS GO. (1978) (HOPE CREEK GENERATING STATION, UNITS 1 AND 23, 7 NRC 642 (1978) LBP-78-15

LBP-78-18 NEW ENGLAND POWER CD. (NEP UNITS 1 AND 2), 7 NRC 932 (1978)

S-78-2 CARDLINA POWER AND LIGHT CO. (SHEARDN HARRIS NUCLEAR PLANT, UNITS 1-4), 7 NRC 83 (1978) LBP-78-2

LBP-78-20 PACIFIC GAS AND ELECTRIC CO. (STANISLAUS NUCLEAR PROJECT, UNIT 1), 7 NRC 1038 (1978)

CARDLINA POWER AND LIGHT CD. RDBINSON, UNIT 2), 7 NRC 1052 (1978) LBP-78-22 (H. B.

(82612 B NRC . LBP-78-23 WISCONSIN ELECTRIC POWER CO. (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2).

(KEWAUNEE NUCLEAR POWER PLANT), 8 MRT 78 (1978) LBP-78-24

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WISCONSIN PURLIC SERVICE CORP LBP-78-24

102 (1978) LBP-78-26 PUBLIC SERVICE CO. OF OKLAHOMA (BLACK FOX STATION, UNITS 1 AND 2), 8 NRC

5-78-27 CONSUMERS POWER CG. (1978) (MIDLAND PLANT UNITS 1 AND 2), 8 MRC 275 (1978) LBP-78-27

LBP-78-28 PUBLIC SERVICE CD. OF OKLAHOMA (1978) (BLACK FOX STATION, UNITS 1 AND 2), 8 NRC 281 (1978)

(CALLAWAY PLANT, UNITS 1 AND 2), 8 NRC 366 (1978) LBP-78-31

3-78-32 PORTLAND GENERAL ELECTRIC CO. (TROJAN NUCLEAR PLANT), 8 NRC 413 (1978) LBP-78-32

.-78-33 GENERAL ELECTRIC CO. (VALLECITOS NUCLEAR CENTER, GENERAL ELECTRIC TEST REACTOR), 8 NRC 461 (1978) LBP-78-33

OJABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AMD 2), 8 NRC 567 (1978) LBP-78-36

19-37 DETROIT EDISON CD. (ENRICO FERMI ATOMIC POVER PLANT, UNIT 2), 8 NRC 575 (1978) LBP-78-37

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(VIRGIL C. SUMMER NUCLEAR STATION, UNIT 1), 7 NRC 209 (1978) LBP-78-6

(NEP UNITS) AND 2), 7 NRC 271 (1978) £85-78-9

FENRICO FERMI ATOMIC POWER PLANT, UNIT 27, 9 NRC 73 (1979) 1-64-487

(SOUTH TEXAS PROJECT, UNITS 1 AND 2), 9 NRC 439 (1979)

LRP-79-14 PUBLIC SERVICE ELECTRIC AND GAS CO. (578) (512)

P-79-15 OFFSHORE POWER SYSTEMS (1979) (FLOATING NUCLEAR POWER PLANTS), 9 NRC 653 (1979) 18P-79-15

6,13,1 2.8.1.3 2.9.3.3.3

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P-79-17 CINCINNATI GAS AND ELECTRIC CO. (WILLIAM H. ZIMMER NUCLEAR STATION), 9 NRC 723 (1979) LBP-79-17

LBP-79-20 CONSUMERS POWER CO. (PALISADES NUCLEAR PLANT), 10 NRC 108 (1979)

LBP-79-21 FLORIDA POWER AND LIGHT CO. (TURKEY POINT NUCLEAR GENERATING UNITS 3 AND 4), 10 NRC 183 (1979)

LBF-79-22 CINCINNATI GAS AND ELECTRIC CO. (WILLIAM H. ZIMMER NUCLEAR STATION), 10 NRC 213 (1979)

LBP-79-23 PHILADELPHIA ELECTRIC CO. (FULTON GENERATING STATION, UNITS 4 AND 21, 19 NRC 220 (1979)

0-79-24 CINCINNATI GAS AND ELECTRIC CO. (1979) (WILLIAM H. ZIMMER NUCLEAR STATION), 10 NRC 226 (1979) LBP-79-24

L3P-79-27 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 10 NRC 563 (1979)

LBP-79-4 FLORIDA POWER AND LIGHT CO. (ST. LUCIE NUCLEAR PLANT, UNIT 2), 9 NRC 164 (1979)

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| CITATION INDEX JULY 1992 | PAGE 118 |
|---|--|
| LBP-79-4 FLORIDA FOWER AND LIGHT CO. | 6.3.3 |
| LBP-79-5 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 9 NRC 193 (1979) | 2.11.2.6 2.11.5 |
| LBP-79-6 PENNSYLVANIA POWER AND LIGHT CO. (SUSQUEHANNA STEAM ELECTRIC STATION, UNITS (AND 2), 9 NRC 291 (1979) | 2.9.5.10 2.9.5.4 6.15.6.1 6.9.1 |
| LBP-79-7 WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECT NO. 2), 9 NRC 320 (1979) | 2 9.4.1.2 2 9.4.1.4 |
| LBP-80-14 CINCINNATI GAS AND ELECTRIC CO. (WILLIAM H. ZIMMER NUCLEAR STATION), 11 NRC 570 (1980) | 2.9.3.3.3 |
| LBP-80-15 PUERTO RICO ELECTRIC POWER AUTHORITY (NORTH COAST NUCLEAR PLANT, UNIT 1), 11 NRC 735 (1980) | 2.9.10.1 3.1.2.2 3.5.1.1 |
| LBP-80-17 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 11 NRC 893 (1980) | 2.11.5.2 |
| LBP-80-18 PENNSYLVANIA POWER AND LIGHT CO. (SUSQUEHANNA STEAM ELECTRIC STATION, UNITS 1 AND 2), 11 NRC 906 (1980) | 2.11.2.2 3.1.1 6.15.8.1 |
| LBP-80-22 NORTHERN INDIANA PUBLIC SERVICE CO. (BAILLY GENERATING STATION, NUCLEAR-1), 12 NRC 191 (1980) | 2.9.4.1.4 6.1.4.2 |

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LBP-80-27 PUBLIC SERVICE ELECTRIC AND GAS CO. (5980)

LBP-80-28 UUKE POWER CO. (AMENDMENT TO DICONEE SAM LICENSE), 12 NRC 459 (1980)

LBP-80-29 WISCONSIN ELECTRIC POWER CO. (POINT BEACH NUCLEAR PLANT, UNIT 1), 12 NRC 581 (1980)

(BP-80-30 COMMONWEALTH EDISON CD. (8YRON STATION, UNITS 1 AND 2), 12 NRC 583 (1980)

LBP-80-31 NORTHERN INDIANA PUBLIC SERVICE CD. (BAILLY GENERATING STATION, NUCLEAR-1), 12 NRC 699 (1980)

LBP-80-7 COMMONWEALTH EDISON CO. (ZIDN STATION, UNITS 1 AND 2), 11 NRC 245 (1980)

-81-1 DUKE POWER CO. (CATAMBA NUCLEAR STATION, UNITS 1 AND 2), 13 NRC 27 (1981) LBP-81-1

SOUTH CAROLINA ELECTRIC AND GAS CO. SUMMER NUCLEAR STATION, UNIT 1), 13 NRC 420 (1981) (VIRGIL C. LBP-81-11

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| CITATION INDEX JULY 1992 | PAGE 116 |
|---|---|
| LBP-81-14 FLORIDA POWER AND LIGHT CO. (TURKEY POINT PLANT, CNITS 3 AND 4), 13 NRC 677 (1981) | 6.15.1.2 |
| LBP-81-15 ILLINDIS POWER CO. (CLINTON POWER STATION, UNITS 1 AND 2), 13 NRC 708 (1981) | 6. 6. |
| LBP-81-18 LONG ISLAND LIGHTING CO. (SHOREH - 4 NUCLEAR POWER STATION, UNIT 1), 14 NRC 71 (1981) | 3. 4. 4. 4. 4. 4. 4. 4. 4. 4. 4. 4. 4. 4. |
| LBP-81-2 CINCINNATI GAS AND ELECTRIC CO. (WILLIAM H. ZIMMER NUCLEAR STATION), 13 NRC 36 (1981) | 50 10 50 |
| LBP-81-23 TEXAS UTILITIES GENERATING CD (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 14 MRC 15S (1981) | 29 49 65 |
| LBP-81-24 CLEVELAND ELECTRIC ILLUMINATING CD. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 14 NRC 175 (1981) | 23.64 |
| LBP-81-25 TEXAS UTILITIES GENERATING CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 14 NRC 241 (1981) | 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 |
| LBP-81-28 FLURIDA POWER AND LIGHT CO. (ST. LUCIE NICLEAR PLANT, UNIT 2), 14 NRC 333 (1981) | 64 61 50 |
| LBP-81-29 THE REGENTS OF THE UNIVERSITY OF CALIFORNIA (UCLA RESEARCH REACTOR), 14 NRC 353 (1981) | 64 65 |
| LBP-81-30 FLORIDA POWER AND LIGHT CO. (1981) (TURKEY POINT PLANT, UNITS 3 AND 4), 14 NRC 357 (1981) | t- th |

| LBP-81-30-A COMMONWEALTH EDISON CO. (BYRON STATION, UNITS 1 AND 2), 14 N°C 364 (1981) | 2.11.1 2.11.6 2.9.3 3.1.2.2 |
|---|--|
| LBP-B1-31 DAIRYLAND POWER COOPERATIVE (LA CROSSE BOILING WATER REACTOR), 14 NRC 375 (1981) | 3.3.6 |
| LBP-81-34 HOUSTON LIGHTING AND POWER CO. (ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1), 14 NRC 637 (1981) | 3.5 |
| LBP-81-35 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 14 NRC 682 (1981) | 11.4 2 9.3.3 9.5.3 9.9.2 3.7.3.2 |
| LBP-81-36 SOUTHERN CALIFORNIA EDISON CO. (SAN ONOFRE NUCLEAR GENERATING STATION, UNITS 2 AND 3), 14 NRC 691 (1981) | 3.1.2.3 3.4.2 5.14 |
| LBP-81-39 WISCONSIN ELECTRIC POWER CO. (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 14 NRC 819 (1981) | 3,1,2,4 |
| LBP-81-42 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 14 NRC 842 (1981) | 2.9.5.7 |
| LBP-81-44 WISCONSIN ELECTRIC POWER CO. (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 14 NRC 850 (1981) | 3.1.2.4 |
| LBP-81-45 WISCONSIN ELECTRIC POWER CG. (PDINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 14 NRC 853 (1981) | 2.1.2.4 2.4.1 |

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14 NRC 877 (1981) -81-48 LDUIS ANA POWER AND LIGHT CD. (WATERFORD STEAM ELECTRIC STATION, UNIT 3). LBP-81-48

LBP-81-5 PACIFIC GAS AND ELECTRIC CO. (DIABLE CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 13 NRC 226 (1981)

(THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 14 NRC 888 (1981) LBP-81-50

14 NRC 896 (1981) '-81-51 TEXAS UTILITIES GENERATING CO. COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2). LBP-81-51

LBP-81-52 COMMONWEALTH EDISON CO. (8981) (BYRON STATION, UNITS 1 AND 2), 14 NRC 901 (1981)

LBP-81-54 HOUSTON LIGHTING AND FOWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 14 NRC 943 (1981)

(BP-81-55 WISCONSIN ELECTRIC POWER CO. (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 14 NRC 1017 (1981)

7-81-57 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 14 MRC 1037 (1981) LBP-81-57

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| | CITATION INDEX JULY 1992 | PAGE 119 |
|---|---|-------------------------------|
| | | |
| LBP-81-58 FLORIDA POWER AND LIGHT CO. (ST. LUCIE NUCLEAR PLANT, UNIT 2), 14 | | 3, 17 |
| LBP-81-6 NORTHERN INDIANA PUBLIC SER (BAILLY GENERATING STATION, NUCLEAR-1) | | 3,4,5 |
| LBP-81-60 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UN | NIT 1), 14 NRC 1724 (1931) | 3.4.1 |
| LBP-81-61 ILLINOIS POWER CO. (CLINTON POWER STATION, UNIT 1), 14 NR | RC 1735 (1981) | 2.11.2.1 2.11.4 2.9.3.1 |
| LBP-81-62 WISCONSIN ELECTRIC POWER CO (POINT BEACH NUCLEAR PLANT, UNITS 1 AN | | 6.23 |
| LBP-81-63 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 14 NRC | 1768 (1981) | 2 11,2.6 3 12 6.5.4.7 |
| LBP-81-7 DAIRYLAND POWER COOPERATIVE (LA CK. SSE BOILING WATER REACTOR), 13 | | 6.24.5 |
| LBP-81-8 PENNSYLVANIA POWER AND LIGH (SUSQUEHANNA STEAM ELECTRIC STATION, U | IT CO. AND ALLEGHENY ELECTRIC COOPERATIVE INC. INITS 1 AND 2), 13 NRC 335 (1981) | 3 5 3 5 2 3 3 5 3 |
| LBP-82-1 CONSOLIDATED EDISON CO. OF 1 (INDIAN POINT STATION, UNIT NO. 2), 15 | | 1.7.1 2.9.3.3.3 |

| LBP-82-14 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY MACLEAR DOWER PLANT INITS 1 AND 21 15 NRC 43 (1983) | | |
|---|---|--|
| | | |
| (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 15 NRC 341 (1982) | 2 | |
| (WATERFORD STEAM ELECTRIC STATION, UNIT 3), 16 NRC 1550 (1982) | 6.9.5 | |
| LBF-82-101 CONSUMERS POWER CO. (PALTSADES NUCLEAR POWER FACILITY), 16 MAC 1982! | ir: 0: 0: | |
| LBP-82-102 CLEVELAND ELECTRIC :LLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 16 NRC 1597 (1982) | 2.11.2.2 | |

LBP-82-105 CONSOLIDATED EDISON CO. Of N.Y.; POWER AUTHORITY OF THE STATE OF N.Y. (INDIAN POINT, UNIT NO. 3), 16 NRC 1629 (1982)

LBP-82-103 ILLINGIS POWER CO. (CLINTON POWER STATION, UNIT NO.1), 15 NRC 1603 (1982)

LBP-82-105 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 16 NRC 1649 [1982]

14.2.2 2 9 5 3 4 5 6 20 3 3, 4, 2, 7

P-82-107 LDNG ISLAND LIGHTING CD. (1982) (1982) LBP-82-107

P-82-107A DUKE POWER CO. UNITS 1 AND 2), 16 NRC 1791 (1982) LBP-82-107A

P-82-108 WISCONSIN ELECTRIC POWER CD. (1982) (POINT BEACH NUCLEAR PLANT, UNIT 1), 16 NRC 1811 (1982) LBP-82-108

15 NRC 348 (1982) (PERRY MUCLEAR POWER PLANT, UNITS 1 AND 2). 1 LBP-52-11

(INDIAN POINT, UNIT NO. 2); (INDIAN POINT, UNIT NO. 3), 15 NRC 1907 (1982) LBP-82-413

P-82-114 CLEVELAND ELECTRIC ILLUMINATING CD. (1982) (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 16 NRC 1909 (1982) LBP-82-114

5-82-115 LUNG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 16 NRC 1923 (1982) LBP-82-115

LBP-82-116 DUKE POWER CD (CATEMBA MUCLEAR STATION, UNITS 1 AND 2), 16 NRC 1937 (1982)

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| 82-117A ARIZONA PUBLIC SERVI | DE NUCLI IR GENERATING STATI | |
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| P-82-117A ARIZONA PUBLIC SERVI | ID VERDE NUCLLIR GENERATING STATI | |

LBP-82-1178 ARIZONA PUBLIC SERVICE CG. (PALD VERDE NUCLEAR GENERATING STATION, UNITS 1, 2 AND 3), 16 NPC 2024 (1982)

LBP-82-118 CONSLIMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 23), 16 NRC 2034 (1982)

LBP-82-119A CARDLINA POWER AND LIGHT CD. AND NOATH CAROLINA EASTERN MUNICIPAL POWER AGENCY (SHEARDN PARRIS NUCLEAR POWER PLANT, UNITS 1 AND 2). 16 NRC 2069 (1982)

LBP-82-12 WISCONSIN ELECTRIC POWER CD (POINT BEACH MUCLEAR PLANT, UNITS 1 AND 2), 15 NRC 354 (1982)

LBP-82-12A CONSOLIDATED EDISON CO. OF N.Y., POWER AUTHORITY OF THE STATE OF N.Y. (INDIAN POINT, UNIT NO. 2), (INDIAN POINT, UNIT NO. 3), 15 NRC 515 (1982)

LBP-82-12B CONSCLIDATED EDISON CO. OF N.Y.: POWER AUTHORITY OF THE STATE OF N.Y. (INDIAN POINT, UNIT NO. 2), 15 NRC 523 (1982)

LBP-82-14 GENERAL ELECTRIC CO. (GE MDRRIS OPERATION SPENT FUEL STORAGE FACILITY), 15 NRC 530 (1982)

LBP-82-15 CLEVELAND ELECTRIC ILLUMINATING CO. (1982) (1982)

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123

PAGE

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| | 1982) | 1982) | | | |
| | 15 NRC 593 (15 | 15 NRC 598 (| 1982) | (1982) | |
| 83 8 | ITS 1 AND 2). | ITS 1 AND 2). | 15 NRC 601 (1982) | 21, 15 MRC 623 | |
| CLEVELAND ELECTRIC FLLUMINATING CO | -82-17 TEXAS UTILITIES GENERATING CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS | -82-18 TEXAS UTILITIES GENERATING CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 | -82-19 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1). | | 98 CONSUMERS POWER CO. ROCK POINT PLANT), 15 NRC 627 (1982 |
| CLEVELAND ELECT | TEXAS UTILITIES GENERATING CO YEAK STEAM ELECTRIC STATION, U | TEXAS UTILITIES GENERATING CO PEAK STEAM ELECTRIC STATION, U | LONG ISLAND LIGHTING CO. | -82-19A WISCONSIN ELECTRIC POWER CO. (FOINT BEACH MICLEAR PLANT, UNITS 1 AND | CONSUMERS POWER CO. |
| L8P-82-15 | LBP-82-17 (COMANCHE R | LBP-82-18 (COMANCHE F | £8P-82-19 {SHDREHAM b | LBP-82-19A (FOINT BEAC | LBP-82-198 (EIG ROCK F |

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ei ei

LBP-82-23 CONSOLIDATED EDISON CO. OF N.Y.; FOWER AUTHORITY OF THE STATE OF N.Y. (INDIAN POINT, UNIT NO. 2); (INDIAN POINT, UNIT NO. 3), 15 NRC 647 (1982)

LBP-82-24 ARMED FORCES RADIOBIOLOGY RESEARCH INSTITUTE (COBALT-60 STORAGE FACILITY), 15 NRC 652 (1982)

6.3

3.1.2.7

LBP-82-2 WISCONSIN ELECTRIC PGWER CO. (5 NRC 48 (1982) (POINT BEACH MUCLEAR PLANT, UNITS 1 AND 2). (5 NRC 48 (1982)

LEP-82-21 FLORIDA POWER AND LIGHT CO. (ST. LUCIE PLANT, UNIT NO. 2), 15 NRC 639 (1982)

| FAGE 124 | 3.1.2.3 | 2.10.2 | 2.9.8 | 9 | 6.23 | 3,14,2 |
|--------------------------|---|---|--|---|--|---|
| CITATION INDEX JULY 1992 | LBP-82-24A WISCONSIN ELECTRIC POWER CO. 15 NRC 661 (1982) | 18P-82-25 CONSOLIDATED EDISON CO. OF N.Y.; POWER AUTHORITY OF THE STATE OF N.Y. (INDIAN POINT, CNIT NO. 2); | LBP-82-26 PUGET SOUND POWER AND LIGHT CO. (SKAGIT/HAMFORD NJCLEAR POWER PROJECT, UNITS † AND 2), 15 NP 74 (1982) | LBP-82-3 SOUTHERN CALIFORNIA EDJSON CO. (SAN ONOFRE NUCLEAR GENERATING ST 19N, UNITS 2 AND 3), 15 NRC 51 (1982) | LBP-82-33 WISCONSIN ELECTRIC POWER CD. (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 15 NRC 887 (1982) | LBP-82-34A METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT NO. 1), 15 NRC 914 (1982) |

źΝ

¥.

