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INDEXES TO NUCLEAR REGULATORY COMMISSION ISSUANCES

July - December 1985



U. S. NUCLEAR REGULATORY COMMISSION

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Index 2

**INDEXES TO
NUCLEAR REGULATORY
COMMISSION ISSUANCES**

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U. S. NUCLEAR REGULATORY COMMISSION

Foreword

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

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

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

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

1. Case Name Index

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

2. Digests and Headers

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

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

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

3. Legal Citations Index

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

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

4. Subject Index

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

5. Facility Index

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

CASE NAME INDEX

ARIZONA PUBLIC SERVICE COMPANY, et al.
OPERATING LICENSE; ORDER DISMISSING PROCEEDING; Docket Nos. STN 50-529-OL, STN 50-530-OL (ASLBP No. 80-447-01-OL); LBP-85-26, 22 NRC 118 (1985)
OPERATING LICENSE AMENDMENT; ORDER; Docket No. STN 50-528 (Application in Respect of a Sale and Leaseback Financing Transaction by Public Service Company of New Mexico); CLI-85-17, 22 NRC 875 (1985)
REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket No. 50-528; DD-85-12, 22 NRC 449 (1985); DD-85-15, 22 NRC 643 (1985)

BOSTON EDISON COMPANY
OPERATING LICENSE AMENDMENT; DECISION; Docket No. 50-293-OLA; ALAB-816, 22 NRC 461 (1985)
OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER; Docket No. 50-293-OLA (ASLBP No. 85-510-01-LA); LBP-85-24, 22 NRC 97 (1985)

CAROLINA POWER & LIGHT COMPANY and NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY
OPERATING LICENSE; PARTIAL INITIAL DECISION ON EMERGENCY PLANNING AND SAFETY CONTENTIONS; Docket No. 50-400-OL (ASLBP No. 82-472-03-OL); LBP-85-49, 22 NRC 899 (1985)
OPERATING LICENSE; PARTIAL INITIAL DECISION ON SAFETY CONTENTIONS; Docket No. 50-400-OL (ASLBP No. 82-472-03-OL); LBP-85-28, 22 NRC 232 (1985)
OPERATING LICENSE; REASONS SUPPORTING SUMMARY DISPOSITION OF EMERGENCY PLANNING CONTENTIONS; Docket No. 50-400-OL (ASLBP No. 82-472-03-OL); LBP-85-27A, 22 NRC 207 (1985)

CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.
OPERATING LICENSE; CONCLUDING PARTIAL INITIAL DECISION ON EMERGENCY PLANNING, HYDROGEN CONTROL AND DIESEL GENERATORS; Docket Nos. 50-440-OL, 50-441-OL (ASLBP No. 81-457-04-OL); LBP-85-35, 22 NRC 514 (1985)
OPERATING LICENSE; MEMORANDUM AND ORDER; Docket Nos. 50-440-OL, 50-441-OL; ALAB-820, 22 NRC 743 (1985); LBP-85-33, 22 NRC 442 (1985)
REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket Nos. 50-440, 50-441; DD-85-14, 22 NRC 635 (1985)

COMMONWEALTH EDISON COMPANY
OPERATING LICENSE; MEMORANDUM AND ORDER; Docket Nos. 50-456-OL, 50-457-OL; ALAB-817, 22 NRC 470 (1985); LBP-85-40, 22 NRC 759 (1985)
OPERATING LICENSE; MEMORANDUM DETAILING RATIONALE IN SUPPORT OF JUNE 21, 1985 ORDER ON ADMISSIBILITY OF NEINER FARMS CONTENTION 4 (RAILROAD EXPLOSION); Docket Nos. 50-456, 50-457; LBP-85-27, 22 NRC 126 (1985)
OPERATING LICENSE; MEMORANDUM OF RATIONALE FOR SUMMARY DISPOSITION OF NEINER FARMS CONTENTION 1; Docket Nos. 50-456, 50-457; LBP-85-43, 22 NRC 805 (1985)

COMMONWEALTH EDISON COMPANY AND ALL LIGHT-WATER REACTORS
IMMEDIATE ACTION REQUEST; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket No. 50-295; DD-85-10, 22 NRC 143 (1985)

CONNECTICUT YANKEE ATOMIC POWER COMPANY
REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket No. 50-213; DD-85-20, 22 NRC 971 (1985)

CASE NAME INDEX

CASE NAME INDEX

DUKE POWER COMPANY, et al.
OPERATING LICENSE; DECISION; Docket Nos. 50-413-OL, 50-414-OL; ALAB-813, 22 NRC 59 (1985); ALAB-825, 22 NRC 785 (1985)

FLORIDA POWER AND LIGHT COMPANY
OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER; Docket Nos. 50-250-OLA-2, 50-251-OLA-2 (ASLBP No. 84-504-07-LA) (Spent Fuel Pool Expansion); LBP-85-36, 22 NRC 590 (1985)

OPERATING LICENSE AMENDMENT; ORDER; Docket Nos. 50-250-OLA-1, 50-251-OLA-1 (ASLBP No. 84-496-03-LA) (Vessel Flux Reduction); LBP-85-29, 22 NRC 300 (1985)

GENERAL ELECTRIC COMPANY
SPECIAL PROCEEDING; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket Nos. 70-1308, 72-1-SP; DD-85-16, 22 NRC 851 (1985)

GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION
REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket No. 50-289; DD-85-20, 22 NRC 971 (1985)

SPECIAL PROCEEDING; ORDER; Docket Nos. 50-289-RA, 50-289-EW; CLI-85-19, 22 NRC 886 (1985)

HOUSTON LIGHTING AND POWER COMPANY, et al.
OPERATING LICENSE; MEMORANDUM AND ORDER; Docket Nos. STN 50-498-OL, STN 50-499-OL (ASLBP No. 79-421-07-OL); LBP-85-42, 22 NRC 795 (1985); LBP-85-45, 22 NRC 819 (1985)

ILLINOIS POWER COMPANY, et al.
OPERATING LICENSE; MEMORANDUM AND ORDER; Docket No. 50-462-OL; LBP-85-22, 22 NRC 89 (1985)

INQUIRY INTO THREE MILE ISLAND UNIT 2 LEAK RATE DATA FALSIFICATION
PROCEDURAL RULING; ORDER AND NOTICE OF HEARING; Docket No. LRP; CLI-85-18, 22 NRC 877 (1985)

JOHN L. NANTZ
RULEMAKING DENIAL; DENIAL OF PETITION FOR RULEMAKING; Docket No. PRM-50-35; DPRM-85-3, 22 NRC 173 (1985)

KERR-McGEE CHEMICAL CORPORATION
MATERIALS LICENSE; MEMORANDUM AND ORDER; Docket No. 40-2061-ML (ASLBP No. 83-495-01-ML); LBP-85-46, 22 NRC 830 (1985)

MATERIALS LICENSE; MEMORANDUM AND ORDER; Docket Nos. 40-2061-ML, 40-2061-SC (ASLBP Nos. 83-495-01-ML, 84-502-01-SC); LBP-85-38, 22 NRC 604 (1985)

SHOW CAUSE; MEMORANDUM AND ORDER; Docket No. 40-2061-SC (ASLBP No. 84-502-01-SC); LBP-85-48, 22 NRC 843 (1985)

LONG ISLAND LIGHTING COMPANY
OPERATING LICENSE; CONCLUDING PARTIAL INITIAL DECISION ON EMERGENCY PLANNING; Docket No. 50-322-OL-3 (Emergency Planning); LBP-85-31, 22 NRC 410 (1985)

LONG ISLAND LIGHTING COMPANY
OPERATING LICENSE; DECISION; Docket No. 50-322-OL; ALAB-818, 22 NRC 651 (1985); ALAB-824, 22 NRC 776 (1985)

LOUISIANA POWER & LIGHT COMPANY
OPERATING LICENSE; DECISION; Docket No. 50-382-OL; ALAB-812, 22 NRC 5 (1985)

MAINE YANKEE ATOMIC POWER COMPANY
REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket No. 50-309; DD-85-17, 22 NRC 859 (1985)

METROPOLITAN EDISON COMPANY, et al.
OPERATING LICENSE AMENDMENT; ORDER; Docket No. 50-320-OLA (ASLBP No. 80-442-04-LA); LBP-85-44, 22 NRC 816 (1985)

SPECIAL PROCEEDING; DECISION; Docket No. 50-289-SP (Management Phase); ALAB-826, 22 NRC 893 (1985)

SPECIAL PROCEEDING; MEMORANDUM AND ORDER; Docket No. 50-289-SP; ALAB-815, 22 NRC 198 (1985); ALAB-821, 22 NRC 750 (1985)

CASE NAME INDEX

SPECIAL PROCEEDING, PARTIAL INITIAL DECISION ON THE REMANDED ISSUE OF THE DIECKAMP MAILGRAM. Docket No. 50-289-SP (ASLBP No. 79-429-09-SP) (Restart Remand on Management). LBP-85-30, 22 NRC 332 (1985)

PACIFIC GAS AND ELECTRIC COMPANY
OPERATING LICENSE, MEMORANDUM AND ORDER. Docket Nos. 50-275-OL, 50-323-OL, CLI-85-14, 22 NRC 177 (1985)

PHILADELPHIA ELECTRIC COMPANY
IMMEDIATE ACTION REQUEST, DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206. Docket Nos. 50-352, 50-353, DD-85-11, 22 NRC 149 (1985)
OPERATING LICENSE, DECISION. Docket Nos. 50-352-OL, 50-353-OL, ALAB-819, 22 NRC 681 (1985)
OPERATING LICENSE, FOURTH PARTIAL INITIAL DECISION. Docket Nos. 50-352-OL, 50-353-OL (ASLBP No. 81-465-07-OL). LBP-85-25, 22 NRC 101 (1985)
OPERATING LICENSE, MEMORANDUM. Docket Nos. 50-352-OL, 50-353-OL, CLI-85-13, 22 NRC 1 (1985)
OPERATING LICENSE, MEMORANDUM AND ORDER. Docket Nos. 50-352-OL, 50-353-OL, ALAB-814, 22 NRC 191 (1985); ALAB-823, 22 NRC 773 (1985); CLI-85-15, 22 NRC 184 (1985)
OPERATING LICENSE, ORDER. Docket Nos. 50-352-OL, 50-353-OL, CLI-85-16, 22 NRC 459 (1985)
REQUEST FOR ACTION, DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206. Docket Nos. 50-352, 50-353, DD-85-18, 22 NRC 870 (1985)

REICH GEO-PHYSICAL, INC.
CIVIL PENALTY, INITIAL DECISION. Docket No. 30-14821 (ASLBP No. 85-508-01-OT) (License Nos. 25-18304-01, EA-84-78). ALJ-85-1, 22 NRC 941 (1985)
CIVIL PENALTY, SUPPLEMENT TO INITIAL DECISION. Docket No. 30-14821 (ASLBP No. 85-508-01-OT) (License Nos. 25-18304-01, EA-84-78). ALJ-85-2, 22 NRC 968 (1985)