LBP-82-41 LONG ISLAND LIGHTING CD. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 15 NRC 1295 (1982) LBP-82-4 MAINE YANKEE ATOMIC POWER CO. (MAINE YANKEE ATOMIC POWER STATION), 15 NRC 198 (1982)

LBP-82-36 NUCLEAR FUEL SERVICES, INC. AND N.Y.S. ENERGY RESEARCH AND DEVELOPMENT AUTHORITY (WESTERN NEW YORK NUCLEAR SERVICE CENTER), 15 NRC 1075 (1982)

- 4

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6.23.3

3.4.5

LBP-82-42 WISCONSIN ELECTRIC POWER CO. (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 15 NRC 130 (1982)

CITATION INDEX --- JULY 1992

PAGE 125

| LBP-82-43A PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 15 NRC 142 (1982) | 2.9.3 2.9.4.1.2 2.9.4.1.2 2.9.4.2 3.4.1 6.15 6.15.1 |
|--|---|
| LBP-82-45 ARIZONA PUBLIC SERVICE CO. (PALO VERDE NUCLEAR GENERATING STATION, UNITS 1, 2 AND 3), 15 NRC 152 (1982) | 6.15.8 |
| LBP-82-46 SOUTHERN CALIFORNIA EDISON CO. (SAN ONOFRE NUCLEAR GENERATING STATION, UNITS 2 AND 3), 15 NRC 1531 (1982) | 3.14.2 |
| LBP-82-47 CINCINNATI GAS AND ELECTRIC CO. (WM. H. ZIMMER NUCLEAR POWER STATION, UNIT 1), 15 NRC 1538 (1982) | 2.11.2.2 |
| LBP-82-48 CINCINNATI GAS AND ELECTRIC CD. (WM. H. ZIMMER NUCLEAR POWER STATION, UNIT 1), 15 NRC 1549 (1982) | 4.2.2 |
| LBP-82-5 COMMONWEALTH EDISON CO. (BYRON STATION, UNITS 1 AND 2), 15 NRC 209 (1982) | 2.11.5.2 |
| LBP-82-5A WISCONSIN ELECTRIC POWER CO. (POINT BEACH NUCLEAR PLANT, UNITS 1 APO 2), 15 NRC 216 (1982) | 3.1.2.3 3.1.2.4 6.23.3 6.4.1.1 |
| LBP-82-51 DUKE POWER CO. (CATAWBA NUCLEAR STATION, UNITS 1 AND 2), 16 NRC 167 (1982) | 2.9.5.9 |
| LBP-82-51A CONSUMERS POWER CO. (BIG ROCK POINT PLANT). 16 NRC 180 (1982) | 4.2 |

DJ T.

LBP-82-52 COMMONWEALTH EDISON CO. (DRESDEN NUCLEAR POWER STATION, UNIT 1), 16 NRC 183 (1982)

LBP-92-53 CLEVELAND ELECTRIC ILLUMINATING CO. (1982) (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 16 NRC 196 (1982)

16 NRC 210 (1982) (ZIMMER NUCLEAR POWER STATION, UNIT 1), 1 LGP-82-54

LBP-82-56 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 16 NRC 281 (1982)

L8P-82-58 DAIRYLAND POWER CODPERATIVE (LA CROSSE BOILING WATER REACTOR), 16 NRC 512 (1982)

16 NRC 533 (1982) .-82-59 TEXAS UTILITIES GENERATING CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), LBP-82-59

P-82 6 WISCONSIN ELECTRIC POWER CO. (1982) (1982) LBP-82 6

V.8P-82-62 ARIZONA PUBLIC SERVICE CO. (PALO VERDE NUCLEAR GENERATING STATION, UNITS 1, 2 AND 3), 16 NRC 565 (1982)

126

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| CITATION INDEX JULY 1992 | PAGE 127 |
|--|--|
| LBP-82-63 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 16 NRC 571 (1982) | 2,9,3,1 2,9,3,3,3 2,9,5,5 6,15,6 6,21 6,8 |
| LBP-82-67 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 16 NRC 734 (1982) | 2.11.2.8 |
| LBP-82-69 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 16 NRC 751 (1982) | 3.1.2.1 |
| LBP-82-72 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 16 NRC 968 (1982) | 6 14 6 15.8 6 15.8,4 |
| LBP-82-73 LDNG ISLAND LIGHTING CG. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 16 NRC 974 (1982) | 3.1.2.7 |
| LBP-82-74 PUGET SOUND POWER AND LIGHT CO. (SKAGIT/HANFORD NUCLEAR POWER PROJECT, UNITS 1 AND 2), 16 NRC 981 (1982) | 2.9.3 2.9.3.3 2.9.3.3.3 2.9.4.1.1 2.9.4.1.2 |
| LEP-82-75 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 16 NRC 986 (1982) | 2.9.5 2.9.5.1 |
| LBP-82-76 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 16 NRC 102 (1982) | 1.7.1 2.10.2 2.9.5.1 3.1.2.1.1 3.17 |

| CITATION INDEX JULY 1992 | PAGE 128 |
|---|--|
| LBP-82-76 PUBLIC SERVICE CD. OF NEW HAMPSHIRE | 6.15.1.1 |
| LBP-82-77 CONSUMERS POWER CO. (BIG ROCK POINT PLANT), 16 NRC 109 (1982) | 3.7 |
| LBP-82-78 CONSUMERS POWER CO. (BIG ROCK POINT PLANT), 16 NRC 110 (1982) | 6.15.1.1 |
| LBP-82-79 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 16 NRC 111 (1982) | 2.9.5.5 3.1.2.3 |
| LBP-82-8 CONSUMERS POWER CO. (BIG ROCK POINT PLANT), 15 NRC 299 (1982) | 2.2 3.5 3.5.2.1 6.5.1 |
| LBP-82-80 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1). 16 NRC 112 (1982) | 6.29.3.2 |
| LBP-82-81 DUKE POWER CO. (PERKINS NUCLEAR STATION, UNITS 1, 2 AND 3), 16 NRC 112 (1982) | 1.9 |
| LBP-82-82 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 16 NRC 114 (1982) | 2.11.2.8 2.11.2.5 2.11.2.6 2.11.4 |
| LBP-82-84 SOUTH CARRILINA ELECTRIC AND GAS CO. (VIRGIL C. SUMMER NUCLEAR STATION, UNIT 1), 16 NRC 1183 (1982) | 3.1.2.1 4.4.2 5.7.1 |

1), 16 NRC 1190 (1982)

7-82-86 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT NO.

LBP-82-86

LBP-82-87

- 3.1.2.
- 0 0 0 0 + 4 0 0 0

- 0-82-87 TEXAS UTILITIES GENERATING CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 16 NRC 1195 (1982)
- (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), 16 NRC 1335 (1982) LBP-82-88
- (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 16 NRC 1355 (1982) LBP-82-89
- -82-9 CLEVELAND ELECTRIC ILLUMINATING CO (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 15 NRC 339 (1982) LBP-82-9
- 16 NRC 1359 (1982) (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 16 LBP-82-90
- (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 16 NRC 1364 (1982) LBP-87-91
- LBP-82-92 MISSISSIPPI POWER AND LIGHT CO. (GRAND GULF NUCLEAR STATION, UNITS 1 AND 2), 16 NRC 1376 (1982)
- -82-93 THE REGENTS OF THE UNIVERSITY OF CALIFORNIA (UCLA RESEARCH REACTOR), 16 NRC 1391 (1982) LBP-82-93
- (MIDLAND PLANT, UNITS 1 AND 2), 16 NRC 1401 (1982) LBP-82-95

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| HIT EDISON CO. | OMIC POWER PLAN |
| ROLL EDISON CO. | STOMIC POWER PLAN |
| ROIT EDISON CO. | ATOMIC POWER PLAN |
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| DETROIT EDISON CO. | MI ATOMIC POWER PLAN |
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| DETROIT EDISON CO. | FERMI ATOMIC POWER PLAN |
| DETROIT EDISON CO. | O FERMI ATOMIC POWER PLAN |
| 6 DETROIT EDISON CO. | CO FERMI ATOMIC POWER PLAN |
| 96 DETROIT EDISON CO. | ICO FERMI ATOMIC POWER PLA |
| 96 DETROIT EDISON CO. | ICO FERMI ATOMIC POWER PLA |
| 2-96 DETROIT EDISON CO. | NRICO FERMI ATOMIC POWER PLAN |
| 82-96 DETROIT EDISON CO. | ICO FERMI ATOMIC POWER PLA |
| -82-96 DETROIT EDISON CO. | ICO FERMI ATOMIC POWER PLA |
| P-82-96 DETROIT EDISON CO. | ICO FERMI ATOMIC POWER PLA |
| BP-82-96 DETROIT EDISON CO. | ICO FERMI ATOMIC POWER PLA |
| LBP-82-96 DETROIT EDISON CO. | ICO FERMI ATOMIC POWER PLA |
| (8P-82-96 DETROIT EDISON CO. | ICO FERMI ATOMIC POWER PLA |

(PERRY NUCLEAR SOURCE PLANT, UNITS 1 AND 2), 16 NRC 1654 (1982) LBP-52-98

P-83-11 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 17 NRC 413 (1983) LBP-83-11

CINCINNATI GAS AND ELECTRIC CO. ZIMMER NUCLEAR POWER STATION, UNIT 1), 17 NRC 466 (1983) LBP-83-12 (WM, H.

(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 17 NRC 469 (1983) LBP-83-13

(WESTERN NEW YORK NUCLEAR SERVICES, INC. AND N.Y.S. ENERGY RESEARCH AND DEVELOPMENT AUTHORITY (WESTERN NEW YORK NUCLEAR SERVICE CENT*), 17 NRC 476 (1983) LBP-83-15

LBP-83-16 WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECT NO. 1), 17 NRC 479 (1983)

(SEABROOK STATION, UNITS 1 AND 2). 17 NRC 400 (1983) LBP-83-17

(PERRY NUCLEAR POWER PLANT, UNITS + AND 2), 17 NRC 501 (1983) 189-83-18

2.9.3.3.3

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3.4.2.4

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6.17.1

| | CITATION INDEX JULY 1992 | PAGE 131 |
|--|---|--------------------------------|
| LBF-83-19 GENERAL ELECTRIC CO. (GETR VALLECITOS), 17 NRC 573 (1983) | CITATION INDEX | 2.5 2.9.3 2.9.4 2.9.5 |
| LBP-83-2 PACIFIC GAS AND ELECTRIC CO. (STANISLAUS NUCLEAR PROJECT, UNIT 1), 17 | NRC 45 (1983) | 1.9 |
| LBP-83-20A PUBLIC SERVICE CO. OF NEW HAN (SEABROOK STATION, UNITS 1 AND 2), 17 NR | | 2.11.5.2 3.7.2 |
| LBP-83-21 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1) | , 17 NRC 593 (1983) | 3.1.2.7 5.12.2 |
| LBP-83-22 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1) | , 17 NRC 608 (1983) | 6 16.2 6 20 3 |
| LBP-83-25 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AN | D 2), 17 NRC 681 (1983) | 3.1.2.1. 5.6.1 5.8.10 |
| L8P-83-26 HOUSTO'S LIGHTING AND POWER CO (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 17 | | 2.10.2 |
| LBP-83-27A CAROLINA POWER AND LIGHT CO. (SHEARON HARRIS NUCLEAR POWER PLANT, UNI | AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY TS 1 AND 2), 17 NRC 971 (1983) | 6 15.6 |
| LBP-83-28 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 17 NRC 9 | 87 (1983) | 2.9.9 2.9.9.2.2 3.13 |

- P-83-29 CONSOLIDATED EDISON CD. OF N.V.; POWER AUTHORITY OF THE STATE OF N.Y. (INDIAN POINT, UNIT 2); (INDIAN POINT, UNIT 3), 17 NRC 1117 (1983) LBP-83-29
- (CATAWBA NUCLEAR STATION, UNITS 1 AND 2), 17 NRC 1121 (1983) LBP-83-29A
- LBP-83-3 CLEVELAND ELECTRIC ILLUMINATING CO (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 17 NRC 59 (1983)
- (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 17 NRC 1132 (1983) LBP-83-30
- (SEABROOK STATION, UNITS 1 AND 2), 17 MRC 1170 (1983) LBP-83-32A
- 0.83-33 TEXAS UTILITIES GENERATING CO. (1983) (1983) (1983) LBP-83-33
- 18 NAC 36 (1983) (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND ... LBP-83-34
- 1-83-36 ARIZONA PUBLIC SERVICE CO (PALO VERDE NUCLEAR GENERATING STATION, UNITS 2 AND 3), 18 NRC 45 (1983) L8P-83-36

- 12 2.11.5 8
- 2 2 2 2

- 3 5 3 3
- 4. 4. 10

| | | | CITATION INDEX JULY 1992 | |
|--------|----------------------|-----------|--------------------------|--|
| P-83-3 | HOUSTON LIGHTING | AND POWER | CO. | |
| (SOUTH | TEXAS PROJECT, UNITS | 1 AND 2). | 18 NRC 52 (1983) | |

LBP-83-38 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 18 NRC (1983)

LBP-83-3

PHILADELPHIA ELECTRIC CO. LBP-83-39 (LIMERICK GENERATING STATION, UNITS 1 AND 2), 18 NRC 67 (1983)

LBP-83-40 COMMONWEALTH EDISON CO. (BYRON NUCLEAR POWER STATION, UNITS 1 AND 2), 18 NRC 93 (1983)

LBP-83-41 COMMONWEALTH EDISON CO. (BYRON NUCLEAR POWER STATION, UNITS 1 AND 2), 18 NRC 104 (1983)

LBP-83-42 __JNG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 18 NRC 112 (1983)

LBP-83-45 NIAGARA MOHAWK POWER CORP. (NINE MILE POINT NUCLEAR STATION, UNIT 2), 18 NRC 213 (1983)

LEP-83-46 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2). 18 NRC 218 (1983)

LBP-83-49 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 18 NRC 239 (1983) PAG 123

2.9.5.5 6.8

6.13 6 15 1 1

1.8 2.5.5.5 2.9.5.8 3.0

3.4

3.11.1.5 6.23.1

3.14.2 4.4.1 4.4.2

> 2.9.3.3.1 2.9.5.5

2.10.2 2.9.4.1 2 3 4 1 1

3.5.3

6.20.4

| CITATION INDEX JULY 1992 | PAGE 134 |
|--|---|
| LBP-83-5 CONSOLIDATED EDISON CO. OF N.Y.; POWER AUTHORITY OF THE STATE OF N.Y. (INDIAN POINT, UNIT 2); (INDIAN POINT, UNIT 3), 17 NRC 134 (1983) | 2.9.5 |
| LBP 83-52 CLEVELAND EXECTRIC ILLUMINATING CD. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 18 NRC 256 (1983) | 3. † . 2 |
| LBP-83-52A GULF STATES UTILITIES CO. (RIVER BEND STATION, UNITS 1 AND 2), 18 NRC 265 (1983) | 2.9.9.2.2 |
| LBP-83-53 CONSUMERS POWER CD. (MIDLAND PLANT, UNITS 1 AND 2), 18 NRC 282 (1983) | 2.11.2 2.11.2.4 |
| LBP-83-55 TEXAS UTILITIES GENERATING CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 18 NRC 415 (1983) | 3.14 |
| LBP-83-57 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 18 NRC 445 (1983) | 1.8 2.9.9 3.1.2.5 3.11.2 3.14.2 3.16 3.8.1 6.15.1.1 6.15.6 6.9.1 |
| LBP-83-58 CINCINNATI GAS AND ELECTRIC CD. (WILLIAM H. ZIMMER NUCLEAR POWER STATION, UNIT 1), 18 NRC 640 (1983) | 2.9.5.5 3.1.2.1 |
| LBP-83-59 WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECT NO. 1), 18 NRC 667 (1983) | 2.9.3 |

| CITATION INDEX JULY 1992 | PAGE 135 |
|--|--------------------------|
| LBP-83-61 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 18 NRC 700 (1983) | 2.11,3 3.11.1.5 |
| LBP-83-62 CONSUMERS POWER CO. (EIG ROCK POINT PLANT), 18 NRC 708 (1983) | 3.1.2,1 |
| LBP-83-64 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 18 NRC 766 (1983) | 2.11.2 2.11.2.4 |
| LBP-83-65 ROCKWELL INTERNATIONAL CORP. (ENERGY SYSTEMS GROUP SPECIAL NUCLEAR MATERIALS LICENSE NO. SNM-21), '8 NRC 774 (1983) | 2 2 2 9 4 1 1 6 13 |
| LBP-83-66 WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECT NO. 1), 18 NRC 780 (1983) | 2.9.5.3 2.9.5.5 |
| LBP-83-70 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 18 NRC 1094 (1983) | 2.11.2.4 |
| LBP-83-71 UNION ELECTRIC CO. (CALLAWAY PLANT, UNIT 1), 18 NRC 1105 (1983) | 1.8 |
| LBP-83-72 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 18 NRC 1221 (1983) | 2.11.2.4 |
| LBP-83-73 ROCHESTER GAS AND ELECTRIC CORP. (R.E. GINNA NUCLEAR PLANT, UNIT 1), 18 NRC 1231 (1983) | 2.5.4 2.9.10.1 |
| LBP-83-75A TEXAS UTILITIES GENERATING CD. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 18 NRC 1260 (1983) | 2.9.5 2.9.5.1 |

| CITATION INDEX JULY 1992 | PAGE 136 |
|---|--------------------------------------|
| LBP-83-75A TEXAS UTILITIES GENERATING CO. | 2.9.5.5 |
| LBP-83-76 METROPOLITAN EDISON CD. (THREE MILE ISLAND NUCLEAR STATION, UNIT NO. 1), 18 NRC 1266 (1983) | 2.9.5.1 2.9.5.6 2.9.5.7 3.4 |
| LBP-83-77 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 18 NRC 1365 (1983) | 5.4 |
| LBP-83-79 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 18 NRC 1400 (1983) | 2.41.1 |
| LBP-83-8 U.S. DEPT. OF ENERGY, PROJECT MANAGEMENT CORP., TENNESSEE VALLEY AUTHORITY (CLINCH RIVER BREEDER REACTOR PLANT), 17 NRC 158 (1983) | 6.19.2 |
| LBP-83-8A DUKE POWER CO. (CATAWBA NUCLEAR STATION, UNITS 1 AND 2), 17 NRC 282 (1983) | 3.3.1 |
| LBP-83-80 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 18 NRC 1404 (1983) | 2.9.3.3.3 2.9.5.5 |
| LBP-83-81 TEXAS UTILITIES GENERATING CO. (COMPTICHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 18 NRC 1410 (1983) | 3.12.4 4.2 |
| LBP-83-9 PUBLIC SERVICE CD. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 17 NRC 403 (1983) | 2,10-2 |
| LBP-84-1 KANSAS GAS AND ELECTRIC CO. (WOLF CREEK GENERATING STATION, UNIT 1), 19 NRC 29 (1984) | 2.9.5 2.9.5.1 2.9.5.5 |

| CITATION INDEX JULY 1992 | PAGE 137 |
|---|---------------------------------------|
| LBP-84-10 TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 19 NRC 509 (1984) | 3 12,4 4 2 4 3 1 5 12 1 |
| LBP-84-13 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 19 NRC 659 (1984) | 3.7.3.7 |
| LBP-84-15 CAROLINA POWER AND LIGHT CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (SHEARON HARRIS NUCLEAR PLANT, UNITS 1 AND 2), 19 NRC 837 (1984) | 3.1.2.5 3.12.3 3.5.2.3 3.5.3 |
| LBP-84-16 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 19 NRC 857 (1984) | 3.1.2.1 3.4.1 6.13 |
| LBP-84-17 KANSAS GAS AND ELECTRIC CO. (WOLF CREEK GENERATING STATION, UNIT 1), 19 NRC 878 (1984) | 2.9.3.3 2.9.3.3.3 |
| LBP-84-17A WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECT NO. 3), 19 NRC 1011 (1984) | 2.9.3.3.3 |

2.9.5.6

6,1,4

3.1.2.5

6.16.1.3

LBP-84-18 PHILADELPHIA ELECTRIC CO.

LBP-84-2 COMMONWEALTH EDISON CO.

LBP-84-19 MISSISSIPPI POWER AND LIGHT CO.

(LIMERICK GENERATING STATION, UNITS 1 AND 2 19 NRC 1020 (1984)

(GRAND GULF NUCLEAR STATION, UNIT 1), 19 NRC 1076 (1984)

(BYRON NUCLEAR POWER STATION, UNITS 1 AND 2), 19 NRC 36 (1984)

| CITATION INDEX JULY 1992 | PAGE | 138 |
|--|------|---|
| LBP-84-20 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 19 NRC 1285 (1984) | | 1.5.2 2.9.5.4 2.9.5.5 3.7.3.7 4.4.2 |
| LBP-84-22 THE REGENTS OF THE UNIVERSITY OF CALIFORNIA (UCLA RESEARCH REACTOR), 19 NRC 1383 (1984) | | 1.5.2 |
| LEP-84-23 MISSISSIPPI POWER AND LIGHT CO. (GRAND GULF NUCLEAR STATION, UNIT 1), 19 NRC 1412 (1984) | | 6.1,4 |
| LBP-84-24 DUKE POWER CO. (CATAWBA NUCLEAR STATION, UNITS 1 AND 2), 19 NRC 1418 (1984) | | 2.11.1 |
| LBP-84-25 TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 19 NRC 1589 (1984) | | 3.5 |
| LBP-84-26 KANSAS GAS AND ELECTRIC CO. (WOLF CREEK GENERATING STATION, UNIT 1), 20 NRC 53 (1984) | | 3.4.2 4.2.2 6.16.1.3 |
| LBP-84-28 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR PUWER PLANT, UNITS 1 AND 2), 20 NRC 129 (1984) | | 2.9.5.1 |
| LBP-84-29A SUFFOLK COUNTY AND NYS MOTION FOR DISQUALIFICATION OF CHIEF AJ COTTER (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 20 NRC 385 (1984) | | 3.1.4.1 |
| LBP-84-3 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 19 NRC 282 (1984) | | 3.14.2 4.4.1 |

| CITATION INDEX JULY 1992 | PAGE 139 |
|---|-------------------------------------|
| LBP-84-30 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 20 NRC 426 (1984) | 2.3.5.5 |
| LBP-84-31 PHILADELPHIA ELECTRIC CO. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 20 NRC 446 (1984) | 6.15.3 |
| LBP-84-33 CINCINNATI GAS AND ELECTRIC CO. (WILLIAM H. ZIMMER NUCLEAR POWER STATION, UNIT 1), 20 NRC 765 (1984) | 1.9 |
| LBP-84-35 GEORGIA POWER CO. (ALVIN W. VOGTLE NUCLEAR PLANT, UNITS 1 AND 2), 20 NRC 887 (1984) | 2.9.5.1 3.7.3.2 6.20.4 6.8 |
| LBP-84-39 MISSISSIPPI POWER AND LIGHT CO. (GRAND GULF NUCLEAR STATION, UNIT 1), 20 NRC 1031 (1984) | 6.1.4 |
| LBP-84-42 FERR-MCGEE CHEMICAL CORP. (WEST CHICAGO PARE EARTHS FACILITY), 20 NRC 1296 (1984) | 3.1.2.1 3.4 6.15.6 |
| LBP-84-43 PHILADELPHIA ELECTRIC CO. (FULTON GENERATING STATION, UNITS 1 AND 2), 20 NRC 1333 (1984) | 1.9 |
| LBP-84-45 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 20 NRC 1343 (1984) | 6.19 |
| LBP-84-47 METROPOLITAN EDISON CO. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 20 NRC 1405 (1984) | 4.2.2 |
| LBP-84-50 TEXAS UTILITIES GENERATING CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 20 NRC 1464 (1984) | 2,11,2,4 |

| CITATION INDEX JULY 1992 | PAGE | 140 |
|--|------|--|
| LBP-84-53 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 20 NRC 1531 (1984) | | 5.19.3 6.5.4.1 |
| LBP-84-54 GENERAL ELECTRIC CO. (GETR VALLECITOS), 20 NRC 1637 (1984) | | 2.9.3.3.3 3.6 |
| LBP-84-6 DUQUESNE LIGHT CO. (BEAVER VALLEY POWER STATION, UNIT 2), 19 NRC 393 (1984) | | 2.10.2 2.9.4.1.1 2.9.4.1.2 2.9.5.1 2.9.5.7 |
| LBP-84-7 CAROLINA POWER AND LIGH, CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (SHEARON HARRIS NUCLEAR PLANT, UNITS 1 AND 2), 19 NRC 432 (1984) | | 3.1.2.5 3.12.3 3.5.2.3 3.5.3 |
| LBP-84-9 WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS NUCLEAR PROJECT NO. 1), 19 NRC 497 (1984) | | 3.4.5 |
| LBP-85-1 KERR-MCGEE CHEMICAL CDRP. (WEST CHICAGO RARE EARTHS FACILITY), 21 NRC 11 (1985) | | 2.11.2 2.11.2.4 |
| LBP-85-11 COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 21 NRC 609 (1985) | | 2.9.5 2.9.5.1 2.9.5.5 3.17 6.5.4.1 |
| LBP-85-12 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 21 NRC 644 (1985) | | 1.8 3.1.2.6 |

| CITATION INDEX JULY 1992 | PAGE 141 |
|---|---|
| LBP-85-19 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 21 NRC 1707 (1985) | 4.4.1.1 4.4.2 5.6.1 6.4.2.3 |
| LBP-85-2 CONSUMERS POWER CO. (MIDLAND PLANT, UNITS 1 AND 2), 21 NRC 24 (1985) | 2.9.9.3 2.9.9.4 |
| LBP-85-20 COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 21 NRC 1732 (1985) | 2.9.5 2.9.5.1 2.9.5.4 3.13.1 |
| LBP-85-24 BOSTON EDISON CO. (PILGRIM NUCLEAR POWER STATION), 22 NRC 97 (1985) | 2.9.3,3.3 2.9.4 2.9.4.t.t |
| LBP-85-27 COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 22 NRC 126 (1985) | 2.9.5.9 5.5.1 |
| LBP-85-27A CAROLINA POWER AND LIGHT CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (SHEARON HARRIS NUCLEAR POWER PLANT), 22 NRC 207 (1985) | 3.5 3.5.2.3 3.5.3 |
| LBP-85-28 CAROLINA POWER AND LIGHT CD. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (SHEARON HARRIS NUCLEAR POWER PLANT), 22 NRC 232 (1985) | 5.4 |
| LBP-85-29 FLORIDA POWER AND LIGHT CO. (TURKEY POINT NUCLEAR GENERATING PLANT, UNITS 3 AND 4), 22 NRC 300 (1985) | 3.5 3.5.1.2 3.5.2 3.5.2.3 3.5.3 |

| CITATION INDEX JULY 1992 | PAGE 142 |
|---|---------------------------------|
| LBP-85-29 FLORIDA POWER AND LIGHT CO. | 3.5.5 |
| LBP-85-3 KERR-MCGEE CHEMICAL CORP. (WEST CHICAGO RARE EARTHS FACILITY), 21 NRC 244 (1985) | 5.12.2 6.15.3 6.16.1 |
| LBP-85-32 TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 22 NRC 434 (1985) | 2.11.2.2 3.5.2.2 6.16.1.3 |
| LBP-85-33 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), 22 NRC 442 (1985) | 2.9.5.6 5.20.4 |
| LBP-85-34 VIRGINIA ELECTRIC AND POWER CO. (NORTH ANNA POWER STATION, UNITS 1 AND 2), 22 NRC 481 (1985) | 6.15.4 |
| LBP-85-39 TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 22 NRC 755 (1985) | 3,11,1,1 |
| LBP-85-4 GENERAL ELECTRIC CO. (GETR VALLECITOS), 21 NRC 399 (1985) | 3.17 3.5 |
| LBP-85-40 COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 22 NRC 759 (1985) | 2.11.2.4 |
| LBP-85-41 TEXAS UTIL (ES ELECTRIC CO. (COMANCHE PEAK STEAM & ECTRIC STATION, UNITS 1 AND 2), 22 NPC 765 (1985) | 2.76.4 |
| LBP-85-42 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 22 NRC 795 (1985) | 4.4.1 4.4.2 |

| CITATION INDEX JULY 1992 | PAGE | 143 |
|--|------|---------------------------|
| LBP-85-43 COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 22 NRC 805 (1985) | | 6.15.8 |
| LBP-85-45 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 22 NRC 819 (1985) | | 4.4.1.1 4.4.2 6.4.2 |
| LBP-85-46 KERR-MCGEE CHEMICAL CORP. (WEST CHICAGO RARE EARTHS FACILITY), 22 NRC 830 (1985) | | 2.11.1 |
| LBP-85-48 KERR-MCGEE CHEMICAL CORP. (KRESS CREEK DECONTIMINATION), 22 NRC 843 (1985) | | 2.11.5.2 3.1.2.6 |
| LBP-85-49 CAROLINA POWER AND LIGHT CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (SHEARON HARRIS NUCLEAR POWER PLANT), 22 NRC 899 (1985) | | 1.8 2.9.5.5 3.4.2 |
| LBP-85-6 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 21 NRC 447 (1985) | | 6,5,4,1 |
| LBP-85-7 U.S. DEPT. OF ENERGY, PROJECT MANAGEMENT CORP., TENNESSEE VALLEY AUTHORITY (CLINCH RIVER BREEDER REACTOR PLANT), 21 NRC 507 (1985) | | 1.9 |
| LBP-85-8 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 A(4D 2), 21 NRC 516 (1985) | | 3.1.2.3 |
| LBP-85-9 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 21 NRC 524 (1985) | 3 | 2.9.5.5 |
| LBP-86-10 GENERAL PUBLIC UTILITIES NUCLEAR CORP. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 23 NRC 283 (1986) | | 2.9.5 |

| CITATION INDEX JULY 1992 | PAGE 144 |
|--|---|
| LBP-86-10 GENERAL PUBLIC UTILITIES NUCLEAR CORP. | 3.17 |
| LBP-86-11 CAROLINA POWER AND LIGHT CO. AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (SHEARON HARRIS NUCLEAR POWER PLANT), 23 NRC 294 (1986) | 1.8 6.16.2 |
| LBP-86-12 COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 23 NRC 414 (1986) | 3,11,1,1,1 3,5 3,5,2,3 3,5,3 |
| LBP-86-14 GENERAL PUBLIC UTILITIES NUCLEAR CORP. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 23 NRC 553 (1986) | 3,1,2,7 3,6 6,16,1,3 6,5,4,1 |
| LBP-86-15 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 23 NRC 595 (1986) | 3.5 3.5.2.3 3.5.3 4.4.2 4.4.4 6.4.1.1 6.5.4.1 |
| LBP-86-16 PUBLIC SERVICE CO. OF INDIANA (MARBLE HILL NUCLEAR GENERATING STATION, UNITS 1 AND 2), 23 NRC 789 (1986) | 6.14.3 |
| LEP-86-17 GENERAL PUBLIC UTILITIES NUCLEAR CORP. (THREE MILE ISLAND NUCLEAR STATION, UNIT 1), 23 NRC 792 (1986) | 6.16.1.3 |
| LBP-86-20 TEXAS UTILITIES ELECTRIC CD. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 23 NRC 844 (1986) | 3,1.2 |

| 에게 하는 사람들이 되었다면 하면 이번 때문에 되었다면 하는 것이 되었다면 하는데 이번 사람들이 되었다면 하는데 되었다면 하는데 되었다면 하는데 | |
|--|---------------------------------|
| CITATION INDEX JULY 1992 | PAGE 145 |
| LBP-86-21 PACIFIC GAS AND ELECTRIC CD. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 23 NRC 849 (1986) | 2.9.5 3.1.1 6.1 6.15.7 |
| LBP-86-22 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 24 NRC 103 (1986) | 2.9.9 |
| LBP-86-24 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 24 NRC 132 (1986) | 2.10.2 5.2 6.20.4 |
| LBP-86-25 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 24 NRC 141 (1986) | 6.20.4 |
| LBP-86-27 FLORIDA POWER AND LIGHT CO. (TURKEY POINT NUCLEAR GENERATING PLANT, UNITS 3 AND 4), 24 NRC 255 (1986) | 3.5.2.3 |
| LBP-86-30 PUBLIC SE. ICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 24 NRC 437 (1986) | 3.5.2.3 3.5.3 |
| LBP-85-31 COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 24 NRC 451 (1986) | 6.16.1 |
| LBP-86-34 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 24 NRC 549 (1986) | 2.9.9 € 14.3 € 16.1 |
| LBP-86-35 RADIOLOGY ULTRASOUND NUCLEAR CONSULTANTS , P.A. (STRONTIUM-90 APPLICATOR), 24 NRC 557 (1986) | 6.13 |

| CITATION INDEX JULY 1992 | PAGE 146 |
|--|--|
| LBP 86-36A TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNIT 1), 24 NRC 575 (1986) | 2.9.5.5 |
| LBP-86-37 PUBLIC SERVICE CO. OF INDIANA AND WABASH VALLEY POWER ASSOCIATION (MARBLE HILL NUCLEAR GENERATING STAYION, UNITS 1 AND 2), 24 NRC 719 (1986) | 1.9 3.1.2.1 |
| LBP-86-38A LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 24 NRC 819 (1986) | 3,1.2.1 |
| LBP-86-4 KERR-MCGEE CHEMICAL CORP. (WEST CHICAGO RARE EARTHS FACILITY), 23 NRC 75 (1986) | 2.11.2 2.11.2.8 2.11.4 2.11.5.2 |
| LBP-86-5 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 23 NRC 89 (1986) | 6.9.1 |
| LBP-86-7 COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 23 NRC 177 (1986) | 2.ft.2 2.tt.2.6 |
| LBP-86-8 HOUSTON LIGHTING AND POWER CO. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), 23 NRC 182 (1986) | 2.9.5 6.9.1 |
| LBP-86-9 PHILADELPHIA ELECTRIC CD. (LIMERICK GENERATING STATION, UNIT 1', 23 NRC 273 (1986) | 2.9.3.1 2.9.3.3.3 |
| LBP-87-11 TOLEDO EDISON CO. (DAVIS-BESSE NUCLEAR PO) 3 STATION, UNIT 1), 75 NRC 287 (1987) | 6.16.1.3 |
| LBP-87-12 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 25 NR. 324 (1987) | 6.20.4 |

| CITATION INDEX JULY 1992 | PAGE 147 |
|---|---|
| LBP-87-13 COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 25 NRC 449 (1987) | 4.2.2 |
| LBP-87-15 INQUIRY INTO THREE MILE ISLAND UNIT 2 LEAK RATE DATA FALSIFICATION (THREE MILE ISLAND NUCLEAR STATION, UNIT 2), 25 NRC 671 (1987) | 3.10 3.8 |
| LBP-87-17 VERMONT YANKEE NUCLEAR POWER CORP. (VERMONT YANKEE NUCLEAR POWER STATION), 25 NRC 838 (1987) | 2.9.5 2.9.5.1 3.17 6.1.4.4 6.15.7 6.15.9 6.16.3 |
| LBP-87-18 TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 25 NRC 945 (1987) | 2.11.2 |
| LBP-87-19 COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 25 NRC 950 (1987) | 1.2.1 |
| LBP-87-2 FLORIDA POWER AND LIGHT CO. (ST. LUCIE NUCLEAR POWER PLANT, UNIT 2), 25 NRC 32 (1987) | 2.9.3 2.9.4 2.9.4.2 |
| LBP-87-20 TEXAS UTILITIES ELECTRIC CO. (COMANCHE PEAK STEAM ELECTRIC STATION, UNIT 1), 25 NRC 953 (1987) | 2.11.2.4 |
| LBP-87-21 FLORIDA POWER AND LIGHT CO. (TURKEY POINT NUCLEAR GENERATING PLANT, UNITS 2 AND 4), 25 NRC 958 (1987) | 4.4.1 4.4.2 4.4.4 |