SOUTHERN CALIFORNIA EDISON COMPANY
REQUEST FOR ACTION, DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206. Docket No. 50-206, DD-85-20, 22 NRC 971 (1985)

TEXAS UTILITIES ELECTRIC COMPANY, et al.
OPERATING LICENSE, MEMORANDUM. Docket Nos. 50-445-OL, 50-446-OL (ASLBP No. 79-430-06-OL). LBP-85-37, 22 NRC 601 (1985)
OPERATING LICENSE, MEMORANDUM AND ORDER. Docket Nos. 50-445-OL&OL-2, 50-446-OL&OL-2 (ASLBP No. 79-430-06-OL). LBP-85-32, 22 NRC 434 (1985); LBP-85-39, 22 NRC 755 (1985); LBP-85-41, 22 NRC 765 (1985)
OPERATING LICENSE, MEMORANDUM AND ORDER. Docket Nos. 50-445-OL, 50-446-OL (ASLBP No. 79-430-06-OL). LBP-85-47, 22 NRC 835 (1985)

THE DETROIT EDISON COMPANY, et al.
REQUEST FOR ACTION, DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206. Docket No. 50-341, DD-85-13, 22 NRC 454 (1985)

UNIVERSITY OF LOWELL
SPECIAL PROCEEDING, MEMORANDUM AND ORDER. Docket No. 50-223-SP (ASLBP No. 85-509-02-SP). LBP-85-23, 22 NRC 95 (1985)

VIRGINIA ELECTRIC AND POWER COMPANY
OPERATING LICENSE AMENDMENT, INITIAL DECISION. Docket Nos. 50-338-OLA-1, 50-339-OLA-1 (ASLBP No. 83-481-01-LA). LBP-85-34, 22 NRC 481 (1985)
OPERATING LICENSE AMENDMENT, MEMORANDUM AND ORDER. Docket Nos. 50-338-OLA-1, 50-339-OLA-1, ALAB-822, 22 NRC 771 (1985)

WISCONSIN PUBLIC SERVICE CORPORATION
REQUEST FOR ACTION, DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206. Docket No. 50-305, DD-85-20, 22 NRC 971 (1985)

DIGESTS
ISSUANCES OF THE NUCLEAR REGULATORY COMMISSION

CLI-85-13 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL; OPERATING LICENSE; July 24, 1985; MEMORANDUM

A The Commission reviewed the Limerick Ecology Action's comments on effectiveness of the Second and Third Partial Initial Decisions of the Licensing Board (LBP-84-31, 20 NRC 446 (1984), and LBP-85-14, 21 NRC 1219 (1985)). These comments addressed delegation of issues to the Staff through license conditions, need for local organizations to approve their emergency plans, adequacy of surveys of transport-dependent individuals, possible measures to mitigate severe accidents, and procedural rulings. The Commission also reviewed the Licensing Board decisions sua sponte. The Commission determined that neither the comments nor the decisions warranted staying the effectiveness of the decisions. This Memorandum did not affect the Commission's prior determination that questions involving hearing rights of the inmates at the State Correctional Institution at Graterford, Pennsylvania, warrant staying effectiveness of the authorization for issuance of a full-power operating license.

CLI-85-14 PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275-OL, 50-323-OL; OPERATING LICENSE; August 1, 1985; MEMORANDUM AND ORDER

A The Commission authorizes the issuance of a full-power operating license for the Diablo Canyon Nuclear Power Plant Unit 2 upon finding that all matters have been adequately resolved and denies the Joint Intervenors' request to stay the effectiveness of such authorization for failure to meet the stay criteria in 10 C.F.R. § 2.788(e).

CLI-85-15 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL; OPERATING LICENSE; August 8, 1985; MEMORANDUM AND ORDER

A The Commission addressed all the comments raised by the Graterford inmates and found that neither these comments nor the Staff briefing raised any issues which warranted staying effectiveness of the Licensing Board's authorization for issuance of a full-power license for Limerick Generating Station, Unit 1. Accordingly, the Commission made the authorization immediately effective.

CLI-85-16 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL; OPERATING LICENSE; September 19, 1985; ORDER

A By completing its consideration of emergency planning issues raised by the Graterford inmates, the Licensing Board has mooted the need for the exemption to 10 C.F.R. § 50.47(a) and (b) which it had granted Philadelphia Electric Company in May 1985. The Commission has therefore vacated, on grounds of mootness, ALAB-809 and the underlying Licensing Board decisions which addressed the exemption issue.

CLI-85-17 ARIZONA PUBLIC SERVICE COMPANY, et al. (Palo Verde Nuclear Generating Station, Unit 1), Docket No. STN 50-528 (Application in Respect of a Sale and Leaseback Financing Transaction by Public Service Company of New Mexico); OPERATING LICENSE AMENDMENT; December 12, 1985; ORDER

A In this matter the Commission has determined that in the totality of the circumstances, the proposed sale and leaseback financial transaction with the license amendment recommended by the Staff and subject to specified conditions is acceptable under the Atomic Energy Act and the Commission regulations.

B The lessor and anyone else who may acquire an interest under the sale and leaseback financing transaction are prohibited from exercising any control over the licensees.

DIGESTS
ISSUANCES OF THE NUCLEAR REGULATORY COMMISSION

DIGESTS
ISSUANCES OF THE NUCLEAR REGULATORY COMMISSION

- C The limitations in 10 C.F.R. § 50.81, "Creditor Regulations," are applicable to the named lessor in the sale and leaseback financing transaction and any successor in interest to that lessor.
- CLI-85-18 INQUIRY INTO THREE MILE ISLAND UNIT 2 LEAK RATE DATA FALSIFICATION, Docket No. LRP; PROCEDURAL RULING; December 18, 1985; ORDER AND NOTICE OF HEARING
- A The Commission establishes the procedures to govern a legislative-format hearing (ordered in CLI-85-2), to develop sufficient information for the identification of persons involved in and the facts surrounding the reactor coolant system leak rate data falsifications at Three Mile Island Unit 2 prior to the March 28, 1979 accident. The Commission authorizes the appointment of a Presiding Board to rule on petitions to intervene, to conduct prehearing procedures and the hearing, and to issue a recommended decision. After issuance of the Presiding Board's findings, the NRC Staff is to recommend to the Commission what action, if any, should be taken against individuals found to have engaged in wrongdoing. The Commission will then address whether to initiate enforcement proceedings against individuals and whether employment restraints imposed on certain individuals in the Three Mile Island, Unit 1 restart proceeding should be lifted.
- CLI-85-19 GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Three Mile Island Nuclear Station, Unit 1), Docket Nos. 50-289-RA, 50-289-EW; SPECIAL PROCEEDING; December 19, 1985; ORDER
- A The Commission establishes procedures for determining whether to lift a condition imposed in the TMI-1 restart proceeding on GPU Nuclear Corporation. The condition requires GPU Nuclear to notify the Commission before assigning Robert Arnold or Edward Wallace to certain positions. The Commission solicits views from the public and the NRC Staff regarding whether Messrs. Arnold or Wallace willfully, knowingly, or with a reckless disregard for the truth made a material false statement to the NRC. If the Commission determines that there is a reasonable basis for answering that question affirmatively, the Commission will consider initiating an adjudicatory hearing to resolve whether to retain the notification requirement. If the Commission reaches a contrary determination, the Commission intends to lift the notification requirement.

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

ALAB-812 LOUISIANA POWER & LIGHT COMPANY (Waterford Steam Electric Station, Unit 3), Docket No. 50-382-OL; OPERATING LICENSE; July 11, 1985; DECISION

- A The Appeal Board denies most of Joint Intervenors' motion to reopen the record in this operating license proceeding on issues of quality assurance and management character and competence and refers the remainder to the Commission, insofar as it raises issues that may relate to matters under investigation by NRC's Office of Investigations. The Appeal Board also denies as moot Joint Intervenors' motion for a protective order.
- B A successful motion to reopen the record of an adjudicatory proceeding must be timely, address a significant safety or environmental issue, and show that a different result might have been reached had the newly proffered material been considered initially. Bare allegations or the simple submission of new contentions is not enough. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089 (1984). See also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981).
- C At a minimum, 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 C.F.R. § 2.714(b) for admissible contentions. It must be tantamount to evidence and possess the attributes set forth in 10 C.F.R. § 2.743(c) defining admissible evidence for adjudicatory proceedings. Specifically, the new evidence supporting the motion must be relevant, material and reliable. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366-67, *aff'd sub nom. San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984), vacated in part and reh'g en banc granted on other grounds, 760 F.2d 1320 (1985). See also *id.* at 1367 n.18.
- D A motion to reopen that raises previously uncontested issues must also satisfy, in addition to other requirements, the standards for admitting late-filed contentions embodied in 10 C.F.R. § 2.714(a)(1). Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1714-15 (1982).
- E The burden of satisfying all of the requirements of a motion to reopen that raises previously uncontested issues is a heavy one. See Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978). See also Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-85-7, 21 NRC 1104, 1106 (1985).
- F Neither the Atomic Energy Act of 1954, as amended, nor the Commission's implementing regulations mandate a demonstration of error-free construction. What they require is simply a finding of reasonable assurance that, as built, the facility can and will be operated without endangering the public health and safety. 42 U.S.C. §§ 2133(d), 2232(a); 10 C.F.R. § 50.57(a)(3)(i). See also Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983).
- G In examining claims of quality assurance deficiencies, one must look to the implication of those deficiencies in terms of safe plant operation. To determine if the requisite reasonable assurance exists, two questions must be addressed: (1) whether all ascertained construction errors have been cured, and (2) even if so, whether there has nonetheless been so pervasive a breakdown in the quality assurance procedures as to raise legitimate doubt about the overall safety of the facility. *Ibid.*
- H The considerations that must be addressed in examining claims of quality assurance deficiencies — i.e., whether all ascertained construction errors have been cured, and if so, whether

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

there has nonetheless been so pervasive a breakdown in the quality assurance procedures as to raise legitimate doubt about the overall safety of the facility — are also pertinent to the disposition of a motion to reopen on quality assurance. See Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1209-11 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344-45 (1983), *aff'd sub nom. San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984), vacated in part and *reh'g en banc* granted on other grounds, 760 F.2d 1320 (1985); Diablo Canyon, ALAB-775, 19 NRC at 1367.