| CITATION INDEX JULY 1992 | PAGE 148 |
|---|-----------------------------------|
| LBP-87-22 COMMONWEALTH EDISON CO. (BRAIDWOOD NUCLEAR POWER STATION, UNITS 1 AND 2), 26 NRC 41 (1987) | 3.1.2.1 |
| LBP-87-23 ALFRED J MORABITO (SENIOR OPERATOR LICENSE FOR BEAVER VALLEY POWER STATION, UNIT 1), 26 NRC 81 (1987) | 3.1.2.1 3.7 |
| LBP-87-24 PACIFIC GAS AND ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), 26 NRC 159 (1987) | 2.9.5 2.9.5.7 |
| LBP-87-26 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 26 NRC 201 (1987) | 3,5,2 3.5.2.3 3.5.3 |
| LBP-87-27 TEXAS UTILITIES ELECTRIC CD. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), 26 NRC 228 (1987) | 2,11.2 |
| LEP-87-28 ALFRED J MORABITO (SENIOR OPERATOF: LICENSE FOR BEAVER VALLEY POWER STATION, UNIT 1), 26 NRC 297 (1987) | 6.23.1 |
| LBP-87-28 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 26 NRC 302 (1987) | 3.5.2 3.5.2.3 3.5.3 5.14 |
| LBP-87-3 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 25 NRC 71 (1987) | 2.9.5.5 4.4.1 4.4.2 |
| LBP-87-5 U.S. ECOLOGY, INC. (SHEFFIELD, ILL. LOW-LEVEL RADIOACTIVE WASTE DISPOSAL SITE), 25 NRC 98 (1987) | 6.13 |

| CITATION | INDEX | JULY | 1992 |
|----------|-------|------|------|
| | | | |

PAGE 149 LBP-87-7 VERMONT YANKEE NUCLEAR POWER CORP. 2.9.3 (VERMONT YANKEE NUCLEAR POWER STATION), 25 NRC 116 (1987) 2.9.4.1.2 LBP-88-1A FINLA' TESTING LABORATORIES, INC. 3.3.2.1 27 NRC 19 (1988) LBP-88-10A FLORIDA POWER AND LIGHT CO. 2.9.4.1.4 (ST. LUCIE NUCLEAR POWER PLANT, UNIT 1), 27 NRC 452 (1988) 2.9.5 6.1.4.4 6.15.7 6.15.9 6.16.2 LBP-88-12 PHILADELPHIA ELECTRIC CO. 3.5.2.3 (LIMERICK GENERATING STATION, UNIT 1), 27 NRC 495 (1988) LBP-88-13 LONG ISLAND LIGHTING CO. 3.10 (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 27 NRC 509 (1988) LBP-88-15 DAIRYLAND POWER COOPERATIVE 1.9 (LA CROSSE BOILING WATER REACTOR), 27 NRC 576 (1988) 3.1.2.1 6.15.1.1 LBP-88-19 VERMONT YANKEE NUCLEAR POWER CORP. 3.1.2.1 (VERMONT YANKEE NUCLEAR POWER STATION), 28 NRC 145 (1988) 3.1.2.2 6.1.4.4

6.16.1

5.12.2

5.12.2.1

LBP-88-20 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 28 NRC 161 (1988)

LBP-88-21 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 28 NRC 170 (1988)

- (THREE MILE ISLAND NUCLEAR STATION, UNIT 2), 28 NRC 178 (1988) LBP-88-23
- -88-24 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 28 NRC 311 (1988) LBP-88-24
- LBP-88-25 VERMONT YANKEE MUCLEAR POWER CORP. (1988) (VERMONT YANKEE NUCLEAR POWER STATION), 28 NRC 394 (1988)
- LBP-88-25A
- 9-88-26 VERMONT YANKEE NUCLEAR POWER CORP. (1988) LBP-88-26
- LBP-88-27 FLORIDA POWER AND LIGHT CD. (ST. LUCIE NUCLEAR POWER PLANT, UNIT 1), 28 NRC 455 (1988)
- LBP-88-28 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 28 NRC 537 (1988) OF NEW HAMPSHIRE
- LBP-88-29 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 28 NRC 637 (1988)
- 1-88-3 RADIOLOGY ULTRASOUND NUCLEAR CONSULTANTS . P.A. (STRONTIUM-90 APPLICATOR), 27 NRC 220 (1988) L8P-88-3
- LBP-88-30 LONG ISLAND LIGHTING CD. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 28 NRC 644 (1988)

- 150
- (%) 57
- 2.11.5.2
- 2.11.4
- 2 11 4

- 3.5.2.3
- 2.41.2.5
- 3. 4. 4. 2
- 6. 13
- 6, 16, 1

| CITATION INDEX JULY 1992 | PAGE | 151 |
|---|------|--|
| LBP-88-31 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 28 NRC 652 (1988) | | 3.5.2.3 3.5.3 |
| LBP-88-32 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 28 NRC 667 (1988) | | 1.8 |
| LBP-88-4 PACIFIC GAS AND ELECTRIC CO. (HUMBOLDT BAY POWER PLANT, UNIT 3), 27 NRC 236 (1988) | | 6.1.4 |
| LBP-88-5 ALFRED J MORABITO (SENIOR OPERATOR LICENSE FOR BEAVER VALLEY POWER STATION, UNIT 1), 27 NRC 241 (1988) | | 6,16,1 |
| LBP-88-6 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 27 NRC 245 (1988) | | 2.9.5.1 3.1.2.1 |
| LBP-88-7 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 27 NRC 289 (1988) | | 3.1.2.1 |
| LBP-88-8 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 27 NRC 293 (1988) | | 5.23 |
| LBP-89-1 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 29 NRC 5 (1989) | 2 | 2.9.5.10 2.9.5.6 3.1.2 5.12.2 |
| LBP-89-10 PUBLIC SERVICE CO. DF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 29 NRC 297 (1989) | 6 | . 8 |
| LBP-89-11 ADVANCED MEDICAL SYSTEMS (ONE FACTORY ROW, GENEVA, OHIO 44041), 29 NRC 306 (1989) | | 1.1.2.2 |

.

- -89-14 PHILADELPHIA ELECTRIC CD. (LIMERICK GENERATING STATION, UNITS 1 AND 2), 29 NRC 487 (1989) LBP-89-14
- (TURKEY POINT NUCLEAR GENERATING PLANT, UNITS 3 AND 4), 29 NRC 493 (1989)
- (WEST CHICAGO RARE EARTHS FACILITY), 29 NRC 508 (1989) L8P-89-16
- (LIMERICK GENERATING STATION, UNITS 1 AND 2), 30 NRC 55 (1989) LBP-89-19
- (HEMAILTE FUEL FABRICATION FACILITY), 30 NRC 340 (1989) LBP-89-23
- -89-25 COMBUSTION ENGINEERING, INC. (HEMATITE FUEL FABRICATION FACILITY), 30 NRC 187 (1989) LBP-89-25
- (SEABROOK STATION, UNITS 1 AND 2), 30 NRC 271 (1989) LBP-89-28
- 7-89-29 RDCKWELL INTERNATIONAL 'DRP. (ROCKETDYNE DIVISION), 30 NRC 299 (1989) LBP-89-29
- LBP-89-3 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 29 NRC 51 (1989)

- 18
- 3.12.1
- 2.9.5.5
- 3, 1, 2,
- 63 10
- 3, 1, 2, 7
- 3.17

CITATION INDEX --- JULY 1992

PAGE 153

| LBP-89-30 NORTHERN STATES POWER CO. (PATHFINDER ATOMIC PLANT), 30 NRC 311 (1989) | 2.9.4 2.9.4.1 2.9.4.1 |
|--|---|
| LBP-89-32 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 30 NRC 375 (1989) | 1.8 3.1.2.5 3.10 3.11.4 6.16.1.3 |
| LBP-89-33 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 30 NRC 656 (1989) | 3.1.2 |
| LBP-89-35 KERR-MCGEE CHEMICAL CORP. (WEST CHICAGO RARE EARTHS FACILITY), 30 NRC 677 (1989) | 2 11.5.2 3 1.2.1 3 5.2.3 6 15.3 |
| LBP-89-38 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 30 NRC 725 (1989) | 3.5.1 4.4.1 6.20.5 |
| LEP-89-39 WRANGLER LABORATORIES, LARSEN LABS, ORION CHEMICAL CO., AND JOHN P LARSEN 30 NRC 746 (1989) | 6.16.1.1 6.16.2 6.20.5 |
| LBP-89-4 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 29 NRC 62 (1989) | 2.9.5.4 2.9.5.5 3.1.2.1 4.4.1 4.4.2 6.16.1 |

| PAGE | 154 |
|------|-------------------|
| | |
| | |
| | |
| | |
| | |
| | 2.9.5 |
| | 4 - 2 - 3 |
| | 2.9.5.5 |
| | 3.15 |
| | 3.13 |
| | 6.15.4 |
| | |
| | 6.15.7 |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | 3.12.4 |
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| | 3.5.2.3 |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | 2.9.5.5 |
| | |
| | 4.4.1 |
| | 4.4.2 |
| | 7.79.2 |
| | |
| | |
| | |
| | |
| | |
| | |
| | 3.11.1.1 |
| | 2-11-12-2 |
| | |
| | |
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| | |
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| | |
| | w 42 4 A |
| | 3.11.1.3 |
| | |
| | |
| | |
| | |
| | |
| | |
| | the March Service |
| | 2.10.2 |
| | 2.9.3.5 |
| | 2 2 2 2 2 |
| | 2.9.9.5 |
| | 20 20 |
| | 3.6 |
| | 4.4.1.1 |
| | |
| | 4.4.2 |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | 2.9.4.1. |
| | |
| | |

| CITATION INDEX JULY 1992 | 7AGC 134 |
|---|---|
| LBP-89-6 VERMONT YANKEE NUCLEAR POWER CORP. (VERMONT YANKEE NUCLEAR POWER STATION), 29 NRC 127 (1989) | 2.9.5 2.9.5.5 3.15 6.15.4 6.15.7 |
| LBP-89-7 GENERAL PUBLIC UTILITIES NUCLEAR CORP. (THREE MILE ISLAND NUCLEAR STATION, UNIT 2), 29 NRC 138 (1989) | 3.12.4 |
| LBP-89-9 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 29 NRC 271 (1989) | 3.5.2.3 |
| LBP-90-1 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 31 NRC 19 (1990) | 2.9.5.5 4.4.1 4.4.2 |
| LBP-90-10 ROCKWELL INTERNATIONAL CORP. (ROCKETDYNE DIVISION), 31 NRC 293 (1990) | 3.11.1.1 |
| LBP-90-11 ROCKWELL INTERNATIONAL CORP. (ROCKETDYNE IVISION), 31 NRC 320 (1990) | 3.11,1,3 |
| LBP-90-12 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 31 NRC 427 (1990) | 2.10.2 2.9.3.5 2.9.9.5 3.6 4.4.1.1 4.4.2 |
| LBP-90-15 CLEVELAND ELECTRIC ILLUMINATING CO. (PERRY NUCLEAR POWER PLANT, UNIT 1), 31 NRC 501 (1990) | 2.9.4.1.1 |
| LBP-SO-16 FLORIDA POWER AND LIGHT CO. (TURKEY POINT NUCLEAR GENERATING PLANT, UNITS 3 AND 4), 31 NRC 509 (1990) | 2.9.3.5 |

| CITATICY INDEX JULY 1992 | PAGE | 155 |
|--|------|-----------------------------------|
| LBP-90-16 FLORIDA POWER AND LIGHT CO. | | 2.9.5.1 |
| LBP-90-17 ADVANCED MEDICAL SYSTEMS (ONE FACTORY ROW. GENEVA. DHIO 44C11), 31 NRC 540 (1990) | | 3.5.2.3 6.24.3 |
| LBP-90-18 CURATORS OF THE UNIVERSITY OF MISSOURI 31 NRC 559 (1990) | | 2.2 2.9.4.1.2 6.1.4 6.13 |
| LBP-90-22 CURATORS OF THE UNIVERSITY OF MISSOURI 31 NRC 592 (1990) | | 3.1.2.7 |
| LBP-90-23 CURATORS OF THE UNIVERSTY OF MISSOURI 32 NRC 7 (1990) | | 6.20.4 |
| LBP-90-24 FLORIDA POWER AND LIGHT CD. (TURKEY POINT NUCLEAR GENERATING PLANT, UNITS 3 AND 4), 32 NRC 12 (1990) | | 2.9.3.5 |
| LBP-90-25 CLEVELAND ELECTRIC ILLUMINATING CD. (PERRY NUCLEAR POWER PLANT, UNIT 1), 32 NRC 21 (1990) | | 2.9.4.1.1 |
| LBP-90-26 ALL CHEMICAL ISOTOPE ENRICHMENT, INC. 32 NRC 30 (1990) | | 3.5.2.3 6.26 |
| LBP-90-27 CURATOR. OF THE UNIVERSITY OF MISSOURI 32 NRC 40 (1990) | | 3.1.2.7 |
| LBP-90-28 ROBERT L. DICKHERBER AND COMMONWEALTH EDISON CO. (QUAD CITIES NUCLEAR POWER STATION), 32 NRC 85 (1990) | | 3.18.1 |

| | ÷ | | | |
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| | | | | |
| | | | | |

| CITATION INDEX JULY 1992 | PAGE 157 |
|---|--|
| LBP-90-44 PUBLIC SERVICE CD. DF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 32 NRC 433 (1990) | 3,5,2,3 |
| LBP-90-45 CURATORS OF THE UNIVERSITY OF MISSOURI 32 NRC 449 (1990) | 1,5.1 |
| LBP-90-46 ST. MARY MEDICAL CENTER-HOBART AND ST. MARY MEDICAL CENTER-GARY 32 NRC 463 (1990) | 3.18.1 |
| LBP-90-5 FLORIDA POWER AND LIGHT CO. (TURKEY POINT NUCLEAR GENERATING PLANT, UNITS 3 AND 4), 31 NRC 73 (1990) | 2.9.3.3.3 |
| LBP-90-6 VERMONT YANKEE NUCLEAR POWER CORP. (VERMONT YANKEE NUCLEAR POWER STATION), 31 NRC 85 (1990) | 2.9.3 6.1.4.4 6.15.1.1 |
| LBP-90-8 SAFETY LIGHT CORP. (BLOOMSBURG SITE DECONTAMINATION), 31 NRC 143 (1990) | 5.7.1 |
| LBP-91-1 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 33 NRC 15 (1991) | 2.9.3.2 2.9.4 2.9.4.1 2.9.4.1.1 2.9.4.1.2 3.1.2.1 |
| LBP-91-13 ARIZONA PUBLIC SERVICE CO. (PALO VERDE NUCLEAR GENERATING STATION, UNITS 1, 2 AND 3), 33 NRC 259 (1991) | 2.9.9.5 6.17.1 |
| LBP-91-14 CURATORS OF THE UNIVERSITY OF MISSOURI 33 NRC 265 (1991) | 3.1.2.7 |

| | j | ř | | |
|--|---|---|---|--|
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LBP-91-17 SACRAMFNIO MUNICIPAL UTILITY DISTRICT (RANCHO SECO NUCLEAR GENERATING STATION), 33 NRC 379 (1991)

33 NRC 394 (1991) 2 AND 3). (PALD VERDE NUCLEAR GENERATING STATION, UNITS 1, 1,89-91-18

33 NRC 397 (1991) (PALD VERDE NUCLEAR GENERATING STATION, UNITS 4, 2 AND 3).

(1991) (TURKEY POINT NUCLEAR GENERATING PLANT, UNITS 3 AND 4), 33 NRC 42 (1991)

33 NRC 416 (1991) LBP-91-20 ARIZONA PUBLIC SERVICE CO. (PALO VERDE NUCLEAR GENERATING STATION, UNITS 1, 2 AND 3) (ALVIN W. VOGTLE ELECTRIC GENERATING PLANT, UNITS 1 AMD 2), 33 NRC 419 (1991) LBP-91-21

(SHOREHAM NUCLEAR POWER STATION, UNIT 1), 33 NRC 430 (1991)

LBP-94-24 PUBLIC SERVICE CD. DF NEW HAMPSHIRE (SEABROOK STATION, UNITS 1 AND 2), 33 NRC 446 (1991)

158 PAGE 3.5.2.3

2.9.4.1.1

ľŊ

2.9.4.1.4

ĮD. 0.0

2.9.5.4

3.5.23

| ***** | PARK 1 | PARTY W | MARK SV | 1000 |
|--------|--------|---------|-----------|-----------|
| CITATI | LUIN I | PRULA | SETTING 1 | 1.24.25.5 |

| CITATION INDEX JULY 1992 | PAGE 159 |
|--|--|
| LBP-91-25 TULSA GAMMA RAY, INC. 33 NRC 535 (1991) | 3.11 |
| LBP-91-26 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 33 NRC 537 (1991) | 2.9.4 2.9.4.1 2.9.4.1.1 2.9.4.1.2 |
| LBP-91-27 NUCLEAR METALS, INC. 33 NRC 548 (1991) | 6.13 |
| LBP-91-28 PUBLIC SERVICE CO. OF NEW HAMPSHIRE (SEABROOK STATION, UNIT 1), 33 NRC 557 (1991) | 2,9.4.1.1 |
| LBP-91-30 SACRAMENTO MUNICIPAL UTILITY DISTRICT (RANCHO SECO NUCLEAR GENERATING STATION), 34 NRC 23 (1991) | 2.9.4.1.1 6.15.1.1 |
| LBP-91-31 CURATORS OF THE UNIVERSITY OF MISSO'RI 34 NRC 29 (1991) | 1.5.1 1.8 3.1.2.7 5.16.1 |
| LBP-91-32 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATION, UNIT 1), 34 NRC 132 (1991) | 2.9.4 2.9.4.1 2.9.4.1.1 2.9.4.1.2 |
| LBP-91-33 GEORGIA POWER CO. (ALVIN W. VOGTLE ELECTRIC GENERATING PLANT, UNITS 1 AND 2), 34 NRC 138 (1991) | 2.9.3 2.9.4.1.2 2.9.4.1.4 |

| CITATION INDEX JULY 1992 | PAGE 160 |
|--|---|
| LRP-91-34 CURATORS OF THE UNIVERSITY OF MISSOURI 34 NRC 159 (1991) | 1.5.1 1.8 3.1.2.7 4.3.1 6.16.1 |
| LBP-91-35 LONG ISLAND LIGHTING CO. (SHOREHAM NUCLEAR POWER STATE N. UNIT 1). 34 NRC 163 (1991) | 2.9.4.1 2.9.5.1 2.9.5.3 6.15.1.1 |
| LBP-91-36 GEORGIA POWER CO. (ALVIN W. VOGTLE ELECTRIC GENERATING PLANT, UNITS 1 AND 2), 34 NRC 193 (1991) | 1.9 |
| LBP-91-37 WRANGLER LABORATORIES, LARSEN LACS, PRION CHEMICAL CO., AND JOHN P. LARSEN 34 NRC 196 (1991) | 6.24 |
| LBP-91-4 ARIZONA PUBLIC SERVICE CD. (PALO VERCE NUCLEAR GENERATING STATION, UNITS 1, 2 AND 3), 33 ARC 153 (391) | 2.9.3.1 2.9.4.1.1 2.9.4.1.2 |
| LBP-91-5 SEQUOYAH FUELS CORP. 33 NRC 163 (1991) | 2.9.3 2.9.4.1.1 2.9.4.1.2 6.13 |
| LBP-91-6 GEORGIA POWER CO. (ALVIN W. VOGTLE ELECTRIC GENERATING PLANT, UNITS 1 AND 2), 33 NRC 169 (1991) | 2,11,1 |
| LBP-91-7 LONG ISLAND LIGHTING CO. (SHUREHAM NUCLEAR POWER STATION, UNIT 1), 33 NRC 179)91) | 2.9.3.2 2.9.4 2.9.4.1 2.9.4.1.1 2.9.4.1.2 |

b

•

CITATIO: INDEX --- JULY 1592

LBP-91-9 ADVANCED MEDICAL SYSTEMS (ONE FACTORY ROW, GENEVA, DHID 44041), 33 NRC 212 (1991)

151

PAGE

CFR Index

•

| 3, 13, 1 | 3.1.2.7 | 3.12.5 | 6. 13 | 3,1,2,2 | 3.4.1 6.15.1 6.15.1 6.6 | 3.1.2.2 5.8.11 6.13 | 3, 1, 2, 7 | W US | 2.9.4.1.3 | 6.29.3 | 6.29.3 | 1.4.1 | 6.5.3.1 | 1.4.1 | 9 + | 6.3 | 2.11.7.1 | 5.00.00 | e0 + | 6.5.3.1 |
|---------------------------|--------------------------|----------------------|----------------|----------------|----------------------------------|---------------------------|-----------------|----------------|------------------|----------------|----------------------|---------------|--------------------|--------------------|---------------------|--------------------|----------------|----------------|--------------|-----------------|
| 10 CFR PART 2, APP. A, IV | 10 CFR PART 2, APP. A. V | 10 CFR PART 2, APP.A | 10 CFR PART 40 | 10 CFR PART 50 | 10 CFR PART 51 | 10 CFR PART 70 | 10 CFR 0.735-27 | 10 CFR 1,32(F) | 10 CFR 110,84(A) | 10 CFR 2, 1000 | 10 CFR 2,1000-2,1023 | 10 CFR 2, 101 | 10 CFR 2.101(A)(1) | 10 CFR 2.101(A)(2) | 10 CFR 2, 101(A)(3) | 10 CFR 2, 101(A-1) | 10 CFR 2, 1010 | 10 CFR 2, 1014 | 10 CFR 2.102 | 10 CFR 2.102(A) |

| 100 | | | |
|----------------------------|--------------------------|---|---|
| 70 | CER | 2.102(D)(3) | 2.9.3.3.1 |
| | | | 3.1.2.1 |
| | | | 2-2-6-7 |
| | | | |
| 10 | CFR | 2. †03(B) | 6, 16, 1 |
| | | | |
| 10 | CFR | 2.104 | 3.1.2.1 |
| | | | 6.15.1 |
| | | | |
| - | - | 0 404/43 | 1.7.1 |
| 77.2 | OFK | 2.104(A) | |
| | | | 2.5.3 |
| | | | 3.1.2.1.1 |
| | | | 3.3.1 |
| | | | 3.3.1.1 |
| | | | 3.4 |
| | | | 3.4 |
| | | | |
| 10 | CFR | 2.104(8)(2) | 3.1.1 |
| | | | 3.1.2 |
| | | | |
| 200 | - | a sustantan | 2 4 4 7 1 |
| 10 | CHR | 2.104(8)(3) | 3.1.1 |
| | | | 2 |
| | | | |
| 10 | CFR | 2.104(C) | 5.1.2.1 |
| | | | |
| 400 | A 17.00 | a sourcies | 0.0 |
| 19 | C. K | 2.104(C)(4) | 6.8 |
| | | | |
| 10 | CFR | 2.105 | 2.5 |
| | | | 2.5.1 |
| | | | 3.1.2.1 |
| | | | |
| | | | 3.7.2.7 |
| | | | |
| 10 | CFR | 2.105(A)(3) | 5.1.4 |
| 10 | CFR | 2.105(A)(3) | |
| | | | |
| | | 2.105(A)(3) 2.105(A)(4) | 6.1.4 2.2 |
| | | | 5.1.4 2.2 2.5 |
| | | | 6.1.4 2.2 |
| 10 | CFR | 2.105(A)(4) | 6,1,4 2,2 2,5 6,1,4 |
| 10 | CFR | | 5.1.4 2.2 2.5 |
| 10 | CFR | 2.105(A)(4) | 6,1,4 2,2 2,5 6,1,4 |
| 10 | CFR | 2.105(A)(4) 2.105(A)(6) | 6.1.4 2.2 2.5 6.1.4 6.1.4 |
| 10 | CFR | 2.105(A)(4) | 6,1,4 2,2 2,5 6,1,4 |
| 10 | CFR CFR | 2.105(A)(4) 2.105(A)(6) 2.105(A)(7) | 6,1,4 2,2 2,5 6,1,4 6,1,4 |
| 10 | CFR CFR | 2.105(A)(4) 2.105(A)(6) | 6.1.4 2.2 2.5 6.1.4 6.1.4 |
| 10 | CFR CFR | 2.105(A)(4) 2.105(A)(6) 2.105(A)(7) | 6,1,4 2,2 2,5 6,1,4 6,1,4 1,9 |
| 10 | CFR CFR CFR | 2.105(A)(4) 2.105(A)(6) 2.105(A)(7) | 6,1,4 2,2 2,5 6,1,4 6,1,4 |
| 10 | CFR CFR CFR | 2.105(A)(4) 2.105(A)(6) 2.105(A)(7) 2.107 | 6.1.4 2.2 2.5 6.1.4 6.1.4 1.9 |
| 10 | CFR CFR CFR | 2.105(A)(4) 2.105(A)(6) 2.105(A)(7) 2.107 | 6.1.4 2.2 2.5 6.1.4 6.1.4 1.9 1.9 3.1.2.1.1 |
| 10 | CFR CFR CFR | 2.105(A)(4) 2.105(A)(6) 2.105(A)(7) 2.107 | 6.1.4 2.2 2.5 6.1.4 6.1.4 1.9 |
| 10 10 10 | CFR CFR CFR CFR | 2.105(A)(4) 2.105(A)(6) 2.105(A)(7) 2.107 2.107(A) | 6.1.4 2.2 2.5 6.1.4 6.1.4 1.9 1.9 3.1.2.1.1 |
| 10 10 10 | CFR CFR CFR CFR | 2.105(A)(4) 2.105(A)(6) 2.105(A)(7) 2.107 | 6.1.4 2.2 2.5 6.1.4 6.1.4 1.9 1.9 3.1.2.1.1 |
| 10 10 10 | CFR CFR CFR CFR | 2.105(A)(4) 2.105(A)(6) 2.105(A)(7) 2.107 2.107(A) | 6.1.4 2.2 2.5 6.1.4 6.1.4 1.9 1.9 3.1.2.1.1 |
| 10 10 10 10 | CFR CFR CFR CFR | 2.105(A)(4) 2.105(A)(6) 2.105(A)(7) 2.107 2.107(A) | 6.1.4 6.1.4 6.1.4 1.9 1.9 3.1.2.1.1 3.18.2 |
| 10 10 10 10 | CFR CFR CFR CFR | 2.105(A)(4) 2.105(A)(6) 2.105(A)(7) 2.107 2.107(A) | 6.1.4 2.2 2.5 6.1.4 6.1.4 1.9 1.9 3.1.2.1.1 |
| 10 10 10 10 | CFR CFR CFR CFR | 2.105(A)(4) 2.105(A)(6) 2.105(A)(7) 2.107 2.107(A) 2.109 2.1205(C)(2)(I) | 6.1.4 6.1.4 6.1.4 1.9 1.9 3.1.2.1.1 3.18.2 1.2 |
| 10 10 10 10 | CFR CFR CFR CFR | 2.105(A)(4) 2.105(A)(6) 2.105(A)(7) 2.107 2.107(A) | 6.1.4 2.2 2.5 6.1.4 6.1.4 1.9 1.9 3.1.2.1.1 3.18.2 1.2 6.13 2.9.3 |
| 10 10 10 10 | CFR CFR CFR CFR | 2.105(A)(4) 2.105(A)(6) 2.105(A)(7) 2.107 2.107(A) 2.109 2.1205(C)(2)(I) | 6.1.4 6.1.4 6.1.4 1.9 1.9 3.1.2.1.1 3.18.2 1.2 |
| 10 10 10 10 | CFR CFR CFR CFR | 2.105(A)(4) 2.105(A)(6) 2.105(A)(7) 2.107 2.107(A) 2.109 2.1205(C)(2)(I) | 6.1.4 2.2 2.5 6.1.4 6.1.4 1.9 1.9 3.1.2.1.1 3.18.2 1.2 6.13 2.9.3 |
| 10 10 10 10 10 | CFR CFR CFR CFR CFR | 2.105(A)(A) 2.105(A)(G) 2.105(A)(T) 2.107 2.107(A) 2.109 2.1205(C)(2)(I) 2.1205(D) | 6.1.4 2.2 2.5 6.1.4 6.1.4 1.9 3.1.2.1.1 3.18.2 1.2 6.13 2.9.3 6.13 |
| 10 10 10 10 10 | CFR CFR CFR CFR CFR | 2.105(A)(4) 2.105(A)(6) 2.105(A)(7) 2.107 2.107(A) 2.109 2.1205(C)(2)(I) | 6.1.4 2.2 2.5 6.1.4 6.1.4 1.9 1.9 3.1.2.1.1 3.18.2 1.2 6.13 2.9.3 |

| 3,1,2,7 | 3.1.2.7 | 3127 | 6 5 4 1 | 3.1.2.7 | 3.11.1.3 | 3, 11, 11, 1 | 3 + 2 7 | 6.20.4 | 3. 13 | * * * * * | 6.24.1.1 |
|--|------------------|------------------|------------------|-------------------|-------------------|-------------------|------------------|-------------------|-----------------|--------------|----------|
| 10 CFR 2.1205(K)(1)(I) 10 CFR 2.1209(C) | 10 CFR 2.1231(A) | 10 CFR 2.1231(8) | to CFR 2.1231(C) | 10 CFR 2, 1233(A) | 10 CFR 2, 1233(D) | 10 CFR 2, 1233(E) | 10 CFR 2.1235(A) | 10 CFR 2, 1239(B) | 10 CFR 2, 18(E) | 10 CFR 2.202 | |

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| 6.10.1 | 6.24 | 6.24 | 6.24.4 | 3, 18, 4 |
|---------------------|----------------|------------------------|----------|--------------|
| 10 CFR 2, 202(A)(5) | 2,202(C)(2)(1) | 10 CFR 2 202(C)(2)(11) | 2,202(f) | 10 CFR 2,203 |
| CH TH | 10 CFR | CFR | 10 CFR | CYR |
| 0 | 9 | 10 | 10 | 10 |
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| | | 10 | | 10 | |

6.1.4

5.10.1.1 3.1.2.1.

6.24 6.24

| 10 CFR | 2.205(E) | 3.1.2.1 |
|--------|-------------|-------------------------------|
| 10 CFR | 2.205(F) | 3.1.2.1. |
| 10 CFR | 2.206 | 2.9.3.3.3 |
| | | 3.1.2.1 3.1.2.2 3.4.5 |
| | | 6.1.6 6.24 |
| | | 6.24.1.3 6.24.3 |
| 10 CFR | 2.206(C) | 5.6.1 |
| | | 6.24 6.5.1 |
| 10 CFR | 2.206(C)(1) | 6.24.3 |
| 10 CFR | 2.206(C)(2) | 6.24.3 |
| 10 CFR | 2.600-2.606 | 6.6 |
| 10 CFR | 2.700A | 6.29.1 |
| 10 CFR | 2.7G1(B) | 2.8.1.1 3.1.4.1 6.5.3.2 |
| 10 CFR | 2.70: | 2.8.1 3.1.4.1 5.6.1 |
| 10 CFR | 2.704(C) | 3.1.4.1 |
| 10 CFR | 2.704(0) | 3.1.5 |
| 10 CFR | 2.707 | 2.9.9.5 |
| 10 CFR | 2.707(8) | 3.6 |
| 10 CFR | 2.708(0) | 2.9.10.1 |
| | 2.710 | 5.10.3.1 |
| 10 CFR | 2,711 | 2.11.1 |
| 10 CFR | 2.711(A) | 3.1.2.4 |

| 6, 14, 2, 1 | 4.4.1.1 | 4.4.1.5 | 2.9.10.1 | 6.4.1 | 5.9.2 | 2.9.2 | 6.4.2 | 2.9.3 |
|-------------|-------------|-------------|----------|-------|----------|----------|----------|-------|
| 2.712 | 2.712(D)(3) | 2.712(E)(3) | 2.7+2(F) | 2.713 | 2.713(A) | 2 713(8) | 2,713(C) | 2.714 |
| CFR | CFR | CFR | CFR | CFR | CFR | CFR | CFR | CFR |
| 10 | 10 | 10 | 10 | 0 | 9 | 10 | 10 | 10 |
| | | | | | | | | |

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to CFR 2.714(A)

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| 757 | | |
| | | |
| | | |
| | | |
| | | |
| 160 | | |
| 7 | | |
| | | |
| | | |

| INDEX | | |
|-------|--|--|
| | | |
| | | |
| | | |

| 10 CFR 2.714(A)(1) | 2.9.3.6 |
|--------------------------|-----------|
| TO OTH ALTTHUMPTED | 2.9.5.13 |
| | |
| | 2.9.5.5 |
| | 2.9.9 |
| | 6.3.2 |
| | |
| to the employees the | 2.9.5.5 |
| 10 CFR 2.714(A)(1)(1) | 5-9-0-3 |
| | |
| 10 CFR 2.714(A)(2) | 2.9.3 |
| | |
| 10 CFR 2.714(A)(3) | 2.9.3 |
| TO DER 2. FIREMENTS | 2.9.3.3.3 |
| | |
| | 2.9.4.1.2 |
| | 2.9.5 |
| | |
| 10 CFR 2,714(B) | 2.9.3 |
| 10 CFR 2. / 14(D) | 2.9.3.1 |
| | |
| | 2.9.3.5 |
| | 2.9.5 |
| | 2.9.5.4 |
| | 2.9.5.5 |
| | |
| | 2.9.7 |
| | 2.9.9 |
| | 3.4.1 |
| | 4.4.1 |
| | |
| | |
| to CFR 2.714(B)(2) | 2.9.5.10 |
| | |
| in orn a 314(0)(3)(11) | 2.9.5.1 |
| 10 CFR 2.714(8)(2)(II) | |
| | 2.9.5.3 |
| | |
| 10 CFR 2.714(B)(2)(111) | 2.9.5 |
| NO DESCRIPTIONS | 2.9.5.1 |
| | 2.9.5.3 |
| | |
| | 2.9.5.4 |
| | |
| 10 CFR 2.714(C) | 2.9.3.3.3 |
| 10 01 11 2 1 1 1 1 1 1 1 | 5.8.1 |
| | |
| | |
| 10 CFR 2.714(D) | 2.9.3 |
| | 2.9.3.3.3 |
| | 6.13 |
| | |
| The same of the same of | 2.9.6 |
| 10 CFR 2,714(E) | |
| | 2.9.9.2.2 |
| | 3.1.2 |
| | 6.19.2 |
| | |
| | 200 |
| 10 CFR 2.714(F) | 2.9.6 |
| | 2.9.9.2.2 |
| | 3.1.2 |
| | 6.19.2 |
| | |
| | |
| 10 CFR 2.714(G) | 3.1.2 |
| | |
| | |

| 10 | CFR | 2.714(G) | 6.19.2 |
|------|-------|-----------|--|
| 400 | CED | 2.7144 | 2.6.3.3 |
| 130 | 22.00 | 2 | 2.9.3 |
| | | | |
| | | | 2.9.5.13 |
| | | | 2.9.7 |
| | | | 3.15 |
| | | | 5.4 |
| | | | 5.12.2 |
| | | | 5.4 |
| | | | 5.5.3 |
| | | | |
| | | | 5.8.1 |
| | | | 5.8.5 |
| 10 | CER | 2.714A(6) | 2.9.5.1 |
| | | | 5.4 |
| | | | 5.8.1 |
| | | | |
| 10 | CFR | 2.714A(C) | 2.9.7 |
| 10 | CEP | 2.715 | 2.10.1.1 |
| | | | 5.2 |
| | | | |
| 10 | CFR | 2.715(A) | 2.10.1.2 |
| | | | 3.13.1 |
| | | | |
| 10 | CFR | 2.715(C) | 2.10.2 |
| | | | 2.9.3.3.3 |
| | | | 2.9.5.1 |
| | | | 2.9.7 |
| | | | 2.9.9.2.1 |
| | | | 5.2 |
| | | | 5.8.1 |
| | | | |
| 10 | CFR | 2.715(D) | 5.10.4 |
| | | | 5.11.3 |
| 100 | CED | 2.7154 | 2.9.6 |
| 1000 | 01.15 | | 2.9.9.2.2 |
| | | | 3.3.6 |
| | | | |
| 10 | CFR | 2,716 | 3.3.6 |
| | | | |
| 10 | CFR | 2.717(A) | 3.1.2.1 |
| | | | 5.6.1 |
| *** | cen | 2.717(8) | 3.1.2.2 |
| 150 | CT 15 | | 6.13 |
| | | | |
| 10 | CFR | 2.718 | 2.9.9.5 |
| | - 5 | | 3.1.2 |
| | | | 3.1.2.1 |
| | | | 3.1.2.5 |
| | | | 3.1.2.7 |
| | | | Mary State of State o |