- I The importance of "managerial attitude" to an applicant's quality assurance program — i.e., the willingness of company officials to implement the program to the fullest — has long been recognized. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-106, 6 AEC 182, 184 (1973).
- J Remedial measures directed to construction and related quality assurance deficiencies may be considered as part of the appraisal of an applicant's character and competence. Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 371-74 (1985).
- K The untimely listing of historical examples of alleged construction quality assurance deficiencies is insufficient to warrant reopening of the record on the issue of management character and competence. Diablo Canyon, ALAB-775, 19 NRC at 1369-70.
- L Documents or portions of documents generated by an applicant or the staff in connection with the construction and regulatory oversight of a facility are acceptable evidence in support of a motion to reopen. Diablo Canyon, CLI-81-5, 13 NRC at 363.
- M The NRC relies upon an applicant's quality assurance program, and its implementation, to ensure that a nuclear power plant and its component parts are designed to acceptable criteria and standards, and that the plant and its components are constructed or fabricated in accordance with their design. See 35 Fed. Reg. 10,498 (1970); 10 C.F.R. Part 50, Appendix B.
- N Delegation of quality assurance activities is acceptable under the NRC's regulations, so long as an applicant bears the ultimate responsibility for quality assurance performance and is able to assure itself that its delegate is performing adequately. 10 C.F.R. Part 50, Appendix B, Criterion I, Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1598 (1984).
- O Serving up exhibits in support of a motion to reopen without citation to pertinent portions or an explanation of the purpose of the exhibits contributes nothing of value to a proceeding.
- P Although audits are an important element of an applicant's overall program and are required by 10 C.F.R. Part 50, Appendix B, Criterion XVIII, they provide but a third level of assurance. The principal levels of assurance are provided by, first, quality craftsmanship and, second, quality inspections.
- Q Proper dispositioning of documents generated in a quality assurance program to identify and record discrepant or changed conditions is a vital part of a quality assurance program, because it is through this process that the suspect condition is eventually corrected or, in some cases, judged by a qualified person to be acceptable in spite of the discrepancy. See 10 C.F.R. Part 50, Appendix B, Criteria XV, XVI. In addition, certain of these documents must be evaluated for reportability to the Commission under 10 C.F.R. § 50.55(e) and 10 C.F.R. Part 21.
- R Lengthy discussion of charges devoid of merit is unnecessary. See *San Luis Obispo Mothers for Peace*, 751 F.2d at 1320-21.
- S Exhibits that are unintelligible, are submitted without citation to pertinent portions, are out of date, have no apparent relation to a specific charge, and generally do not support the point for which they are offered, do not constitute the "relevant, material and reliable" evidence required to support a motion to reopen. Diablo Canyon, ALAB-775, 19 NRC at 1366-67.
- T A draft is a working document and it is entirely reasonable that it will go through several revisions before it appears in final form and presumably reflects the actual, intended position of the preparer. As such, it is not a particularly useful item on which to rely in support of a motion to reopen.
- U A board may not rely upon *ex parte* information, presented in camera by the Office of Investigations, in making licensing decisions. See Statement of Policy, Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36,032, 36,033 (1984).

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

- V The NRC's dependence on a licensee for accurate and timely information about its facility makes candor an especially important element of management character. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1208 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). See also *id.*, CLI-85-9, 21 NRC 1118, 1136-37 (1985). South Texas, 21 NRC at 371 (nexus of particular character trait to particular performance standards contemplated by Atomic Energy Act and NRC regulations is required).
- W Evidence consisting of the views of an individual submitter in affidavit form in support of a motion to reopen should be submitted in an affidavit by that individual and not by counsel. Diablo Canyon, ALAB-775, 19 NRC at 1367 n.18.
- X Because the Commission must necessarily depend heavily on a permittee or licensee to report important information and to assume a role of at least partial self-policing, it is essential that the motivation to discover, analyze, and correct potentially safety-significant problems originate with plant management.
- Y It is entirely appropriate to consider an applicant's successful remedial efforts in connection with claims that it lacks the necessary character and competence to operate a plant safely. See South Texas, 21 NRC at 371-74. Not to do so would have the undesirable effect of discouraging applicants and licensees from promptly undertaking such corrective measures.
- Z The adjudicatory boards are not obliged to do a party's research for it. See Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-801, 21 NRC 479, 483-84 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 592 & n.6 (1985).
- AA A contention challenging the adequacy of the staff's review of an application is not litigable in an operating license proceeding. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807, review declined, CLI-83-32, 18 NRC 1309 (1983). This follows logically from the fact that it is the applicant that ultimately bears the burden of proving its entitlement to the privilege of an operating license. See Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-315, 3 NRC 101, 103 (1976).
- BB The NRC's adjudicatory boards are not empowered to direct the staff in the conduct of its inspection and investigatory duties. 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).
- CC The staff's review of contested technical issues is a significant ingredient of NRC licensing proceedings, even though its adequacy cannot be litigated *per se*, as a contention.
- DD The following technical issues are discussed: Construction Quality Assurance (QA); Staffing; Welding; Audits; Inspector Qualifications; Welder Qualifications; QA Documentation; Pipe Supports.
- ALAB-813 DUKE POWER COMPANY, et al. (Catawba Nuclear Station, Units 1 and 2), Docket Nos. 50-413-OL, 50-414-OL; OPERATING LICENSE; July 26, 1985; DECISION
- A The Appeal Board affirms three Licensing Board partial initial decisions that together authorize full-power operation of the two-unit Catawba facility, but leaves for resolution in a separate decision all questions pertaining to that part of the Licensing Board's authorization permitting the receipt and storage at Catawba of spent fuel generated at the applicants' Oconee and McGuire facilities.
- B Neither the Atomic Energy Act of 1954, as amended, nor the Commission's implementing regulations mandate a demonstration of error-free construction. What they require is simply a finding of reasonable assurance that, as built, the facility can and will be operated without endangering the public health and safety. 42 U.S.C. §§ 2133(d), 2232(a); 10 C.F.R. § 50.57(a)(3)(i). See also Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983).
- C In examining claims of quality assurance deficiencies, one must look to the implication of those deficiencies in terms of safe plant operation. This inquiry necessitates careful consideration of whether all ascertained construction errors have been cured and whether there has been a breakdown in quality assurance procedures of sufficient dimensions to raise legitimate doubt as to the overall integrity of the facility and its safety-related structures and components. *Ibid.*
- D The Commission's Rules of Practice require an appellant to identify clearly in its brief the errors of fact or law that are the subject of the appeal. For each issue appealed, the precise

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

portion of the record relied upon in support of the assertion of error must also be provided. 10 C.F.R. 2.762(d)(1).

- E** A party's failure to submit a brief containing sufficient information and argument to allow the appellate tribunal to make an intelligent disposition of the issues presented by its appeal is tantamount to their abandonment. *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, ALAB-355, 4 NRC 397, 413 (1976).
- F** A mere reference in a brief to previously filed proposed findings of fact and conclusions of law without further illumination as to why the proposed findings are correct will not suffice to show why a board's contrary determination is erroneous.
- G** Because licensing boards must be vested with considerable latitude in determining the course of the proceedings which they are called upon to conduct, an appeal board will review licensing board scheduling rulings only to the extent necessary to insure that no party has been denied a fair opportunity to advance its cause. *Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3)*, ALAB-212, 7 AEC 986, 991 (1974). See also *Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2)*, ALAB-459, 7 NRC 179, 188 (1978).
- H** A mere showing that a licensing board erred by curtailing cross-examination is not sufficient to warrant appellate relief. In addition, the complaining party must demonstrate actual prejudice — i.e., that the ruling had a substantial effect on the outcome of the proceeding. *Houston Lighting & Power Co. (South Texas Project, Units 1 and 2)*, ALAB-799, 21 NRC 360, 376-77 (1985), citing *Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, ALAB-788, 20 NRC 1102, 1151 (1984). See also *Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3)*, ALAB-732, 17 NRC 1076, 1096 (1983); *Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3)*, ALAB-673, 15 NRC 688, 697 & n.14, aff'd, CLI-82-11, 15 NRC 1383 (1982).
- I** It is now well-settled that the issuance of the Federal Emergency Management Agency's (FEMA) final findings on the adequacy of offsite emergency plans and preparedness is not a prerequisite to the authorization of a full-power operating license. Rather, preliminary FEMA reviews and interim findings are sufficient as long as such information permits the Licensing Board to conclude that offsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, ALAB-775, 19 NRC 1361, 1379 (1984), citing *Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3)*, ALAB-717, 17 NRC 346, 380 n.57 (1983); *Cincinnati Gas & Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1)*, ALAB-727, 17 NRC 760, 775 n.20 (1983). See also *Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2)*, ALAB-730, 17 NRC 1057, 1066-67 (1983).
- J** A licensing board is required to consider all five factors specified in 10 C.F.R. 2.714(a)(1) before admitting a late contention, even if the contention is based on previously unavailable information. *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-83-19, 17 NRC 1041, 1045 (1983).
- K** Section 189a of the Atomic Energy Act does not provide members of the public with an unqualified right to a hearing. Rather, the Act permits the establishment of reasonable threshold requirements for the admission of contentions to NRC licensing proceedings. *Id.* at 1045-47.
- L** The Commission has provided by rule that neither need-for-power nor financial qualifications questions are to be explored in certain operating license proceedings. See 10 C.F.R. 51.106(c) (need for power); 10 C.F.R. 2.104(c)(4), as amended effective October 12, 1984, 49 Fed. Reg. 35,747, 35,752, as corrected, 49 Fed. Reg. 36,631 (1984) (financial qualifications).
- M** In meeting factor three of 10 C.F.R. 2.714(a)(1) for late-filed contentions, a bare assertion of the past effectiveness of a party's participation in proceedings, unsupported by specific information from which a board could draw an informed inference that the party can and will make a valuable contribution on a particular issue in the proceeding, will not suffice. See *Washington Public Power Supply System (WPPSS Nuclear Project No. 3)*, ALAB-747, 18 NRC 1167, 1181 (1983); *Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2)*, ALAB-704, 16 NRC 1725, 1730 (1982).

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

- N An appeal board is required on appeal of a licensing board decision to apply the Commission's regulations in effect at the time of the appeal. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2). ALAB-218, 8 AEC 79, 82-83 (1974).
- O The following technical issue is discussed: Intergranular Stress Corrosion Cracking (IGSCC).
- ALAB-814 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2). Docket Nos. 50-352-OL, 50-353-OL; OPERATING LICENSE; August 13, 1985; MEMORANDUM AND ORDER
- A The Appeal Board denies intervenors' motion for a stay of the Licensing Board's partial initial decision resolving the last contested issues in this operating license proceeding and authorizing the Director of Nuclear Reactor Regulation to issue a full power license for the Limerick facility.
- B The first criterion for a stay is a strong showing that the moving party is likely to prevail on the merits. A stay motion must also address three other factors: whether the movant will be irreparably harmed in the absence of a stay, whether the grant of a stay would harm any other party, and where the public interest lies. 10 C.F.R. § 2.788(e).
- C A party's failure to address the stay criteria set out in 10 C.F.R. § 2.788(e) may result in summary denial of a stay motion. See Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2). ALAB-493, 8 NRC 253, 270-71 (1978).
- D Under the "immediate effectiveness" rule, unless the Commission otherwise directs, an immediate effectiveness determination by the Commission is without prejudice to the Appeal Board's determination of a stay motion pursuant to 10 C.F.R. § 2.788(e), or an appeal on the merits pursuant to §§ 2.762 and 2.785, or in any subsequent proceeding. 10 C.F.R. § 2.764(g).
- E An application for a stay must be filed within ten days of service of the decision for which a stay is requested. 10 C.F.R. § 2.788(a).
- F In a motion for a stay, when attempting to show likelihood of prevailing on the merits, it is not sufficient simply to state confidence or an expectation of ultimate success. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804-05 (1984).
- G Irreparable harm is often the most important factor in determining the need for a stay; a party must reasonably demonstrate, not merely allege, such harm. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1633-35 (1984).
- ALAB-815 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289-SP (Management Phase); SPECIAL PROCEEDING; August 29, 1985; MEMORANDUM AND ORDER
- A The Appeal Board denies intervenor's motion to reopen the record for further hearing in the management phase of this restart proceeding, concluding that the motion is not timely and does not demonstrate that a different result might have been reached had the newly proffered material been considered initially.
- B In order to succeed, a motion to reopen a record must be timely and address a significant safety or environmental issue. It must also show that a different result might have been reached had the newly proffered material been considered initially. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089 (1984).
- C A year delay between the time information was made available to the parties and the time of filing a motion to reopen ordinarily renders such a motion untimely. See, e.g., Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1369, aff'd sub nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), vacated in part and reh'g en banc granted on other grounds, 760 F.2d 1320 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1325 n.3 (1983).
- D In assessing the timeliness requirement of a motion to reopen the record, the question is not whether a licensing board is still receiving evidence on an issue to which the new information relates at the time the information comes to the movant's attention, but rather, whether the information could have been submitted earlier. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-85-8, 21 NRC 1111, 1114 & n.3 (1985); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 n.12 (1973).