| 10 CFR 2.718 | 3.11.1.1 3.12.4 |
|--|--------------------|
| | 3.3.4 |
| | 3.4.4 |
| | 5,12,1 |
| | 6.19.2 |
| | 6.23 |
| | |
| 10 CFR 2.718(C) | |
| | 3.13.1 |
| 10 CFR 2.718(E) | 2.9.5.5 |
| | 3.1.2.7 |
| | 3.13.1 |
| | 3.14.2 |
| | 3.5.3 |
| | 6.4.1.1 |
| | |
| 40 000 N N N N N N N N N N N N N N N N N | |
| 10 CFR 2.718(I) | 5.12.2 |
| | 5.12.2.1 |
| | 5.15 |
| | 5.6.1 |
| | |
| 10 CFR 2.718(J) | 3.1.2.1 |
| 10 CFR 2.719 | 6.24 |
| | |
| 10 CFR 2.720 | 2.11.2 |
| | 2,11,3 |
| | |
| | 2.11.5 |
| | 2.11.5.1 |
| | 3,12.1 |
| 10 CFR 2.720(A) | 2.11.5 |
| NO STR 2. NEVERS | |
| | 3.12.1 |
| | 3.12.1.1 |
| 10 CFR 2.720(A)-(G) | 2 42 4 4 |
| 10 CFR 2.720(R)-(G) | 3.12.1.1 |
| 10 CFR 2.720(D) | 2.11.2.2 |
| 10 CTR 2.720(0) | |
| | 3.12.4.1 |
| to cen a model | 2.11.5 |
| 10 CFR 2.720(F) | |
| | 3.12.4.1 |
| 10 000 0 7001111 | |
| 10 CFR 2.720(H) | 3.12.1.1 |
| | 3.12.4.1 |
| 10 000 0 000000000 | |
| 10 CFR 2.720(H)(2) | 2.11.3 |
| en orn a manterial state | |
| 10 CFR 2.720(H)(2)(1) | 2.11.3 |
| | 6.6.1.2 |
| | |
| 10 CFR 2.720(H)(2)(II | 2.11.3 |
| | |

| 10 | CFR | 2.721 | 5.6.1 |
|-----|---------|---------------|----------|
| 10 | CER | 2.721(0) | 1.9 |
| 100 | 1000 | 47-14-14-14-1 | 3,1,2,1 |
| | | | 3.1.3 |
| | | | 0.1.0 |
| 10 | CFR | 2.722 | 6.12 |
| 10 | CFR | 2.722(A)(3) | 6.11 |
| 10 | CFR | 2.730 | 3.5.2.2 |
| | | | 6.14 |
| | | | 6,14,2,1 |
| 10 | CER | 2.730(A) | 2.8.1.1 |
| - | | | 3.1.4.1 |
| | | | |
| 10 | CFR | 2.730(8) | 6.14.1 |
| 10 | CFR | 2.730(C) | 6.14 |
| 10 | CFR | 2.730(F) | 3.15 |
| | | | 5.12.2 |
| | | | 5.12.2.1 |
| | | | 5.15 |
| | | | 5.8.12 |
| | | | 5.8.3.1 |
| | | | 5.8.4 |
| 10 | cep | 2.731 | 2.11.5.2 |
| 10 | 1000 | | 3.1.2.7 |
| 10 | CEB | 2.732 | 2.9.9.1 |
| 110 | 527.78 | 2.702 | 3.7 |
| | | | |
| +0 | | 0.700/41 | 3.13 |
| 10 | CFR | 2.733(A) | 3.10 |
| 10 | CFR | 2.734 | 4.4.2 |
| | | | 6.13 |
| 10 | CFR | 2.734(A) | 2.2 |
| 10 | CFR | 2.734(A)(1) | 4.4.1.1 |
| 10 | CFR | 2.734(8) | 4.4.1 |
| | ren | 2.734(C) | 3.10 |
| 157 | C.F. M. | 2.734(0) | |
| 10 | CFR | 2.740 | 2.11.5 |
| 10 | CFR | 2.740(A)(1) | 2,11,1 |
| | | 2.740(8) | 2.11.2.2 |
| 10 | CER | 2.740(B) | 5.6.3 |
| | | | 2.0.3 |

| DEX | | |
|-----|--|--|
| | | |
| | | |
| | | |

| 10 | CFR | 2.740(B) | 6.3.3.1 |
|----|-----------|-------------|----------|
| 10 | CFR | 2.740(B)(1) | 2.11.1 |
| | | | 2.11.2 |
| | | | 2.11.2.4 |
| | | | 2,11.4 |
| 10 | CFR | 2.740(B)(2) | 2.11.2.4 |
| | | | 2.11.2.6 |
| 10 | CFR | 2.740(8)(3) | 2.11.2.2 |
| 10 | CFR | 2.740(C) | 2.11.2.2 |
| | | | 2.11.2.4 |
| | | | 2.11.5 |
| | | | 3.12.4.1 |
| 10 | CFR | 2.740(0) | 2.11.2.2 |
| 10 | CFR | 2.740(E) | 2.11.2.7 |
| 10 | CFR | 2.740(E)(3) | 2.11.2.7 |
| 10 | CFR | 2.740(F) | 2.11.5 |
| 10 | CFR | 2.740(F)(1) | 2.11.4 |
| 10 | CFR | 2.740(F)(2) | 2.11.2.5 |
| 10 | CFR | 2.740(F)(3) | 2 11.3 |
| 10 | CFR | 2.740A | 2.11.2.2 |
| 10 | CFR | 2.740A(D) | 2,11.2.2 |
| 10 | CFR | 2.740A(H) | 2.11.2.2 |
| | | 2.740A(J) | 2.11.3 |
| | | 2.7408 | 2.11,5 |
| 10 | CFR | 2.741 | 2.11.2 |
| | | | 2.11.2.2 |
| | | | 3.1.2.4 |
| 10 | CFR | 2.741(D) | 2.11.4 |
| 10 | CFR | 2.741(E) | 2.11.3 |
| 40 | cen | 2.743 | 3.11 |
| 10 | S. T. Ph. | | 3. 13 |
| | | | |
| 10 | CFR | 2.743(A) | 3.13 |
| | | | |

| 3.13 | | 0 0 7 | 3, 11.2 | 3.10 | 2.11.3 | 2,11,2,4 6,23,1 6,23,3,1 | 4 4 6 6 6 6 6 6 6 6 6 6 6 6 6 6 6 6 6 6 | 3 3 3 3 3 3 3 3 3 3 3 3 | 3.5.2.3 | 23.25 23.25 23.25 23.25 23.25 23.25 23.25 23.25 23.25 23.25 24.25 25 25.25 25 25 25 25 25 25 25 25 25 25 25 25 2 | 5.12.2 | 5 |
|--------------------|--------------------|-----------------|------------------|-----------------|--------------|--------------------------------|---|-------------------------------|------------------------------------|--|-----------------|---|
| 10 CFR 2.743(B)(2) | 10 CFR 2,743(B)(3) | 10 CFR 2.743(C) | 10 CFR 2, 743(G) | 10 CFR 2.743(1) | 10 CFR 2,744 | 10 CFR 2.744(D) | 10 CFR 2.749 | 10 OFR 2.749(A) | 10 CFR 2,749(B) 10 CFR 2,749(C) | 10 CFR 2.749(D) | 10 CFR 2.750(C) | 10 CFR 2,751A |

| 10 | CFR | 2.751A(A) | 2.6.2 |
|----|--------|-------------|---------|
| 10 | CFR | 2.751A(5) | 2.6.2 |
| 10 | CFR | 2.751A(C) | 2.6.1 |
| ** | cco | 2.751A(D) | 2.6.3.1 |
| | CFR | 2.7318(0) | 2.6.3.2 |
| 10 | CER | 2.752 | 2.11.1 |
| | 201.70 | | 2.6 |
| 10 | CFR | 2.752(A) | 2.6 |
| 10 | CFR | 2.752(8) | 2.6.1 |
| | | 2 252(5) | 2.6.3.1 |
| 10 | CFR | 2.752(C) | 2.6.3.2 |
| | | | 3.9 |
| 10 | SFR | 2.753 | *** |
| 10 | CFR | 2.754 | 4.2 |
| | | | 4.2.2 |
| 10 | CFR | 2.754(A) | 3.1.2.7 |
| 10 | CFR | 2.754(8) | 4.2.2 |
| 10 | CFR | 2.754(C) | 4.2 |
| | | | 4.2.1 |
| 10 | CER | 2.756 | 2.11.1 |
| | | | 4.4 |
| 10 | CFR | 2.757 | 3.13.1 |
| 10 | CFR | 2.757(C) | 3.13 |
| | | | 3.13.1 |
| 10 | CFR | 2.758 | 2.9.5.3 |
| | | | 2.9.5.6 |
| | | | 3.7.3.2 |
| | | | 5.4 |
| | | | 6.19 |
| | | | 6.20.4 |
| | | | 6.8 |
| 10 | CFR | 2.758(8) | 6.19.1 |
| | | | 6.20.4 |
| | | | 6.8 |
| 10 | CFR | 2.758(8)(2) | 2.2 |
| in | CFR | 2.758(D) | 6.19.1 |

| 10 CFR 2.759 | 2.11.2 |
|--------------------|--|
| | 4.0 |
| | - 4 |
| 10 CFR 2.760 | 5.4 |
| 10 CFR 2.760(A) | 3.1.2.1 |
| 10 CFR 2.760(C) | 4.3 |
| 10 CFR 2.760A | 3,1,2,1 3,1,2,1 3,1,2,3 3,4,2 3,5,3 |
| 10 CFR 2.762 | 5.10.2 5.10.3 5.13 5.13.1.1 5.13.1.2 5.13.4 5.2 5.3 5.4 5.8.12 5.9.1 |
| 10 CFR 2.762(A) | 4.3.1 5.10.2 5.10.3 5.13.2 5.4 5.6.1 5.8.10 5.9.1 |
| 10 CFR 2.762(B) | 5,10.3.1 |
| 10 CFR 2,762(D) | 5,10.3 5,13.2 |
| 10 CFR 2.762(D)(1) | 5.5 |
| 10 CFR 2.762(E) | 5.10.2 |
| | 5.10.3 |
| 10 CFR 2.762(F) | 5.10.2 |
| 10 CFR 2.763 | 5.11 |
| 10 CFR 2.764 | 3.1.2 4.3 5.7 |
| | |

| 10 CFR | 2.764(A) | 4.3 |
|--------|-------------|---------|
| 10.000 | 2.764(E) | 4.3 |
| 10 CFR | 2.704(2) | 4.3 |
| 10 CFR | 2.764(F) | 4.3 |
| 10 CFR | 2.764(F)(2) | 5.7 |
| | | |
| 10 CFR | 2.764(G) | 5.5 |
| | | |
| 10 CFR | 2.770 | 5.4 |
| 10 CFR | 2 771 | 4.5 |
| | | 5.17 |
| | | |
| | | 5.4 |
| 10 CFR | 2.780 | 6.5.1 |
| | | |
| 10 CFR | 2.780(D) | 6.5.1 |
| 10 CFR | 2.785 | 3.1.2.3 |
| | | 4.6 |
| | | 5.14 |
| | | 5.6.1 |
| | | 5.6.3 |
| | | 6.13 |
| | | |
| 10 CFR | 2.785(8)(1) | 5. t2.2 |
| | | 5,14 |
| | | |
| TO CTR | 2.785(8)(2) | 5.6.1 |
| 10 CFR | 2.785(0) | 5.14 |
| - | | 6.16.1 |
| | | |
| 10 CFR | 2.786 | 5.15 |
| | | 5.7 |
| en ern | 0 700/+1 | |
| 10 CFR | 2.786(A) | 5.15 |
| 10 CFR | 2.786(8) | 5.12.3 |
| | | 5.7 |
| | | |
| 10 CFR | 2.786(8)(1) | 5.15 |
| | | |
| 10 118 | 2.786(8)(6) | 5.15 |
| 10 CFR | 2.786(8)(7) | 4.7 |
| | | |
| 10 CFR | 2.768 | 4.3 |
| | | 5.19.3 |
| | | 5.7 |
| | | 5.7.1 |
| | | |

| 5. 12.3 | 5.7.4 | 1.0 | 5, 12, 3 | 6 6 6 6 6 6 6 6 6 6 6 6 6 6 6 6 6 6 6 | 23 |
|-----------------|-----------------|-----------------|-----------------|---------------------------------------|-----------------|
| 10 CFR 2.788(A) | 10 CFR 2.788(E) | 10 CFR 2,788(F) | 10 CFR 2.788(H) | 10 CFR 2.790 | 10 CFR 2.790(A) |

| 60 | 90 | から | | |
|---------|--------|-----|--|--|
| 4.4 | 787 | 190 | | |
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| 100 | SN | .15 | | |
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6.23.3.1

6.23

10 CFR 2.790(D)

2.11.2.4

| CFR INDER JULY | | | | | | | | | | | | | | | | | | | | |
|----------------|--------------------|--|------------------------|-----------------------|------------------------|-------------------------|----------------------------|----------------------------|------------------------|-----------------|------------------|------------------|-------------------------|---------------|----------------|-----------------------|---------------|-----------------|-----------------|---------------|
| | 6.29.3 | 2 9 4 1 2 3 1 2 7 3 11 1 1 5 12 2 6 13 | 3.4.4 | 2.6.3.1 | 2,11.5.2 | 3.1.1 | 3.1.4 | 3.1.1 | 1.1.6 | 3.1.2.1 | 6.15.8.3 | 6.19.2 | 6, 19.2 | 6.26 | 6.9.2.1 | 2.2 6.19 6.19 1 | 2.9.5.9 | 6.3.1 | Ø (Ø | Ø. |
| | 10 CFR 2, SUBPRT J | 10 CFR 2, SUBPRT 4 | 10 CFR 2.APP.A.I(C)(1) | 10 CFR 2,APP A, IIIC) | 10 CFR 2,APP.A,V(D)(4) | 10 CFR 2,APP.A,VI(C)(1) | 10 CFR 2, APP, A, VI(C)(2) | 10 CFR 2, APP. A, VI(C)(2) | 10 CFR 2,APP.A,VIII(B) | 10 CFR 2, APP.8 | 10 CFR 50, 10(C) | 10 CFR 50, 10(E) | 10 CFR 50, 10(E)(1)-(3) | 10 CFR 50.100 | 10 CFR 50, 109 | 10 CFR 50, 12 | 10 CFR 50, 13 | 10 CFR 50.30(D) | 10 CFR 50.33(F) | 10 CFR 50.33A |

10 CFR 50,34(8)

| 10 | CFR | 50,36 | 6.27 |
|----|-----|-------------|-----------------------------------|
| 10 | CFR | 50.40 | 6.1 |
| 10 | CFR | 50.44 | 3.4.1 |
| 10 | CFR | 50.45 | 6.20.4 |
| 10 | CFR | 50.46 | 6.15.7 |
| 10 | CFR | 50.47(A)(1) | 1.8 |
| 10 | CFR | 50.47(A)(2) | 1.8 2.9.5.3 3.0 3.11.1.5 |
| 10 | CFR | 50.47(8) | 8.16.2 |
| 10 | CFR | 50.47(C) | 3.1.2 |
| 10 | CFR | 50.47(0) | 6.16.1 |
| 10 | CFR | 50.57 | 6.13 |
| 10 | CFR | 50.57(A) | 3.16 6.16.1 |
| 10 | CFR | 50.57(A)(3) | 2.9.5 |
| 10 | CFR | 50.57(¢) | 6.15.1.1 6.16.1 |
| 10 | CFR | 50.58(8)(6) | 5.1.1 6.1.4.4 |
| 10 | CFR | 50.59(A)(1) | 6.1.6 |
| 10 | CFR | 50.59(4)(2) | 6.1.6 |
| 10 | ÇER | 50.72 | 6.5,4.1 |
| 10 | CFR | 50.82 | 6.28 |
| 10 | CFR | 50.90 | 6.1 6.1.5 6.3.1 |
| 10 | CFR | 50.91 | 6 t 6 t 4.4 |

10 CFR 50, APP.B 2.11,2.4

| 10 | CFR | 50.APP.C | 6.8 |
|----|------|--------------|--------------------|
| 10 | CFR | 50,APP.I | 3.4 |
| 10 | CFR | SO, APP. K | 6.15.7 6.20.3 |
| 10 | CFR | 50,APP.Q | 1.3 6.6 |
| 10 | CFR | 51,102 | 6.15.3 |
| 10 | CFR | 51.109 | 6.15.1 |
| 10 | CFR | 51.109(C) | 6.15 |
| 10 | CFR | 51.109(0) | 6.15 |
| 10 | CFR | 51.21 | 6.15 |
| 10 | CFR | 51.23 | 6.15.1. |
| 10 | CFR | 51.25 | 6.1.4.4 |
| 10 | CFR | 51.5(8) | 6.1.3.1 6.1.4.4 |
| 10 | CFR | 51.5(C) | 6.1.3.1 6.1 4.4 |
| 10 | CFR | 51.52(8) | 6.19.2 |
| 10 | CFR | 51.52(C) | 6.19.2 |
| 10 | CFR | 51.53(C) | 3.7.3.2 |
| 10 | CFR | 52, APP. Q | 1.3 6.6 |
| 10 | CFR | 52, SUBPRT A | 1.3 |
| 10 | CFR | 54.27 | 2.2 |
| 10 | CFR | 54.29(A) | 2.2 |
| 10 | CFR | 54.29(8) | 2.2 |
| 10 | CFR | 54.29(C) | 2.2 |
| 10 | CFE. | 70.23 | 6.13 6.16.1 |
| | | | |

10 CFR 70.31

6.13

PAGE

y

10 CFR 9.51

10 CFR 9.50

10 CFR 70.31

Statute Index

| ADMINISTRATIVE PROCEDURE ACT, 5 USC 551 ET SEQ |
|--|
| ADMINISTRATIVE PROCEDURE ACT, 5 USC 554 |
| ADMINISTRATIVE PROCEDURE ACT, 5 USC 554(A)(4) |
| ADMINISTRATIVE PROCEDURE ACT, 5 USC 554(D) |
| ADMINISTRATIVE PROCEDURE ACT, 5 USC 554(E) |
| ADMINISTRATIVE PROCEDURE ACT, 5 USC 556(C) |
| ADMINISTRATIVE PROCEDURE ACT. 5 USC 556(C)(7) |
| ADMINISTRATIVE PROCEDURE ACT. 5 USC 556(C)(9) |
| ADMINISTRATIVE PROCEDURE ACT. 5 USC 556(D) |
| ADMINISTRATIVE PROCEDURE ACT. 5 USC 701(A)(2) |
| ADMINISTRATIVE PROCEDURE ACT, 5 USC 705 |
| ATOMIC ENERGY ACT |
| ATOMIC ENERGY ACT OF 1954 105(C)6 |
| ATOMIC ENERGY ACT OF 1954 105C |
| ATOMIC ENERGY ACT OF 1954 182(A) |
| |
| ATOMIC ENERGY ACT OF 1954 182(8) |
| ATOMIC ENERGY ACT OF 1954 186 |
| ATOMIC ENERGY ACT OF 1954 189(A) |
| ATOMIC ENERGY ACT G. 1954 189A |
| ATOMIC ENERGY ACT 104(8) |
| ATOMIC ENERGY ACT 105 |
| |
| ATOMIC THEORY ACT 105(C) |
| ATGMIC ENERGY ACT 105(C) |
| ATOMIC ENERGY ACT 105(C)(2) |
| |