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

ALAB-816 BOSTON EDISON COMPANY (Pilgrim Nuclear Power Station), Docket No. 50-293-OLA; OPERATING LICENSE AMENDMENT; September 5, 1985; DECISION

A The Appeal Board affirms the Licensing Board's denial of intervenor's untimely petition to intervene in this operating license amendment proceeding for failure to address the 10 C.F.R. § 2.714(a) lateness factors.

B Under 10 C.F.R. § 2.714(a), nontimely petitions to intervene will not be entertained absent a determination by the Licensing Board that the petition should be granted based upon a balancing of five factors: (i) Good cause, if any, for failure to file on time; (ii) The availability of other means whereby the petitioner's interest will be protected. (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record. (iv) The extent to which the petitioner's interest will be represented by existing parties. (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

C When filing a late petition to intervene, it is the petitioner's obligation to address the five lateness factors of 10 C.F.R. § 2.714(a) in the petition itself. 10 C.F.R. § 2.714(a).

D When filing an untimely petition to intervene, the burden of persuasion on the lateness factors of 10 C.F.R. § 2.714(a) is on the petitioner. 10 C.F.R. § 2.714(a).

E When appealing purely procedural points, appellants should explain in their papers precisely what injury to them was occasioned by the asserted error(s). Cf. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984).

ALAB-817 COMMONWEALTH EDISON COMPANY (Braidwood Nuclear Power Station, Units 1 and 2), Docket Nos. 50-456-OL, 50-457-OL; OPERATING LICENSE; September 6, 1985; MEMORANDUM AND ORDER

A The Appeal Board denies a motion by applicant for directed certification of a Licensing Board ruling that allowed intervenors to amend — after obtaining discovery from the NRC staff — a contention that the Board previously found to be insufficiently specific.

B In deciding whether to exercise its discretionary directed certification authority, appeal boards apply a two-part test. It considers whether a licensing board ruling either (1) threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal, or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977); see, e.g., Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1582 (1984).

C Since the admission of one or more additional issues into an ongoing case seldom has a pervasive or unusual effect on the basic structure of a proceeding, appeal boards have traditionally declined to review on an interlocutory basis rulings that simply admit another contention. See, e.g., Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754 (1982).

D The basic structure of an ongoing adjudication is not changed simply because the admission of a contention results from a licensing board ruling that is important or novel, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984), or may conflict with case law, policy or Commission regulations. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1112-13 (1983); see also Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 552 (1981). Similarly, the mere fact that a party must litigate an additional issue, or that a matter will be subject to adversarial exploration rather than NRC staff review, does not alter the basic structure of the proceeding in a pervasive or unusual way so as to justify interlocutory review of a licensing board decision. See Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 384 (1983); Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 378 (1983).

E Although the general standard for interlocutory review is the same whether or not undertaken on certification or by referral, see Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 375 n.6 (1983), an appeal board is more likely to intercede where a licensing board believes that its ruling has the type of overall impact on the proceeding that warrants the appeal board's immediate attention.

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

ALAB-818 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-3 (Emergency Planning); OPERATING LICENSE; October 18, 1985; DECISION

- A The Appeal Board affirms the Licensing Board finding in the emergency planning phase of this operating license proceeding that the applicant lacks the legal authority to implement material features of its proposed emergency response plan, and therefore, that such a plan cannot be carried out in conformity with Commission regulations.
- B Under Commission regulations, no operating license for a nuclear power reactor can issue unless the NRC finds that there is reasonable assurance that adequate protective measures both on and off the facility site can and will be taken in the event of a radiological emergency. As a general rule, offsite emergency plans must be developed for a 10-mile zone surrounding the plant (the plume exposure pathway emergency planning zone) and a second zone of approximately 50 miles (the ingestion pathway emergency planning zone). See 10 C.F.R. § 50.47 and Part 50, Appendix E.
- C The NRC is obligated to consider a utility-prepared offsite emergency plan submitted in the absence of state and local government-approved plans, and has the ultimate authority to determine whether such a submission is sufficient to meet the prerequisites for the issuance of an operating license. CLI-83-13, 17 NRC 741 (1983).
- D State law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).
- E The Atomic Energy Act does not displace traditional enforcement of state tort law, including the state's right to authorize punitive damages for radiation injuries. *Silkwood*, 464 U.S. 238.
- F The Atomic Energy Act does not preclude a state from enacting a moratorium on nuclear power plant construction based on economic rather than radiological health and safety considerations. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983).
- G The Atomic Energy Act establishes a dual regulatory structure for nuclear-powered electric generation. The federal government maintains complete control of the safety and "nuclear" aspects of energy generation; the states exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like. *Pacific Gas & Electric*, 461 U.S. at 211-12; *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1241 n.4 (7th Cir. 1985). There is no bright line dividing the areas of federal and state responsibility and they may at times overlap.
- H The Commission is involved in emergency planning pursuant to its health and safety jurisdiction.
- I The management of vehicular traffic on public roads, governmental response to public emergencies (including the implementation of any necessary evacuation), and control over the actions of corporations operating within the state, have nothing to do with radiological health and safety and fall well within the category of activities routinely subject to state supervision.
- J Although the Commission has recognized its own role in emergency planning oversight, it has nonetheless observed that the state and local governments have the primary responsibility under their constitutional police powers to protect the public. 44 Fed. Reg. 75,167, 75,169 (1979).
- K State laws that indicate the manner in which a utility may or may not conduct certain nonradiological activities within the state do not invade the federal domain simply because they have a significant effect on nuclear power issues or even foreclose the nuclear option entirely. Such laws are entitled to respect, absent an affirmative showing that Congress intended to supplant them. *Silkwood*, 464 U.S. at 255.
- L In deciding if state laws affecting nuclear power or emergency planning for nuclear power plants are preempted by federal law, all that need be determined is whether there exists a non-

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

safety rationale for the enactment or enforcement of the state laws. See *Pacific Gas & Electric*, 461 U.S. at 213, 216.

- M The reservation of exclusive jurisdiction by the federal government over radiological health and safety matters does not necessarily prevent a state from asserting its authority over matters within its own jurisdiction merely because its action coincidentally affects the area subject to federal control. *Silkwood*, 464 U.S. 238; *Pacific Gas & Electric*, 461 U.S. 190. See generally *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 447 (1960).
- N The Atomic Energy Act does not expressly require the states to construct or authorize nuclear power plants or prohibit the state from deciding, as an absolute or conditional matter, not to permit the construction of any further reactors. *Pacific Gas and Electric*, 461 U.S. at 205.
- O The Atomic Energy Act does not preempt state laws solely because they coincidentally prevent operation of a completed reactor.
- P State law is not preempted in all circumstances where it interferes with the potential exercise of federally licensed activities. See *Radio Station WOW, Inc. v. Johnson*, 325 U.S. 120, 129-33 (1945).
- Q The lack of an emergency plan officially sponsored by a state or local government does not stand as an absolute barrier to the grant of a license. The Commission may consider a utility plan in the absence of a state or local government-sponsored plan.
- R The mere existence of a utility plan is not a sufficient basis for issuance of a license. The Commission must be able to conclude that the utility plan provides reasonable assurance that the public health and safety will be protected.
- S Federal law does not override enforcement of certain state statutes that impede or foreclose a utility from presenting a viable emergency plan to the Commission for review.
- T When choosing between alternative constructions of a statute, displacement of state laws exercising historic police powers should be avoided unless that was the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), cited with approval in *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963).
- U The remarks of individual legislators are often an unreliable gauge of overall legislative intent. In *re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1362 (D.C. Cir. 1980).
- V The 1980 NRC Authorization Act, Pub. L. No. 96-295, 94 Stat. 780 (1980), accords a utility at least the opportunity to supplement an otherwise deficient governmental emergency plan. It also appears to foreclose the Commission from mandating a state or local government-sponsored plan as a regulatory requirement for licensing.
- W Pursuant to 10 C.F.R. § 50.47(c), an applicant is permitted to show that deficiencies in emergency plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation.
- X Section 50.47(a)(1) of 10 C.F.R. requires that there be reasonable assurance that protective measures can and will be taken in the event of a radiological emergency.
- Y Section 50.47(b)(10) of 10 C.F.R. requires that a range of protective actions be developed for the plume exposure pathway emergency planning zone for emergency workers and the public and that guidelines for the choice of protective actions during an emergency, consistent with federal guidance, are developed and in place.
- Z Discrete aspects of an evacuation plan may be subjected to adversarial evaluation to determine the efficiency with which an evacuation can be accomplished. See, e.g., *Cincinnati Gas & Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1)*, ALAB-727, 17 NRC 760, 770-71 (1983).
- AA Commission regulations require the formulation of satisfactory evacuation plans as a part of the overall emergency preparedness effort. *Id.* at 774 n.19.
- ALAB-819 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL; OPERATING LICENSE; October 22, 1985; DECISION
- A The Appeal Board affirms the second partial initial decision rendered by the Licensing Board in this operating license proceeding, LBP-84-31, 20 NRC 446 (1984), with the exception of a matter relating to onsite emergency plan medical arrangements, which is remanded to the Licensing Board for further action.

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

- B In passing upon the admissibility of a contention, the proper inquiry is not whether the contention will ultimately be proven on the merits, but whether the basis and specificity requirements of 10 C.F.R. § 2.714(b) have been met. *Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1)*, ALAB-590, 11 NRC 542, 546-49 & n.10 (1980).
- C The Commission policy in effect at the time an adjudicatory decision is rendered governs that decision. See *Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2)*, ALAB-218, 8 AEC 79, 82-83 (1974).
- D The Commission can limit adjudicatory hearings to issues that it considers material to its licensing decision. *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1444-51 (D.C. Cir. 1984), cert. denied, ___ U.S. ___, 105 S. Ct. 815 (1985); *Siegel v. AEC*, 400 F.2d 778, 783-85 (D.C. Cir. 1968).
- E Severe accident mitigation measures, beyond any already existing Commission requirements, are not to be "addressed in case-related safety hearings." 50 Fed. Reg. 32,138, 32,145 (1985).
- F The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321, could not logically require more than the safety provisions of the Atomic Energy Act; further, these statutes, and the issues raised under each, are inherently interrelated. See *Public Service Electric and Gas Co. (Hope Creek Generating Station, Units 1 and 2)*, ALAB-518, 9 NRC 14, 39 (1979); *Citizens for Safe Power, Inc. v. NRC*, 524 F.2d 1291, 1299-1300 (D.C. Cir. 1975).
- G NEPA does not require the Commission to consider low probability, severe (beyond design-basis) accidents at nuclear facilities. See *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1301 (D.C. Cir. 1984), vacated in part and reh'g en banc granted on other grounds, 760 F.2d 1320 (1985).
- H The Commission's recently adopted Severe Accident Policy Statement requires the issue of sabotage to be analyzed "to the extent practicable" in the design and operating procedures for new nuclear plants. Existing plants, however, need only conform to the Commission's current regulatory requirements. 50 Fed. Reg. at 32,141, 32,144-45.
- I All nuclear plants are required to have a detailed security plan to protect against external and internal sabotage. See 10 C.F.R. Part 73. The adequacy of such plans are subject to litigation in licensing hearings. See, e.g., *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, ALAB-653, printed as an Attachment to CLI-82-19, 16 NRC 53 (1982).
- J Generally, an appeal board will not entertain an issue raised for the first time on appeal. *Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B)*, ALAB-463, 7 NRC 341, 348 (1978).
- K The Council on Environmental Quality regulation requiring a worst-case analysis (40 C.F.R. § 1502.22) is substantive, rather than procedural; hence, the Commission — as an independent regulatory agency — does not consider itself legally bound by it. 49 Fed. Reg. 9352, 9356-58 (1984). See *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 99 n.12 (1983).
- L An appeal board cannot give binding effect to another agency's regulation explicitly eschewed by the Commission itself.
- M The Commission does not have any duty under NEPA to address "remote and highly speculative consequences" in its environmental impact statements. See *San Luis Obispo Mothers for Peace*, 751 F.2d at 1300 and cases cited.
- N Under NRC regulations and court precedent, a facility's Final Environmental Statement can be amended by the adjudicatory hearing record and subsequent Licensing Board decision. See 10 C.F.R. § 51.52(b)(3) (1984); 10 C.F.R. § 51.102 (1985); *New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87, 93-94 (1st Cir. 1978); *Citizens for Safe Power*, 524 F.2d at 1294 n.5.
- O A party is bound by the literal terms of its own contention.
- P Various NRC documents (such as the NUREGs that elaborate on the generalized regulatory requirements of 10 C.F.R. Part 50) simply serve as guidance for the staff's review and do not prescribe regulatory requirements. *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1)*, ALAB-698, 16 NRC 1290, 1298-99 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983).

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

- Q** The Commission relies on predictive findings of adequacy in the emergency planning field more so than in other areas. The emergency plan itself need not even be final, so long as it is sufficiently developed to permit a board to make the necessary "reasonable assurance" finding. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103-04 (1983).
- R** Post-hearing appraisal of an applicant's emergency facilities by the NRC staff is appropriate, if its emergency plan is developed enough to warrant a licensing board finding of adequacy.
- S** Emergency plans must provide arrangements for medical services for "contaminated injured individuals." See 10 C.F.R. § 50.47(b)(12), and Part 50, Appendix E, § IV.E.
- T** The medical arrangements for contaminated injured individuals required by 10 C.F.R. § 50.47(b)(12) should include local and backup hospital and medical services having the capability for evaluation of radiation exposure and uptake, including assurance that persons providing these services are adequately prepared to handle contaminated individuals. NUREG-0654, Rev. 1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" (November 1980) at 69 (Planning Standard L.1). See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, 535 n.9 (1983), rev'd in part on other grounds, GUARD v. NRC, 753 F.2d 1144 (D.C. Cir. 1985).
- U** The Commission's emergency planning regulations are premised on the assumption that a serious accident might occur and that evacuation of the emergency planning zone might well be necessary. See *id.* at 533. As a corollary, a possible deficiency in an emergency plan cannot properly be disregarded because of the low probability that action pursuant to the plan will ever be necessary.
- V** The requirement that emergency response plans include "[a]rrangements . . . for medical services for contaminated injured individuals" (10 C.F.R. § 50.47(b)(12)) is not satisfied by a simple list of existing treatment facilities. GUARD, 753 F.2d 1144.
- W** "Prudence" is the proper standard by which to measure emergency provisions. See San Onofre, CLI-83-10, 17 NRC at 533.
- X** The Commission's emergency planning regulations do not require "extraordinary measures." GUARD, 753 F.2d at 1150 n.7.
- Y** Under 10 C.F.R. § 50.47(c)(1), failure to satisfy the emergency planning standards in section 50.47(b) "may result in the Commission[s] declining to issue an operating license" unless it is demonstrated "that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation."
- Z** An expert witness may testify about analyses performed by other experts. See Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 332 (1972).
- AA** Hearsay evidence is generally admissible in administrative proceedings, providing its reliability can be determined — usually through questioning of the witness giving the hearsay. *Id.* at 332-33. See Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 477 (1982).
- BB** It is well-settled that an appellate tribunal must judge appeals on the basis of the record developed at the hearing below. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-648, 14 NRC 34, 36 (1981).
- CC** Expert testimony is typically a mixture of scientific principles (known to the expert through his or her training and experience), data derived from analyses or by perception, and the expert's opinions based on these principles and data. See Fed. R. Evid. 702; McGuire, 15 NRC at 475.
- DD** The standard of proof that an applicant must meet in a licensing proceeding is a preponderance of the evidence. See Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 421 (1980).
- EE** Disqualifying bias is not shown by unfavorable rulings, or by a judge's occasional use of strong language toward a party or the expression of his or her views on pending matters. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-5, 21 NRC 566, 569 (1985), *aff'd sub nom.* Three Mile Island Alert, Inc. v. NRC, 771 F.2d 720 (3d Cir. 1985). Disqualifying bias must stem from an extrajudicial source — that is, it must be based on something

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

- other than what the adjudicator has learned from participating in the case. *Houston Lighting and Power Co. (South Texas Project, Units 1 & 2)*, CLI-82-9, 15 NRC 1363, 1365 (1982).
- FF NEPA requires the NRC to take a "hard look" at the environmental issues posed by a particular project. See *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972).
- GG The NRC requires an applicant to have a quality assurance program to ensure that a plant and its parts are designed and constructed or fabricated in accordance with acceptable standards. The necessary elements of a quality assurance program are set forth in 18 criteria specified in 10 C.F.R. Part 50, Appendix B.
- HH In order for a contention to be admissible, the bases for it must be set forth with reasonable specificity. 10 C.F.R. § 2.714(b).
- II Discrete welding deficiencies identified in a few NRC inspection reports do not provide enough of a bases to support a contention alleging a complete breakdown in an applicant's quality assurance program. See generally *Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3)*, ALAB-812, 22 NRC 5, 16-44 (1985).
- JJ The conditional admission of any contention is unauthorized under the Commission's rules. *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, ALAB-687, 16 NRC 460, 467 (1982).
- KK The admission of late-filed contentions is to be determined by balancing the five factors in 10 C.F.R. § 2.714(a)(1). *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-83-19, 17 NRC 1041, 1045 (1983).
- LL Staff documents, if relevant and specific enough, can be relied on to support a contention. Cf. *Waterford*, ALAB-812, 22 NRC at 14, 17 & n.7.
- MM Inadvertent and possibly inaccurate statements do not establish bias on the part of an adjudicator.
- NN The Commission's Rules of Practice provide licensing boards with considerable flexibility to regulate the course of a hearing and designate the order of procedure. 10 C.F.R. §§ 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 rules set forth a general schedule for the filing of proposed findings, licensing boards are authorized to alter that schedule or to dispense with it entirely. See 10 C.F.R. § 2.754(a).
- OO Under 10 C.F.R. § 2.760(c) of the Commission's Rules of Practice, a licensing board is required to put its initial decision and the reasons or bases for the supporting findings, conclusions, and rulings in writing. While the decision may include transcript references to oral rulings made from the bench in explanation of the decision, this method of decisionmaking in complicated NRC licensing hearings is counterproductive to meaningful appellate review and should be avoided.
- PP Neither the Atomic Energy Act of 1954, as amended, nor the Commission's implementing regulations mandate a demonstration of error-free construction. What they require is simply a finding of reasonable assurance that, as built, the facility can and will be operated without endangering the public health and safety. 42 U.S.C. §§ 2133(d), 2232(a); 10 C.F.R. § 50.57(a)(3)(i); *Union Electric Co. (Callaway Plant, Unit 1)*, ALAB-740, 18 NRC 343, 346 (1983). The requisite reasonable assurance exists if all ascertained construction errors have been corrected, and there is no showing of a pervasive breakdown in quality assurance so as to raise serious doubt about the overall safety of the plant. *Ibid.*
- QQ The fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations. *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981).
- RR A witness is qualified as an expert by knowledge, skill, experience, training, or education. Fed. R. Evid. 702. See *McGuire*, 15 NRC at 475.
- SS Technical testimony on matters such as pipeline location or accidents requires an expert witness who can be examined on the reliability of the factual assertions and soundness of the scientific opinions offered. *McGuire*, 15 NRC at 477.
- TT Where an asserted expert witness can supply no scientific basis for his statements (other than his belief) and disparages his own testimony, a licensing board would be remiss in giving such testimony any weight whatsoever.

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

UU The use of conservatism and margin for error in making technical calculations is necessary and desirable, but must be footed to some extent in reasonable, scientific ground. Conservatism upon conservatism can distort technical data to the point where the mechanism at issue is no longer meaningfully described.

VV Regulatory guides and the like do not prescribe regulatory requirements. In general, they are treated simply as evidence of legitimate means for complying with regulatory requirements, and the staff is required to demonstrate the validity of its guidance if it is called into question during the course of litigation. TMI-1 Restart, ALAB-698, 16 NRC at 1299.

WW A licensing Board's function is to oversee the parties' development of the record on contested issues and to issue an initial decision containing the board's findings of fact and conclusions of law on the matters in controversy. See 10 C.F.R. §§ 2.718, 2.760, 2.760a. This does not mean that a board must stand mute during the hearing and ignore deficiencies in the testimony. It must satisfy itself that the conclusions expressed by expert witnesses on significant safety or environmental questions have a solid foundation. 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).

XX Reasonable assurance that the plant will be operated safely and that public health, safety, and environmental concerns will be adequately protected is the standard by which a licensing board is to measure an application; a risk-free environment is not required. Carstens v. NRC, 742 F.2d 1546, 1557 (D.C. Cir. 1984), cert. denied, ___ U.S. ___, 86 L. Ed. 2d 694 (1985).

YY Alternative site issues can be raised only at the construction permit stage and not in connection with an operating license. See 10 C.F.R. §§ 51.106(c), (d).