ATOMIC ENERGY ACT 105(C)(5)

| 6.24 | |
|------------------|--|
| 2.2 | |
| 6.29.1 | |
| 3.1.5 | |
| 3.1.2.2 | |
| 3.3.4 | |
| 3, 13, 1 | |
| 3.1.2.2 | |
| 3.13.1 | |
| 6.24.3 | |
| 5.15.2 | |
| 2.9.4.1.2 | |
| 6.3 | |
| 2.9.3.6 6.3 | |
| 6.8 | |
| 3.11.2 | |
| 1.5.2 | |
| 1.5.2 6.5.4.1 | |
| 6.1.4 | |
| 6.26 | |
| 6.3 | |
| 2.9.3.6 | |
| 2.9.4.1.1 | |
| 6.3.1 | |
| 6.3.2 | |
| 6 7 | |
| 6.3 | |
| 6.3.1 | |
| | |
| 6.3 | |

| ATOMIC ENERGY ACT 105C(1) | 6.3.1 |
|---|---|
| ATOMIC ENERGY ACT 105C(2) | 6.3.1 |
| ATOMIC ENERGY ACT 109(8) | 6.29.2.7 |
| ATOMIC ENERGY ACT 11E(2) | 2.2 |
| ATOMIC ENERGY ACT 127 AND 128 | 6.29.2.2 |
| ATOMIC ENERGY ACT 1610 | 6.10 |
| ATOMIC ENERGY ACT 181 | 3,13.1 |
| ATOMIC ENERGY ACT 182 | 1.5.2 |
| ATOMIC ENERGY ACT 186(A) | 6.26 |
| ATOMIC ENERGY ACT 189 | 2.9.4 |
| ATOMIC ENERGY ACT 189(A) | 2.2 |
| ATOMIC ENERGY ACT 189A | 2.2 2.9.3 2.9.3.1 2.9.3.3 2.9.4.1.1 2.9.4.1.3 2.9.5.1 |
| ATOMIC ENERGY ACT 234 | 6.10.1.1 |
| ATOMIC ENERGY ACT 274.L | 2.10.2 |
| ATOMIC ENERGY ACT 2748 | 2.10.2 |
| ATOMIC ENERGY ACT 2740 | 2.2 |
| ENDANGERED SPECIES ACT, 7 | 6.7.1 |
| ENERGY REORGANIZATION ACT OF 1974, 210 | 2.9.3.3.3 |
| ENERGY REORGANIZATIO 4CT OF 1974, 42 USC 5801 ET SEQ. | 1.8 |
| FEDERAL REGISTER ACT 4% USC 1508 | 1.7.1 |
| FEDERAL WATER POLIUTION CONTROL ACT (CLEAN WATER ACT), 511(C) (2) | 6.15.8.5 |
| FEDERAL WATER POLLUTION CONTROL ACT, 401 | 3.10 |
| FREEDOM OF INFORMATION ACT, 5 USC 552(B)(4) | 6.23.1 |

5.18

3.1.4.2

| STATUTE INDEX JULY 1992 | |
|---|--|
| FREEDOM OF INFORMATION ACT. 5 USC 552(B)(7)(D) | 2.11.2.4 6.23.3.1 |
| HOBBS ACT, 28 USC 2341 ET SEQ. | 4.5 |
| NATIGNAL ENVIRONMENTAL POLICY ACT | 2.2 2.9.4.1.1 2.9.4.1.2 5.7 6.15 6.15.1 6.15.1.1 6.15.4 6.15.7 6.15.8 |
| NATIONAL ENVIRONMENTAL POLICY ACT, 102 (2) | 6.6 |
| NATIONAL ENVIRONMENTAL POLICY ACT. 102 (2)(C) | 6.15.1.1 6.15.2 6.15.4 6.6.1 |
| NATIONAL ENVIRONMENTAL POLICY ACT, 102 (2)(E) | 6.15.4 |
| NATIONAL ENVIRONMENTAL POLICY ACT, 102(2)(E) | 6.15.4 |
| NATIONAL HISTORIC PRESERVATION ACT 16 USC 470-470(B), 470(C)-470(N) | 6.15.8 |
| NUCLEAR NON-PROLIFERATION ACT OF 1978 | 3.2.1 3.4.6 |
| NUCLEAR WASTE POLICY ACT OF 1982 | 6.15 |
| NUCLEAR WASTE POLICY ACT OF 1982, 112(A) | 2.2 |
| PUB. L. NO. 98-360, 98 STAT. 403 (1984) | 2.9.10.1 |
| PUPLIC LAW 97-415 (1982) | 6.1.4 |
| PUBLIC UVILITIES REGULATORY POLICIES ACT OF 1978 | 6.3 |
| URANIUM MILL TAILINGS RADIATION CONTROL ACT OF 1978. | 2.10.2 |
| WILD AND SCENIC RIVERS ACT | 6.19.1 |
| 28 USC 144 | 3.1.4.2 |
| 28 USC 182* | 3,12.4.1 |
| | |

28 USC 2347(C)

28 USC 455(A)

| 28 USC 455(B)(2) | 3.1.4.2 |
|--------------------|-------------------|
| 28 USC 455(E) | 3.1.4.2 |
| 42 USC 2014(AA) | 6.13 |
| 42 USC 2014(Z) | 6.13 |
| 42 USC 2018 | 6.15 |
| 42 USC 2071 | 6.13 |
| 42 USC 2073 | 6.13 |
| 42 USC 2091 | 6.13 |
| 42 USC 2093 | 6.13 |
| 42 USC 2201(C) | 2.11.5 |
| 42 USC 2236 | 1.5.2 6.26 |
| 42 USC 2236A | 6.5.4.1 |
| 42 USC 2239(A) | 2.9.4.1.3 6.26 |
| 42 USC 2280 | 6.26 |
| 42 USC 2282 | 6.26 |
| 42 USC 4332 | 6.15 |
| 42 USC 4332(2)(C) | 6.15.1.1 |
| 42 USC 5851(A) | 2.9.3.3.3 |
| 49 USC 2236(A) | 6,26 |
| 5 USC 522(A)(6)(C) | 8.23.1 |
| 5 USC 552(A)(6)(A) | 6.27.1 |
| 5 USC 554 | 2.2 |
| 5 USC 554(B)(3) | 2.5.2 |
| 5 USC 555(E) | 6,16,1 |
| 5 USC 556 | 2.11.5.2 |
| 5 USC 558(C) | 6.10.1 |
| | |

Case Law Index

| CASE LAW INDEX JULY 1992 PAG | GE 1 |
|---|---------------------------------------|
| ADICKES V. KRESS AND CO . 398 U.S. 144 (1970) | 3.5.3 |
| AESCHLIMAN V. NRC, 547 F.2D 622 (D.C. CIR, 1976) | 3.7 |
| AIR LINE PILOTS ASS'N INTERNATIONAL V. C.A.B., 458 F.20 846 (D.C. 1972), CERT. DENIED, 420 U.S. 972 (1975) | 6.10.1 |
| ALYESKA PIPELINE SERV V. WILDERNESS SOCIETY, 421 U.S. 240 (1975) | 1.9 |
| AMERICAN MANUF, MUT. INS. CO. V. AMERICAN BROADCASTING- PARAMOUNT THEATERS, 388 F 20 272 (20 CIR. 1967) | 3.5.3 |
| AMERICAN TRUCKING ASSOCIATION V. UNITED STATES, 627 F.2D 1313 (D.C. CIR. 1980) | 6.20 |
| ARNOW V. NRC, 868 F.2D 223 (7TH CIR. 1989) | 6.24.3 |
| ASS'N OF DATA PROCESSING SERVICE ORGANIZATIONS, INC. V. CAMP. 397 U.S. 150 (1970) | 2.9.4.1.1 |
| BARKER V. WINGO, 407 U.S. 514 (1972) | 3.3.2.1 |
| EARLOW V. COLLINS, 397 U.S. 159 (1970) | 2.9.4.1.1 |
| BARR MARINE PRODUCTS CO. V. BORG-WARNER CORP., 84 F.R.D. 631 (E.D.PA. 1979) | 2.11.2.4 |
| BELL V. SDCIALIST WORKERS PARTY, 436 U.S. 962 (1978) | 2,11,2.4 6.23.3.1 |
| BELLOTTI V. NRC. 725 F.2D 1380 (D.C. CIR. 1982) | 6,24.1.3 |
| BPI V. AEC. 502 F.2D 424 (D.C. CIR. 1974) | 2.11.1 2.9.3.1 2.9.5.1 3.5.1 |
| BROOKS V. VOLPE, 350 F. SUPP. 269 (W.D. WASH. 1972) | 6.15.3 |
| CALIFORNIA V. WATT, 683 F.2D 1253 (9TH CIR. 1982) | 6.15.1.1 |
| CARL ZEISS STIFTUNG V. V. E. B. CARL ZEISS, JENA, 40 F.R.D. 318 (D.D.C. 1966), AFF'D, 384 F.2D 979 (D.C. CIR. 1967) | 2.11.2.4 |
| CARSON PRODUCTS CD. V. CALIFANO, 594 F.2D 453 (5TH CIR 1979) | 3.10 |
| CELLULAR MOBILE SYSTEMS V. FCC, 782 F.2D 182 (D.C. CIR. 1985) | 3.12 |
| CHICANO POLICE OFFICERS ASSOC. V. STOVER, 526 F.20 431 (10TH CIR. 1975), 426 U.S. 994 1976, 552 F.20 918 (10TH CIR. | 2,9,4,1,1 |
| CHRYSLER CORP. V. BROWN, 441 U.S. 281 (1979) | 6.23 |
| CITIZENS AGAINST BURLINGTON, INC. V. BUSEY, 938 F.2D 190 (D.C. CIR. 1991) | 6.15.1 |
| CITIZENS FOR FAIR UTILITY REGULATION V. NRC. 898 F.2" 51 (5TH CIR. 1990) | 2.9.3.3.3 |
| CITIZENS FOR SAFE POWER V. NRC, 524 F.2D 1291 (D.C. CIR. 1975) | 6.15.3 |
| CITY OF LOS ANGELES V. NHTSA, 912 F.20 478 (D.C. CIR. 1990) | 2.9.4.1.1 |

| CASE LAW INDEX JULY 1992 | PAGE 7 |
|--|------------------|
| CITY OF WEST CHICAGO V. NRC. 701 F.20 632 (7TH CIR. 1983) | 2.2 6.15.1.2 |
| CITY OF WEST CHICAGO V. NRC. '01 F.20 632 (7TH. CIR. 1983) | 2.5 6.13 |
| COALITION FOR THE ENVIRONMENT W. NRC. 795 F. 20 168 (D.C. CIR 1986) | 6.8 |
| COMMITTEE FOR AUTO RESPONSIBILITY V. SOLOMON, 603 F.2D 992 (D.C. CIR. 1579), CERT. DENIED, 445 U.S. 915 (1980) | 6.15.9 |
| CONSERVATION LAW FOUNDATION V. GSA. 427 F. SUPP. 1369 (D.R.I. 1977) | 6, 15, 1, 2 |
| CONSOLIDATED EDISON CO. V. NLRB, 305 U.S. 197 (1938) | 6.24.3 |
| CREST AUTO SUPPLIES, INC. V. ERO MANUFACTURING CO., 360 F.20 896 (7TH CIR. 1966) | 3.5.3 |
| CRITICAL MASS ENERGY PROJECT V. NRC. 931 F.2D 939 (D.C. CIR. 1991) | 6.23.1 |
| CROSS-SOUND FERRY SERVICES. INC. V. ICC. 934 F 2D 327 (D.C. CIR 1991) | 6. (5. 1. 1 |
| DEFENDERS OF WILDLIFE V. ANDRUS. 627 F.2D 1238 (D.C. CIR. 1980) | 6.15.1.1 |
| DELLUMS V. NRC. 863 F. 2D 968 (D.C. CIR. 1988) | 2.9.4.1 |
| [1] [1] [1] [1] [1] [1] [1] [1] [1] [1] | 3.5.2.1 |
| DONOFRIO V. CAMP. 470 F.2D 428 (D.C. CIR. 1972) | 3 17 |
| DREYFUS V. FIRST NATIONAL BANK OF CHICAGO, 424 F.2D 1171 (714 CIR.), CERT. DEN., 400 U.S.832 (1970) | 2.9.3 |
| EASTON UTILITIES COMMISSION V. AEC. 424 F.2D 847 (D.C. CIR. 1970) | |
| ECOLOGY ACTION V. AEC. 492 F.2D 998 (2ND CIR. 1974) | 6.15.3 6.21.2 |
| EDDLEMAN V. NRC. 825 F.20 46 (4TH CIR. 1987) | 2.2 5.7 |
| EEDC V. TRABUCCO. 791 F.20 1 (1ST CIR. 1986) | 6.18 |
| ENVIRONMENTAL DEFENSE FUND, INC. V. ANDRUS, 619 F.2D 1368 (1980) | 6.15.1.1 |
| EPA V. MINK, 410 U.S. 73 (1973) | 2.11.2.4 |
| ESSEX CITY PRESERVATION ASS'N V. CAMPBELL, 536 F. 2D 956 (15T CIR. 1976) | 6.15.3 |
| F.P.C. V. TEXACO, INC., 377 U.S. 33 (1964) | 6.21 |
| FAIRFIELD UNITED ACTION V. NRC. 679 (.20 261 (D.C. CIR. 1982) | €.13 |
| FEDERAL CROP INSURANCE CORP. V. MERRILL. 332 U.S. 380 (1947) | 2.5.3 |
| FEDERAL CROP INSURANCE CORP. V. MCHATCE, SUL SILVER SYSTEM V. MERRIL, 443 U.S. 340 (1979) | 2.11.2.4 |
| FEDERAL TRADE COMMISSION V. 1EXACO 555 F.2D 862 (D.C. CIR. 1977), CERT. DEN. 431 U. S. 974 (1977) | 3. 17 |
| FEDERAL INAUE COMMETSSION A | |

—

5

| CASE LAW INDEX JULY 1992 | PAGE 3 |
|--|----------------------|
| FEDERAL TRADE COMMISSION V. TEXACO 555 F.2D 862 (D.C. CIR. 1977), CERT. DEN. 431 U. S. 974 (1977) | 6.15.1 |
| FMC V. ANGLO-CANADIAN SHIPPING COMPANY, 335 F.2D 255 (9TH CIR. 1964) | 2.11.5 |
| FRANKLIN SAVINGS ASSOCIATION V. RYAN, 922 F.2D 209 (4TH CIR. 1591) | 2.11.2.4 |
| GAGE V. U.S. AEC, 479 F.2D 1214 (D.C. CIR. 1972) | 6.15.8 |
| GOVERNMENT OF VIRGIN "LANDS V. GEREAU, 51" F.20 140 (3RD CIR. 1975), CERT. DENIED, 424 U.S. 917 (1976) | 3.10 |
| GREATER BOSTON TELEVISION CORP. V FCC, 444 F.2D 841 (D.C. CIR. 1970) | 3.4 |
| GREEN COUNTY PLANNING SOARD V. FPC. 559 F.2D 1227 (2D CIR. 1977) | 2.9.10.1 |
| HECKLER V. CHANEY, 470 U.S. 821 (1985) | 6.24.3 |
| HERCULES, INC. V. EPA, 598 F.2D 91 (D.C. CIR. 1978). | 6.21.2 |
| HICKMAN, V. TAYLOR, 329 U.S. 495 (1947) | 2.11.2.4 |
| HODDER V. NRC, 589 F.3D 1115 (D.C. CIR. 1978) | 6,19,2.1 |
| HOMESTAKE MINING CO. V. MID-CONTINENT EXPLORATION CO., 282 F.2D 787 (10TH CIR. 1960) | 6.13 |
| HORNFLOWER AND WEELS-HEMPHILL NOVES, INC. V. CSAKY, 427 F. SUPP. 814 (S.D.N.Y. 1977) | 5.8.1 |
| HUMMEL V. EQUITABLE ASSURANCE SOCIETY, 151 F.2D 994 (7TH CIR. 1945) | 3. 17 |
| IN RE FISCHEL, 557 F.2D 209 (9TH CIR. 1977) | 2,11,2.4 |
| IN RE INTERNATIONAL BUSINESS MACHINES CORP., 018 F.2D 923 (2D CIR. 1980 | 3.1.4.2 |
| IN RE UNITED STATES, 565 F.2D 19 (1977) | 2.11.2.4 6.23.3.1 |
| INTERNATIONAL HARVESTER CO. V. OCCUPATIONAL SAFETY AND HEALTH REVIEW COMM., 628 F.2D 982 (7TH CIR. 1980) | 3.17 |
| JONES V. STATE BOARD OF EDUCATION, 397 U.S. 31 (1970) | 5.15 |
| KLEPPE V. SIERRA CLUB, 427 U.S. 390 (1976) | 6.15.2 |
| LE COMPTE V. MR. CHIP. INC. 528 F. 2D 601 (5TH CIR. 1976) | 1.9 |
| LIFE OF THE LAND V. BRINEGAR, 485 F.2D 460 (9TH CIR. 1973), CERT, DENIED, 416 U.S. 961 (1974) | 6.15.1.2 |
| LIMERICK ECOLOGY ACTION V. NRC, 869 F.2D 719 (3RD CIR, 1989) | 5.7 6.15.1.1 |
| MARKET ST. RY. V. RAILROAD COMM'N OF CALIFORNIA, 324 U.S. 548 (1945) | 3.10 |
| MARSHALL V. BARLOW'S, INC., 436 U.S. 307 (1978) | 6.10 |
| MARTIN V. EASTON PUBLISHING CO., 85 F.R.D. 312 (E.D. PA. 19 | 2,11,2.8 |

| CASE LAW INDEX JULY 1992 | PAGE 4 |
|--|--|
| MASSACHUSETTS V. NRC. 924 F.2D 311 (D.C. CIR. 1991) | 2.9.5.4 2.9.5.5 3.1.2 3.1.2.1 4.4.1 4.4.2 6.16.1 |
| MAXWELL V. NLRB, 414 F.2D 477 (6TH CIR. 1969) | 3,17 |
| MCI COMMUNICATIONS CORP. V. AT&T. 85 F.R.D. 28 (N.D. ILL. 1979), AFF'D. 708 F.2D 1081, (71H CIR. 1983) | 3.13.1 |
| MEMO FROM COMMN. TO LBP RE SUA SPONTE ISSUES(6-30-81) | 3.1.2.3 |
| METROPOLITAN EDISON CD. V. PEOPLE AGAINST NUCLEAR ENERGY, 103 S. CT. 1556 (1983) | 1.9 |
| MEYERS V. BETHLEHEM SHIPBUILDING CORP., 303 U.S. 41 (1938) | 5.7.1 |
| MINNESOTA V. NRC. 602 F. 2D 412 (D.C. CIR. 1979) | 5.6 t 6.15.9 6.20.2 6.21.2 |
| N.R.D.C. V. MORTON, 458 F.20 827 (D.C. CIR. 1972) | 6.15 6.15.1.2 6.15.3 |
| N.R.D.C. 1. NRC, 547 F.2D 633 (D.C.CIR. 1976), REV'D ON OTHER GROUNDS, 462 U.S. 87 (1983) | 6.9.1 |
| NAACP V. FPC. 425 U.S. 662 (1976) | 6.21 |
| NATIONAL PARKS AND CONSERVATION ASSOCIATION V. MORTON, 498 F.2D 765 (D.C. CIR. 1974) | 6.23.1 |
| NATURAL RESOURCES DEFENSE COUNCIL V. MORTON, 458 F.2D 827 (D.C. CIR. 1972) | 6.15.1.2 |
| NEW ENGLAND COALITION ON NUCLEAR POLLUTION V. NRC. 582 F. 2D 87 (157 CIR. 1978) | 3.1.5 3.4 3.7.3.2 6.15.3 6.15.4 6.15.6 |
| NEW EPIGLAND COALITION ON NUCLEAR POLLUTION V. NRC. 727 F.2D 1127 (D.C. CIR. 1984). | 6.8 |
| NEW ENGLAND POWER CO. V. NRC, 683 F.2D 12 (157 CIR. 1982) | 1.9 |
| O'RRIEN V. BOARD OF EDUCATION OF CITY SCHOOL DIST OF N.Y. 86 F.R.D. 548 (S.D.N.Y. 1980) | 2.11.2./ |
| DFFICE OF THRIFT SUPERVISION V. DOBBS. 931 F.20 956 (D.C. CIR. 1991) | 2.11.6 |
| OGLESBY V. UNITED STATES DEPARTMENT OF THE ARMY, 920 F.2D 57 (D.C. CIR. 1990) | 6.23.1 |