ZZ The following technical issues are discussed: Severe Accident Mitigation, Probabilistic Risk Assessment (PRA), Sabotage/Security Plan, Worst Case Risk Analysis, Socioeconomic Impacts, Onsite Emergency Plan, Emergency Operation Facilities, Technical Support Center, Operations Support Center, Aircraft Carburetor Icing, Quality Assurance, Pipeline Rupture, Overpressure Calculations, Structural Integrity.

ALAB-820 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440-OL, 50-441-OL; OPERATING LICENSE; October 24, 1985; MEMORANDUM AND ORDER

A The Appeal Board denies intervenor's application for a stay pendente lite of a Licensing Board decision (LBP-85-35, 22 NRC 514) in this operating license proceeding.

B In passing upon stay requests, the following criteria are to be applied: whether the movant has made a strong showing that it is likely to prevail on the merits; whether the movant will be irreparably harmed in the absence of a stay; whether the granting of a stay would harm other parties; and where the public interest lies. 10 C.F.R. § 2.788(e). The same criteria are applied by the courts. See, e.g., Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958); Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).

C The second of the 10 C.F.R. § 2.788(e) factors — whether the movant will be irreparably harmed in the absence of a stay — is often the most important in determining the need for a stay. See, e.g., Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1633 (1984), quoting Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1446 (1984). See also Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977).

D The strength or weakness of the showing by the movant on a particular 10 C.F.R. § 2.788(e) stay factor influences how strong the showing on the other factors must be in order to justify the sought relief. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-338, 4 NRC 10, 14 (1976). See also Cuomo v. NRC, 772 F.2d 972, 974 (D.C. Cir. 1985).

E A party applying for a stay is required to demonstrate that the claimed irreparable injury is both "certain and great." Cuomo, 772 F.2d at 976, quoting Wisconsin Gas Co. v. FERC, 772 F.2d 669, 674 (D.C. Cir. 1985).

F Speculation about a nuclear accident does not, as a matter of law, constitute the imminent, irreparable injury required for staying a licensing decision. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5, 19 NRC 953, 964 (1984).

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

citing *New York v. NRC*, 550 F.2d 745, 756-57 (2d Cir. 1977) and *Virginia Sunshine Alliance v. Hendrie*, 477 F. Supp. 68, 70 (D.D.C. 1979).

ALAB-821 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289-SP (Restart); SPECIAL PROCEEDING; October 25, 1985; MEMORANDUM AND ORDER

A Acting on a referral by the Licensing Board of an intervenor's petition to reopen the proceeding, the Appeal Board (1) affirms the Licensing Board's ruling that that Board lacks jurisdiction to consider the petition and (2) declares its own lack of jurisdiction to consider it.

B If an appeal board has previously considered an issue and (by either the action or inaction of the Commission) the determination amounts to final agency action on that issue, the appeal board has no jurisdiction over a subsequent attempt to raise that matter once again. Such requests are, in general, more properly directed to the Director, Nuclear Reactor Regulation, even though other issues in the same proceeding may still be pending before the board. When an issue sought to be considered anew, or to be reconsidered, has a reasonable nexus to a discrete matter still pending before an appeal board, the board has jurisdiction over it. *Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3)*, ALAB-792, 20 NRC 1585, 1588 (1984). See also *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, ALAB-782, 20 NRC 838, 841 (1984). The "reasonable nexus" test can be satisfied where the new issues overlap those pending before the board; a total identity or commonality of issues is not necessary. *Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3)*, ALAB-797, 21 NRC 6, 8-9 (1985).

ALAB-822 VIRGINIA ELECTRIC AND POWER COMPANY (North Anna Power Station, Units 1 and 2), Docket Nos. 50-338-OLA-1, 50-339-OLA-1; OPERATING LICENSE AMENDMENT; November 1, 1985; MEMORANDUM AND ORDER

A After conducting its sua sponte review, the Appeal Board affirms the Licensing Board's initial decision (LBP-85-34, 22 NRC 481 (1985)) authorizing the Director of Nuclear Reactor Regulation to issue a license amendment for the North Anna nuclear facility, Units 1 and 2, to permit the receipt and storage of 500 spent fuel assemblies from the Surry Power Station.

ALAB-823 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL; OPERATING LICENSE; November 19, 1985; MEMORANDUM AND ORDER

A The Appeal Board, finding that it does not have jurisdiction over intervenors' motion to reopen the record, refers the motion to the Commission for its consideration.

B Jurisdiction to rule on a motion to reopen on certain issues, filed after exceptions have been taken to a Licensing Board decision on those issues, rests with the appeal board rather than the licensing board. *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1)*, ALAB-699, 16 NRC 1324 (1982).

C Jurisdiction to rule on a motion to reopen on certain issues, filed after petitions for review of an Appeal Board decision on those issues have been filed with the Commission, no longer rests with the appeal board.

ALAB-824 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL; OPERATING LICENSE; November 21, 1985; DECISION

A The Appeal Board affirms the Licensing Board's partial initial decision (LBP-85-18, 21 NRC 1637 (1985)) which determined that, for the first fuel cycle, the three Transamerica Delaval, Inc. emergency diesel generators installed at the Shoreham nuclear facility will satisfy the requirements of General Design Criterion 17, 10 C.F.R. Part 50, Appendix A.

B The General Design Criteria for Nuclear Power Plants "establish minimum requirements for the principal design criteria for water-cooled nuclear power plants similar in design and location to plants for which construction permits have been issued by the Commission." 10 C.F.R. Part 50, Appendix A.

C Both pressurized water and boiling water reactors are equally subject to the requirements of General Design Criterion 17, and fulfill those requirements in the same fashion.

D The hearing right granted by section 189a of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a), carries with it no license to encumber the record with evidence of little, if any, intrinsic worth on the theory that the examination and cross-examination of other wit-

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

- nesses might establish the proposition for which that evidence had been offered. See *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 968 (7th Cir. 1983). See also 10 C.F.R. § 2.743(c).
- ALAB-825 DUKE POWER COMPANY, et al.** (Catawba Nuclear Station, Units 1 and 2), Docket Nos. 50-413-OL, 50-414-OL; OPERATING LICENSE; November 21, 1985; DECISION
- A** Following up on ALAB-813, 22 NRC 59 (1985), the Appeal Board affirms the remainder of the Licensing Board's authorization of a full power operating license for the Catawba facility -- the receipt and storage at Catawba of spent fuel generated at the applicants' Oconee and McGuire facilities.
- B** Adjudicatory boards do not have plenary subject matter jurisdiction in Commission proceedings. See *Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2)*, ALAB-739, 18 NRC 335, 339 (1983).
- C** Under the Atomic Energy Act, the Nuclear Regulatory Commission is empowered to administer the licensing provisions of the Act, 42 U.S.C. §§ 2132, 2133, and use licensing boards "to conduct such hearings as the Commission may direct." 42 U.S.C. § 2241. The boards, therefore, are delegates of the Commission and, as such, they may exercise authority over only those matters that the Commission commits to them. See *Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4)*, ALAB-577, 11 NRC 18, 25 (1980); *Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1)*, ALAB-249, 8 AEC 980, 987 (1974).
- D** Hearing notices are the means by which the Commission identifies the subject matters of the hearings and delegates to the licensing boards the authority to conduct proceedings. See 10 C.F.R. § 2.700; *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units Nos. 1 and 2)*, CLI-76-1, 3 NRC 73, 74 n.1 (1976).
- E** Licensing boards "can neither enlarge nor contract the jurisdiction conferred by the Commission." *Consumers Power Co. (Midland Plant, Units 1 and 2)*, ALAB-235, 8 AEC 645, 647 (1974).
- F** 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. *Portland General Electric Co. (Trojan Nuclear Plant)*, ALAB-534, 9 NRC 287, 289 n.6 (1979).
- G** Proposals to store spent fuel generated at one facility in the fuel pool of another facility that does not qualify as an independent storage installation under 10 C.F.R. Part 72 should be licensed pursuant to 10 C.F.R. Part 50.45 Fed. Reg. 74,693, 74,698 (1980).
- H** Under the Commission's Rules of Practice, an appellant is obligated to clearly identify the errors of fact or law that are the subject of the appeal and, for each issue appealed, must identify the precise portion of the record relied upon in support of the assertion of error. 10 C.F.R. § 2.762(d)(1). See *Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1)*, ALAB-719, 17 NRC 387, 395 (1983); *Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2)*, ALAB-693, 16 NRC 952, 954-56 (1982); *Consumers Power Co. (Midland Plant, Units 1 and 2)*, ALAB-270, 1 NRC 473, 476 (1975).
- I** Appeal boards are required to apply the regulations in effect at the time of the appeal to matters before them. ALAB-813, 22 NRC 59, 86 (1985).
- ALAB-826 METROPOLITAN EDISON COMPANY, et al.** (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289-SP (Management Phase); SPECIAL PROCEEDING; December 18, 1985; DECISION
- A** The Appeal Board affirms on sua sponte review the Licensing Board's final two partial initial decisions in this special proceeding that resolved that resolved in the licensee's favor issues affecting the central question of management competence and integrity.
- B** In the absence of an appeal, an appeal board will review on its own initiative any final licensing board decision (and pertinent portions of the underlying record) concerning significant safety or environmental issues. *Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, ALAB-655, 14 NRC 799, 803 (1981).
- C** An appeal board's affirmance on sua sponte review of a licensing board's decision accords no stare decisis effect to any of the licensing board's conclusions on purely legal matters. *Consumer's Power Co. (Big Rock Point Plant)*, ALAB-795, 21 NRC 1, 2 (1985).

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

LBP-85-22 ILLINOIS POWER COMPANY, et al. (Clinton Power Station, Unit 2), Docket No. 50-462-OL; OPERATING LICENSE; July 11, 1985; MEMORANDUM AND ORDER

A The Licensing Board grants Applicants' motion to terminate the proceeding for an operating license for Unit No. 2 of the Clinton Power Station, subject to certain conditions.

LBP-85-23 UNIVERSITY OF LOWELL (Training and Research Reactor), Docket No. 50-223-SP (ASLBP No. 85-509-02-SP); SPECIAL PROCEEDING; July 19, 1985; MEMORANDUM AND ORDER

LBP-85-24 BOSTON EDISON COMPANY (Pilgrim Nuclear Power Station), Docket No. 50-293-OLA (ASLBP No. 85-510-01-LA); OPERATING LICENSE AMENDMENT; July 19, 1985; MEMORANDUM AND ORDER

A In this Memorandum and Order, the Licensing Board dismisses a petition to intervene for failure to show good cause, untimeliness and lack of standing

B A petition to intervene in a license amendment case that is late by 9 days and does not show good cause for late filing will be dismissed for untimeliness.

C Although residence 43 miles from a nuclear power plant may be adequate to establish standing with respect to applications for the construction or operation of a nuclear power plant, this same distance is not adequate, without a further showing, to establish standing in a case involving a change in allowable K-effective for a fuel pool.

LBP-85-25 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL (ASLBP No. 81-465-07-OL); OPERATING LICENSE; July 22, 1985; FOURTH PARTIAL INITIAL DECISION

A In this Partial Initial Decision, the Board finds in favor of the Applicant with respect to issues concerning offsite emergency planning for the State Correctional Institution at Graterford, and authorizes the issuance of a full-power operating license.

B Evacuation time estimates (ETE) need not include an analysis of worst-case scenarios. Such an analysis is not contemplated by either the NRC regulations or NUREG-0654. ETEs are intended to be representative and reasonable so that any protective action decision based on them will reflect realistic conditions.

C Neither NRC regulations nor NUREG-0654 establishes a standard for effectuating evacuations within a given time. An evacuation time estimate does not attempt to predict exact conditions during an evacuation. Rather, it attempts to indicate the sensitivity of the analysis to a number of commonly occurring events.

LBP-85-26 ARIZONA PUBLIC SERVICE COMPANY, et al. (Palo Verde Nuclear Generating Station, Units 2 and 3), Docket Nos. STN 50-529-OL, STN 50-530-OL (ASLBP No. 80-447-01-OL); OPERATING LICENSE; July 22, 1985; ORDER DISMISSING PROCEEDING

LBP-85-27 COMMONWEALTH EDISON COMPANY (Braidwood Nuclear Power Station, Units 1 and 2), Docket Nos. 50-456, 50-457; OPERATING LICENSE; July 30, 1985; MEMORANDUM DETAILING RATIONALE IN SUPPORT OF JUNE 21, 1985 ORDER ON ADMISSIBILITY OF NEINER FARMS CONTENTION 4 (RAILROAD EXPLOSION)

A The Licensing Board rules on a three-part contention alleging that the use of the Illinois Central Railroad to transport explosive materials from a federal ammunition plant creates a hazardous condition due to the proximity of the railroad tracks to the nuclear facility. The Board rules the subpart of the contention alleging sabotage or a purposefully induced explosion is precluded from the proceeding under 10 C.F.R. § 50.13(a). The other subsections of the contention, addressing the risk (probability and consequences) of an accidental railroad explosion, were found to be admissible. The Board ruled that those subparts do not involve "use or deployment

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

- of weapons incident to U.S. defense activities," consideration of which would be precluded under 10 C.F.R. § 50.13(b).
- B** Part of the rationale behind § 50.13 was the AEC's recognition of the practical necessity to exempt applicants from protecting their facilities against military or paramilitary attacks threatening the national security, even if the attack is directed against a nuclear plant, because the country's security is intended to be left entirely to the nation's defense establishment and security agencies. *Florida Power and Light Co. (Turkey Point Nuclear Generating Units 3 and 4)*, 4 AEC 9, 13 (1967), *aff'd*, *Seigel v. AEC*, 400 F.2d 778 (D.C. Cir. 1968).
- C** The AEC determined that requiring an applicant to demonstrate that its facility is protected against an enemy attack would "stifle utterly the peaceful utilization of atomic energy in the United States." *Seigel v. AEC*, 400 F.2d 778, 783-84 (1968).
- D** Two inquiries must be made when determining if a contention is barred under 10 C.F.R. § 50.13(a). The first is whether the postulated sabotage is "directed against the facility" and the second is whether the saboteurs qualify as an "enemy of the United States."
- E** In determining whether an attack is "directed against the facility," the subjective intent of the attackers is not material. The Board is not required to engage in an inquiry into the mind of an attacker to determine whether the attack was intended to damage the nuclear facility or whether the damage was merely incidental to some other hostile goal. See *Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2)*, LBP-81-42, 14 NRC 842, 844 (1981).
- F** The Appeal Board in the Indian Point case determined that an applicant is not required to take affirmative measures against an attack by an armed group which is not an enemy of the United States. *Consolidated Edison Co. of New York (Indian Point Station, Unit No. 2)*, ALAB-202, 7 AEC 825, 829-30 (1974).
- G** A Board may determine whether an attacking force is an "enemy of the United States" by applying the objective test set out in the Perry decision. That test questions whether a hostile act was committed and whether the damaging result was caused by the hostile act. If the answers to both questions are affirmative, the group or nation perpetrating the hostile act qualifies as an enemy of the United States. *Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2)*, LBP-81-42, 14 NRC 842, 844 (1981).
- H** When an enemy act is beyond the type of design basis security threat encompassed by 10 C.F.R. § 73.1(a), then an applicant is entitled to rely on the government's military or law enforcement agencies to handle such an attack.
- I** Section 73.1(a) of 10 C.F.R. is to be read in pari materia with § 50.13, *Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2)*, LBP-82-119A, 16 NRC 2069, 2098 (1982), but Part 73 refers to sabotage accomplished with the use of small weapons carried out by small bands of saboteurs, while § 50.13 addresses military-style attacks, broader in nature and employing heavier weapons. Part 73 contemplates sabotage on the plant site, and the security measures mandated under Part 73 are not to be extended beyond the vicinity of the plant's boundaries. See 10 C.F.R. §§ 73.45 and 73.46.
- J** To determine whether a contention is barred under § 50.13(b), the Board must decide whether the contention postulates a scenario causing damage to the reactor's integrity, which is the result of "use or deployment of weapons incident to U.S. defense activities."
- K** When artillery shells or explosives are transported, their mere movement is not "deployment" within the context of § 50.13(b) because they are not being strategically arranged in locations appropriate for their use, unlike nuclear missiles in silos from which they can be launched, or conventional weapons being tactically placed in the field with a military unit. It stretches the rationale on which 10 C.F.R. § 50.13 is premised to accept mere movement of raw ingredients for the manufacture of ammunition, or the ammunition itself, to or from a local ammunition plant, as deployment of weapons.
- L** An explosion of a nuclear missile or other weapon would either be an enemy act, or, if a U.S. nuclear device, would arise from the deployment of weapons by the U.S. See *Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2)*, LBP-82-43A, 15 NRC 1423, 1500 (1982) and *Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2)*, LBP-81-42, 14 NRC 842, 845 (1981).

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

- M It is erroneous to view 10 C.F.R. § 50.13(b) as precluding the Board from considering anything related to the military that might impact a nuclear facility, on the theory that such military activity is necessarily "use or deployment of weapons incident to U.S. defense activities." I.e., past agency practice has allowed Boards to consider the possible risks to a nuclear plant from crashes of military airplanes. Consumers Power Co. (Big Rock Point Plant), LBP-84-32, 20 NRC 601, 639-52 (1984).
- LBP-85-27A CAROLINA POWER & LIGHT COMPANY and NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (Shearon Harris Nuclear Power Plant), Docket No. 50-400-OL (ASLBP No. 82-472-03-OL); OPERATING LICENSE; August 14, 1985; REASONS SUPPORTING SUMMARY DISPOSITION OF EMERGENCY PLANNING CONTENTIONS
- A This Memorandum supplies the reasons supporting the Licensing Board's earlier grant of several motions for summary disposition on emergency planning contentions.
- LBP-85-28 CAROLINA POWER & LIGHT COMPANY and NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (Shearon Harris Nuclear Power Plant), Docket No. 50-400-OL (ASLBP No. 82-472-03-OL); OPERATING LICENSE; August 20, 1985; PARTIAL INITIAL DECISION ON SAFETY CONTENTIONS
- A In this Partial Initial Decision, the Licensing Board decides most of the contested safety issues, including management capability issues, in the Applicants' favor.
- B The following technical issues are discussed: Accuracy of Thermoluminescent Dosimeters; Environmental Qualification of Electrical Equipment; Integrity of Containment Concrete.
- LBP-85-29 FLORIDA POWER AND LIGHT COMPANY (Turkey Point Nuclear Generating Plant, Units 3 and 4), Docket Nos. 50-250-OLA-1, 50-251-OLA-1 (ASLBP No. 84-496-03-LA) (Vessel Flux Reduction); OPERATING LICENSE AMENDMENT; August 16, 1985; ORDER
- A In this Order the Licensing Board rules on Licensee's motions for summary disposition of intervenors' two admitted contentions in this operating license amendment proceeding. The motion for summary disposition of intervenors' Contention (b) is granted. The motion for summary disposition of intervenors' Contention (d) is denied.
- B Under 10 C.F.R. § 2.749(d) a motion for summary disposition will be granted when the record shows that there is no genuine issue as to any material fact, and that the moving party is entitled to a favorable decision as a matter of law.
- C Summary disposition is available in hearings on amendments to licenses.
- D The following technical issues are discussed: ECCS evaluation model; peak cladding temperature; fuel design limits; heat transfer coefficients; Appendix K; critical heat flux; departure from nucleate boiling (DNBR).
- LBP-85-30 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289-SP (ASLBP No. 79-429-09-SP) (Restart Remand on Management); SPECIAL PROCEEDING; August 19, 1985; PARTIAL INITIAL DECISION ON THE REMANDED ISSUE OF THE DIECKAMP MAILGRAM
- A In this Partial Initial Decision, the Licensing Board resolves the remanded "Dieckamp mailgram issue" in favor of the Licensee.
- LBP-85-31 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-3 (Emergency Planning); OPERATING LICENSE; August 26, 1985; CONCLUDING PARTIAL INITIAL DECISION ON EMERGENCY PLANNING
- A In this concluding Partial Initial Decision, the Board finds no reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at the Shoreham Nuclear Power Station, and therefore no operating license shall be issued.
- B Lack of a plan for concerted action among the State, local government, and utility in response to a radiological emergency creates a risk of release to the public of conflicting and confusing information in the event of a radiological emergency at Shoreham. The State and local governments have indicated that, in an emergency, they would pursue a course of action independent of that of the utility. The absence of a cooperative effort constitutes a substantial deficiency in the Shoreham emergency plan.
- C Where State statutes prohibit the utility from performing activities essential to the successful implementation of the utility emergency plan, the Board finds that the utility does not have an adequate plan to respond to an emergency at the Shoreham Nuclear Power Station.
- D The following technical issues are discussed: Relocation centers; Thyroid monitoring.

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

LBP-85-32 TEXAS UTILITIES ELECTRIC COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445-OL&OL-2, 50-446-OL&OL-2 (ASLBP No. 79-430-06-OL); OPERATING LICENSE; August 29, 1985; MEMORANDUM AND ORDER

- A** In this Memorandum and Order, the Licensing Board declines to adopt Applicants' Management Plan as the sole basis for continued litigation of this case, holding that a hearing may be terminated and unresolved issues turned over to the Applicants and Staff only when the tasks left to be done are merely confirmatory of plant safety.
- B** Where Applicants sought to exclude litigation of prior QA/QC and design practices because of a comprehensive program of reexamination of the safety of the plant, it would not be proper to determine whether the study adequately resolves the issues until the results of the study are available for examination and challenge.
- C** Where Intervenors sought an order to require Applicants to preserve plant components removed from the plant for design deficiencies but did not provide any authority for such an order, the criteria for a stay are not met and Intervenors do not meet discovery criteria because they are not seeking access to information.
- D** Where the information being collected by Applicants was sufficiently important to warrant the delay, the Board granted Applicants an indefinite continuance in their obligation to respond to summary disposition motions being addressed pursuant to the Management Plan.
- E** Although a major study of plant safety may not be left solely for Staff examination and be excluded from the hearing process when the study is relevant to an admitted contention, it may be possible to exclude the final stages of the study after the earlier stages have demonstrated its adequacy and only similar tasks are left to be performed.