- - - ·

| CASE LAW INDEX JULY 1992 PA | vGE : | 5 |
|--|---|-------|
| OHIO V. NRC, 814 F.2D 258 (6TH CIR. 1987) | 1.8 2.10 3.14 4.4. 4.4. 5.15 | 2 2 4 |
| OHIO V. NRC, 868 F.2D 810 (6TH CIR. 1989) | 6.24 | . 3 |
| OHIO-SEALY MATTRESS MANUFACTURING CO. V. KAPLAN, 90 F.R.D. 21 (N.D. IL. 1980) | 2.11 | .2.4 |
| PACIFIC COAST EUROPEAN CONFERENCE V. U.S., 350 F.20 197 (9TH CIR.), CERT. DENIED, 382 U.S. 958 (1965) | 6.21 | . 2 |
| PARKLANE HOSIERY CO. V. LEO M. SHORE, 439 U.S. 322 (1979) | 3.17 | |
| PERMIAN BASIN AREA RATE CASES, 390 U.S. 747 (1968) | 5.8. | 1 |
| PESHLAKAI V. DUNCAN, 476 F. SUPP. 1247 (D.D.C. 1979) | 6.15 | 1.2 |
| POLLER V. COLUMBIA BROADCASTING CD., 368 U.S. 464 (1962) | 3.5. | 2 |
| PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMER'.CA V. AEC. 633 F.2D 1011 (7TH CIR. 1976) | 6.16 6.24 | |
| PORTER COUNTY CHT TER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC. V. NRC, 606 F.2D 1363 (D.C. CIR. 1979) | 6.24 | |
| PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE, INC. V. NRC. 606 F.2D 1363 (D.C. CIR. 1979) | 6,24 | . 5 |
| PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION V. FEDERAL LABOR RELATIONS AUTHORITY, 685 F.20 547 (D.C. CIR. 1982 | 6.5. | 1 |
| ROVARIO V. UNITED STATES, 363 U.S. 53 (1957) | | .2.4 |
| RUSSELL V. DEP'T OF THE AIR FORCE, 682 F.2D 1045 (D.C. CIR. 1962) | 2.11 | .2.4 |
| SAFE ENERGY COALITION V. NRC, 866 F.2D 1473 (D.C. CIR. 1989) | 6.24 | . 3 |
| SAN LUIS OBISPO MOTHERS FOR PEACE V. NRC, 751 F.201287 (D.C. CIR. 1984), AFF'D ON REH'G EN BANC, 789 F.20 26 (1986) | . 14 . 4. 4.4. 6.15 6.26 | 1.1 |
| SAN LUIS OBISPO MOTHERS FOR PEACE V. NRC. 799 F.2D 1268 (9TH CIR. 1986) | 5.7. 6.1. | |
| SARTOR V. ARKANSAS NATURAL GAS CORP., 321 U.S. 620 (1954) | 9,5. | 3 |
| SCM CORP. V. XEROX CORP., 70 F.R.D. 508 (D. CONN.), INTER LOCUTORY APPEAL DISMISSED, 534 F.20 1031 (20 CIR. 1976) | 2.11 | .2.4 |
| SEACOAST ANTI-POLLUTION LEAGUE V. NRC, 690 F.2D 1025 (D.C. CIR. 1985) | 5.7. | Ť |
| SEC V. CHENERY CORP., 318 U.S. 80 (1943) | 5.16 | . 1 |

| CASE LAW INDEX JULY 1992 | PAGE 6 |
|---|--|
| SEC V. SLOAN, 436 U.S. 103 (1978) | 3.1.2.2 |
| SEC. AND EXCH. COMM'N V. SPENCE AND GREEN CHEMICAL CO. 612 F.20 896 (5TH CIR. | (980) 3.5.2.1 |
| SHOREHAM-WADING RIVER CENTRAL SCHOOL DISTRICT V. NRC. 931 F. 2D 102 (D.C. CIR. | |
| SIEGEL V. ATOMIC ENERGY COMMISSION, 400 F.20 776 (*.C. CIR. 1968) | 3.1.2.7 |
| SIERRA CLUB V. MORTON, 405 U.S. 727 (1972) | 2.9.4.1.1 2.9.4.1.2 |
| SIERRA CLUB V. NRC. 862 F. 2D 222 (9TH CIF. 1988) | 2.9.5 2.9.5.1 2.9.5.7 3.1.2.6 5.10.3 5.4 5.5.1 6.15.7 |
| SMITH V. DANYO, 585 F.2D 83 (3D CIR. 1978) | 3.1.4.1 |
| SMITH V. FTC, 403 F. SUPP. 1000 (D. DEL. 1975) | 2.11.2.4 |
| STATE OF ALASKA V. ANDRUS, 580 F.2D 465 (D.C. CIR. 1978) | 6.15 |
| STATE OF WISCONSIN V. FPC. 210 F.20 183 (1952). CERT. DEN. 345 U.S. 934 (1953) | 3.10 |
| SWAIN V. BRINEGAR, 542 F.20 364 (7TH CIR. 1976) | 6.15 P |
| TOWNSHIP OF LOWER ALLOWAYS CREEK V. PUBLIC SERVICE ELECTRIC CO., 687 F.20 732 | (3D CIR.1982). 5.10.3 |
| U.S. V. BERRIGAN, 482 F.2D 171 (3RD CIR. 1973) | 2.11.2.4 |
| U.S. V. COMLEY, 890 F.2D 539 (1ST CIR, 1989) | 2.11.5 |
| U.S. V. NIXON, 418 U.S. 683 (1974) | 2.11.2.4 |
| U.S. V. RADIO CORP. OF AMERICA, 358 U.S. 334 (1959) | 3.17 |
| U.S. V. UTAH CONSTRUCTION CD., 384 U.S. 394 (1966) | 3.17 |
| UNION OF CONCERNED SCIENTISTS V. AEC. 499 F.2D 1069 (D.C. CIR. 1974) | 3,1,1 3,11,1,1 3,16 4,2 6,1,3,1 6,15,6 6,21,2 |
| UNION OF CONCERNED SCIENTISTS V. NRC, 735 F. 2D 1437 (D.C. CIR. 1984) | 3,3,1,1 |
| UNITED MINE WORKERS OF AMERICA, DIST. 22 V. RONCOD. 314 F.2D 186 (10 CIR. 1966) | 3.5.3 |
| 그 집에 가는 사람들이 집에 가장 하는 사람들이 가득하는 것이 되는 것이 되었다. | |

| CASE LAW INDEX JULY 1992 |
|--|
| UNITED STATES V. DAVIS, 636 F.2D 1028 (5TH CIR. 1981) |
| UNITED STATES V. EL PASO CO., NO. 81-2484 (5TH CIR. AUGUST 13 1982) |
| UNITED STATES V. LARDE, 673 F. SUPP. 604 (D.D.C. 1987) |
| UNITED STATES V. GRINNELL CORP., 384 U.S. 563 (1966) |
| UNITED STATES V. MGRGAN, 313 U.S. 409 (1941) |
| UNITED STATES V. MUNSINGWEAR, INC., 340 U.S. 36 (1950) |
| UNITED STATES V. PIERCE AUTO FREIGHT LINES, 327 U.S. 515 (1945) |
| UNITED STATES V. STORER BROADCASTING CO., 351 U.S. 192 (1955) |
| UNITED STATES V. UNITED SHOE MACHINERY CORP., 89 F. SUPP. 357 (D.MASS. 1950) |
| UPJOHN CO. V. UNITED STATES, 449 F.S. 383 (1981) |
| V. E. B. CARL ZEISS, JENA V. CLARK, 384 F.2D 979 (D.C. CIR. CERT. DEN. 389 U.S. 952 (1967) |
| VEGA V. BLOOMSBURGH, 427 F. SUPP. 593 (D. MASS. 1977) |
| VERMONT YANKEE NUCLEAR POWER CORP. V. NRDC. 435 U.S. 519 (1978) |
| |

PAGE 7

2.11.2.4 2.11.2. 2.11.2.4 3.1.4.2 2.11.2.4 2.9.3.3.5

3.10 6.21 2.11.2.4 2.11.2.4 2.11.4 2.11.4

3.7.2 3.7.3.2 4.4.2 5.11.1 6.15.1.1 6.15.1.1 6.15.1.2 1.5.2 5.8.1 6.15.1.1 2.9.4.1.1

5.8.1 3.1.2.2 6.15 3.7.2

| VIRGINIA ELECTIRC AND POWER CO. V. NRC, 571 F.2D 1289 (4TH CIR. 1978) |
|--|
| VIRGINIA PETROLEUM JOBBERS ASS'N V. FPC. 259 F.20 921 (D.C. CIR. 1958) |
| WARM SPRING TASK FORCE V. GRIBBLE, 621 F.2D 1017 (9TH CIR. 1981) |
| WARTH V. SELDIN, 422 U.S. 490 (1975) |

| WASHINGTON METROPOLITAN AREA TRANSIT COMM. V. HOLIDAY TOURS, 559 F.2D 841 (D.C. CIR. 1977) |
|--|
| WEINSTEIN V. BRADFORD, 423 U.S. 147 (1975) |
| WESTERN DIL AND GAS ASSOCIATION V. ALASKA, 439 U.S. 922 (1978) |
| YORK COMMITTEE FOR A SAFE ENVIRONMENT V. NRC, 527 F. 2D 812 (D.C. CIR. 1975) |

Other Legal Citations Index

OTHER LEGAL CITATIONS INDEX

| Code of Judicial Conduct Canon 2B | 3.1.4.2 |
|---|----------|
| Code of Judicial Conduct Canon 3A(6) | 3.1.4.2 |
| Code of Professional Responsibility, DR 5-101(B)(4) | 6.4.2.3 |
| Code of Professional Responsibility, DR 5-102(A) | 6.4.2.3 |
| Code of Professional Responsibility, DR 5-102(B) | 6.4.2.3 |
| Code of Professional Responsibility, DR 7-104 | 2.11.2.4 |
| K. Davis, Administrative Law Treatise 15.08 | 3.10 |
| 2 Davis, Administrative Law Treatise 18.12 | 3,17 |
| 3 Davis, Administrative Law Treatise 22.08 | 2.9.4.1. |
| District of Columbia Court of Appeals Rule 13(d) | 5.19.2 |
| 35 <u>Fed. Reg.</u> 19122 (Dec. 17, 1970) | 6.10.1.1 |
| 36 <u>Fed. Reg.</u> 16894 (Aug. 26, 1971) | 6.10.1.1 |
| 41 <u>Fed. Reg.</u> 34707 (Aug. 16, 1976) | 3.7.3.3 |
| 43 Fed. Reg. 17798 (April 26, 1978) | 2.9.5 |
| 43 Fed. Reg. 28058 (June 28, 1978) | 6.5.3.1 |
| 45 <u>Fed. Reg.</u> 3594 (1980) | 6.4.2 |
| 45 Fed. Reg. 40101 (June 13, 1980) | 6.15.7 |
| 45 Fed. Reg. 68919 (Oct. 17, 1980) | 3.5.3 |
| 46 Fed. Reg. 30328 (June 8, 1981) | 3.5.2.1 |
| 46 Fed. Reg. 47764 (Sept. 30, 1981) | 4.3 |
| 46 Fed. Req. 47906 (Sept. 30, 1981) | 5.15.1 |
| 47 Fed. Reg. 13750 (March 31, 1982) | 6.8 |
| 48 Fed. Reg. 36358 (Aug. 10, 1983) | 5.18 |
| 49 Fed. Rey. 9363 (March 12, 1984) | 6.15.6 |
| 49 <u>Fed. Reg.</u> 35747 (Sept. 12, 1984) | . 6.8 |

OTHER LEGAL CITATIONS INDEX

| 49 | Fed. Reg. | 36032 | (Sept. 13 | 3, 1984) | * * * * * | | | | ***** | 4.4.2 6.5.4.1 |
|----|-------------|--------|------------|----------|-----------|--------|------|------|---------|---|
| 49 | Fed. Reg. | 36631 | (Sept. 19 | 9, 1984) | | | | | | 6.8 |
| 50 | Fed. Req. | 32144 | (Aug. 8, | 1985) . | | | | | | 6.15.7 |
| 51 | Fed. Reg. | 7744 | (March 6, | 1986) . | | | | | | 5.7.1 |
| 53 | Fed. Reg. | 24018 | (June 27 | 1988) | | | | | | 6.8 |
| 54 | Fed. Reg. | 7756 | (Feb. 23, | 1989) . | ***** | | **** | | ****** | 4.3 |
| 54 | Fed. Req. | 8269 | (reb. 28, | 1989) . | | | **** | | ***** | 3.1.2.7 6.13 |
| 54 | Fed. Req. | 14925 | (April 1 | 4, 1989) | *** | | | | | 6.29.3 |
| 54 | Fed. Reg. | 27864 | (July 3, | 1989) . | ***** | | | | ****** | 6.15 6.15.1 |
| 54 | Fed. Reg. | 33168 | (Aug. 11 | , 1989) | | ***** | | | | 2.9.5 2.9.5.1 2.9.5.3 2.9.5.4 2.11.2.2 2.11.4 3.5.2.1 3.13 4.2.1 5.5 |
| 54 | Fed. Reg. | 39728 | (Sept. 2 | 8, 1989) | 1 20 141 | | | | | 2.9.5 2.9.5.1 2.9.5.3 2.9.5.4 |
| 55 | Fed. Reg. | 42947 | (Oct. 24 | , 1990) | | | | | prel | . page i |
| 56 | Fed. Reg. | 29403 | (June 27 | , 1991) | | | | | prel | . page i |
| 56 | Fed. Reg. | 40664 | (Aug. 15 | , 1991) | | | | | | 6.24 |
| 56 | Fed. Reg. | 64943 | B (Dec. 13 | , 1991) | | | | | | 1.8 |
| 57 | Fed. Reg. | 20194 | (May 12, | 1992) | | | | | | 6.24 |
| Fe | ederal Rule | s of (| Civil Proc | edure, | Rule 26 | 5 | | | | 2.11.2 3.12.4.1 |
| Fe | ederal Rule | s of (| Civil Prod | edure, | Rule 2 | 6(b) . | | | | 6.3.3.1 |
| JU | JLY 1992 | | | | | | | OTHE | R LEGAL | CITATIONS : |

OTHER LEGAL CITATIONS INDEX

| Federal Rules of Civil Procedure, | Rule | 26(b)(4) | | | 2.11.2 |
|-----------------------------------|-------|---------------|----------|------|---|
| Federal Rules of Civil Procedure, | Rule | 26(b)(4)(B) | | | 3.1.2.7 |
| Federal Rules of Civil Procedure, | Rule | 33 | | | 2.11.2.2 |
| Federal Rules of Civil Procedure, | Rule | 41(a)(1),(2) | | | 1.9 |
| Federal Rules of Civil Procedure, | Rule | 52(a) | | | 5.6.3 |
| Federal Rules of Civil Procedure, | Rule | 56 | | | 3.5 3.5.2 3.5.3 3.5.4 5.8.5 |
| Federal Rules of Civil Procedure, | Rule | 56(f) | | | 3.5.2.1 |
| Fedrral Rules of Evidence, Rule 4 | 08 | | | | 2.11.2 |
| Federal Rules of Evidence, Rule 7 | 02 | | ****** | | 3.11.1.1 3.12.4 |
| Federal Rules of Evidence, Rule 9 | 01(a) | ***** | | | 3.11.1.1 |
| Federal Rules of Evidence, Rule 9 | 02 | | | | 3.11.1.6 |
| Manual for Complex Litigation, Pa | rt 1, | 4.30 | ***** | | 6.3.3.1 |
| Model Rules of Professional Condu | ct Ru | le 1.7 (1983) | Triana. | | 2.11.2.4 |
| Model Rules of Professional Condu | ct Ru | le 3.3(a)(3) | (1983) . | | 2.11.2.4 |
| Model Rules of Professional Condu | ct Ru | le 3.7(a)(3) | (1983) . | | 6.4.2.3 |
| 1B J. Moore, Moore's Federal Prac | tice | para. 0.402[2 | 1 | | 6.18 |
| 4A J. Moore, Moore's Federal Prac | tice | § 33.25(1) (2 | nd ed. 1 | 981) | 2.11.2.8 2.11.4 |
| 5 J. Moore, Moore's Federal Pract | ice § | 41.05 (2nd e | d. 1981) | | 1.9 |
| 6 J. Moore, Moore's Federal Pract | ice § | 56.15(3) (2n | d ed. 19 | 66) | 3.5.3 |
| NUREG-75/087, § 2.23 | | | | | 6.16.4 |
| | | | | | |

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