LBP-85-33 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440-OL, 50-441-OL (ASLBP No. 81-457-04-OL); OPERATING LICENSE; August 30, 1985; MEMORANDUM AND ORDER

- A** In this Memorandum and Order, the Licensing Board denies Intervenor's motion to reopen the record and submit a new contention finding that Applicants' request for exemption was properly filed under the provisions of 10 C.F.R. § 50.12 and need not have been presented by petition pursuant to 10 C.F.R. § 2.758.
- B** When a request for exemption from a Commission regulation does not contend that application of the rule or regulation would not serve the purpose for which it was adopted, but rather that its application would result in costly delays in operation, that request is properly filed under 10 C.F.R. § 50.12 and need not be the subject of a petition pursuant to 10 C.F.R. § 2.758.
- C** When a request for exemption from a Commission regulation is not directly related to a contention in the proceeding, and does not involve such serious safety, environmental, or common defense and security matters as to warrant the Board's raising issues on its own initiative, the request is properly filed pursuant to 10 C.F.R. § 50.12 and need not be the subject of a petition under 10 C.F.R. § 2.758.

LBP-85-34 VIRGINIA ELECTRIC AND POWER COMPANY (North Anna Power Station, Units 1 and 2), Docket Nos. 50-338-OLA-1, 50-339-OLA-1 (ASLBP No. 83-481-01-LA); OPERATING LICENSE AMENDMENT; September 3, 1985; INITIAL DECISION

- A** The Licensing Board issues an Initial Decision authorizing the issuance of an amendment to the operating licenses of the North Anna Power Station, Units 1 and 2, which permits the receipt and storage of 500 spent fuel assemblies transhipped from the Surry Power Station, Units 1 and 2.
- B** The values in Table S-4 reflect the environmental risk of accidents involving the shipment of spent fuel in casks as well as accidents which might be caused by employee error in preparing the casks for shipment.
- C** The record, in amplifying and supporting the analysis in the Safety Evaluation Report, establishes that the probability is remote of either a sabotage attack being undertaken or being successful, and that, even if such an attack was successful, the impact upon the public health and safety and upon the environment would be very small.
- D** Pursuant to § 102(2)(E) of NEPA, the Environmental Assessment must discuss whether a proposed action involves unresolved conflicts concerning alternative uses of available resources.
- E** Consideration of an alternative based on economic superiority (and not environmental superiority) is not the responsibility of the NRC.

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

- F An ultimate NEPA judgment may properly be made on the basis of the entire record before adjudicatory tribunals.
- G The following technical issues are discussed: Table S-4 values; Consideration of sabotage; Consideration of dry cask storage alternative.
- LBP-85-35 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440-OL, 50-441-OL (ASLBP No. 81-457-04-OL); OPERATING LICENSE; September 3, 1985; CONCLUDING PARTIAL INITIAL DECISION ON EMERGENCY PLANNING, HYDROGEN CONTROL AND DIESEL GENERATORS
- A The Licensing Board issues a Partial and Concluding Initial Decision in an operating license proceeding. Contentions on emergency planning, diesel generator reliability and hydrogen control are resolved in Applicants' favor and, the Decision authorizes issuance of an operating license, subject to the completion of several conditions.
- B Where NRC rules do not define the scope of a preliminary analysis for a facility's hydrogen control system, the Board's standard of acceptance is whether a reasonable assurance of safety has been demonstrated in the record.
- C Basic questions that have to be answered in evaluating a preliminary analysis required by 10 C.F.R. § 50.44 for a hydrogen ignitor system are whether the system has been installed, whether it will function as designed, and whether integrity of containment and essential equipment will be retained.
- D Separate contentions should be proffered to challenge the adequacy of safety components that are not a part of the primary hydrogen control system even though these components might have a safety function in an accident that causes a release of hydrogen to containment.
- E The following technical issues are discussed: Emergency plan requirements; Hydrogen ignition system; Containment integrity; Weld quality; Dry well capacity; Hydrogen combustion; States blackout; Containment response modeling; Containment spray operation; Suppression pool bypass; Equipment serviceability; Diffusion of flames; Decay heat removal; Secondary fires; Diesel generator reliability; Revalidation program for diesel generators; Diesel component maintenance and surveillance.
- LBP-85-36 FLORIDA POWER AND LIGHT COMPANY (Turkey Point Nuclear Generating Plant, Units 3 and 4), Docket Nos. 50-250-OLA-2, 50-251-OLA-2 (ASLBP No. 84-504-07-LA) (Spent Fuel Pool Expansion); OPERATING LICENSE AMENDMENT; September 16, 1985; MEMORANDUM AND ORDER
- A In this Order the Licensing Board rules on a non timely amended petition to intervene, granting Petitioner's motion that the filing date be extended, and admitting seven contentions for litigation.
- B A late intervention petitioner must address the five factors specified in 10 C.F.R. § 2.714(a) and affirmatively demonstrate that on balance, they favor his tardy admission into the proceeding. The burden is on the petitioner to make such a demonstration.
- LBP-85-37 TEXAS UTILITIES ELECTRIC COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445-OL, 50-446-OL (ASLBP No. 79-430-06-OL); OPERATING LICENSE; September 18, 1985; MEMORANDUM
- A The Licensing Board states concerns about the adequacy of the record with respect to a Staff action exempting paint from Appendix B quality assurance requirements.
- B The following technical issues are discussed: Paint quality; Core blockage by paint; Sump blockage by paint; Operator error.
- LBP-85-38 KERR-McGEE CHEMICAL CORPORATION (West Chicago Rare Earths Facility), Docket No. 40-2061-ML (ASLBP No. 83-495-01-ML) and (Kress Creek Decontamination), Docket No. 40-2061-SC (ASLBP No. 84-502-01-SC); MATERIALS LICENSE; September 26, 1985; MEMORANDUM AND ORDER
- A The Licensing Board rules on various discovery disputes including requests for discovery of nonwitness experts, and claims of attorney-client and work-product privilege.
- B NRC Rules of Practice do not contain a provision similar to Rule 26(b)(4) of the Federal Rules of Civil Procedure, but NRC decisions have applied Rule 26(b)(4). Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 496-97 (1983); Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2),

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

LBP-83-27A, 17 NRC 971, 976-80 (1983); Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-42, 2 NRC 159, 161 (1975); see also Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-374, 15 NRC 417, 421 (1977) (additional views of Mr. Farrar, joined by the entire Board).

- C Rule 26(b)(4)(B) only applies to experts who have been retained or specially employed in anticipation of litigation, and does not allow shielding of experts who develop pertinent knowledge in other contexts.
- D Whether a subpoenaed party is an expert specially retained in anticipation of litigation is necessarily a factual determination. *USM Corp. v. American Aerosols, Inc.*, 631 F.2d 420, 424-25 (6th Cir. 1980); *Ager v. Jane C. Stormont Hospital and Training School*, 622 F.2d 496, 501 (10th Cir. 1980); *Healy v. Counts*, 100 F.R.D. 493, 496 (D. Colo. 1984).
- E An expert may wear two hats, i.e., initially he may be an actor who engages in the transactions at issue and subsequently becomes a litigation consultant. See *Seiffer v. Topsy Int'l, Inc.*, 69 F.R.D. 69, 72-73 & n.3 (D. Kan. 1975); *Inspiration Consol. Copper Co. v. Lumberman Mut. Cas. Co.*, 60 F.R.D. 205, 210 (S.D.N.Y. 1973).
- F One means of determining whether an expert is retained for litigation is to review the contractual agreements between the expert and the employer. It is reasonable to infer that an expert was not retained in anticipation of litigation if the work specified in the employment contract is of a general nature, or when an expert is hired to help his employer fulfill statutory requirements.
- G When an expert is retained in anticipation of litigation but is not expected to testify, the identity and other collateral information related to the expert are not discoverable unless exceptional circumstances are shown, i.e., the party seeking discovery must demonstrate that it is impracticable to obtain facts or opinions on the same subject by other means. *Ager v. Jane C. Stormont Hospital and Training School*, 622 F.2d 496 (10th Cir. 1980). See also *Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2)*, LBP-83-27A, 17 NRC 971, 976-80 (1983).
- H A disparity in resources between the parties is not sufficient to demonstrate exceptional circumstances under Rule 26(b)(4)(B).
- I The attorney-client and work product privileges are not necessarily waived if the party holding those privileges reveals information on the subject matter of the privileged documents. Disclosure of the privileged content of communications may produce a waiver because the confidential nature of the privileged documents no longer exists. Partial disclosure of the privileged content of a single document can waive privilege as to the remainder of the document.
- J Waiver may occur when specific portions of a privileged communication are disclosed. The mere discussion of facts which are the subject of a privileged communication is insufficient to constitute waiver. 4 Moore's Federal Practice ¶ 26.60[2], 26-203, ¶ 26.64[4], 26-309 et seq.
- K To be privileged under Federal Rule of Civil Procedure 26(b)(3) and NRC Rule of Practice 10 C.F.R. § 2.740(b)(2), a document must be prepared in anticipation of litigation by a party, his attorney or another representative of that party. Materials developed in ordinary course of business or pursuant to public requirements unrelated to litigation are not given immunity under 26(b)(3). See Advisory Committee's Explanatory Statement: Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 501 (1970).
- L Inherent in the determination of whether a corporation must specifically designate who composed the answer to each interrogatory is the element of reasonableness.
- M Interrogatories may properly enquire about legal conclusions and theories that apply to the facts of the case, but may not enquire about legal conclusions which do not so relate. See 4A Moore's Federal Practice ¶ 33.17[2] (1984 ed.).
- N It may be permissible to answer an interrogatory by stating specific references to pages of other documents filed in the case, but a blanket statement that the answers are to be found somewhere in the record is not satisfactory.
- O Executive privilege may be invoked in NRC proceedings. *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).
- P Executive privilege is designed to prevent the "public disclosure [of] governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a proc-

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

ess by which governmental decisions and policies are formulated." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1339 & n.15 (1984).

- Q** A government agency must properly claim the privilege by having the agency head assert the privilege, providing a specific description of the documents for which the privilege is sought and providing the reasons necessitating the confidentiality of the documents.
- R** Executive privilege is a qualified privilege which may be overcome by a showing of need. To overcome the privilege, the Board must balance the party's need for the documents against the government's need for confidentiality.
- S** Waiver of executive privilege does not occur merely because a governmental entity has initiated the litigation.
- LBP-85-39 TEXAS UTILITIES ELECTRIC COMPANY, et al.** (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445-OL&OL-2, 50-446-OL&OL-2 (ASLBP No. 79-430-06-OL); OPERATING LICENSE, October 2, 1985, MEMORANDUM AND ORDER
- A** In this Memorandum, the Board clarifies its previous order in which it stated that it might not "accept" evidence submitted by Applicants based on the work of the Comanche Peak Response Team, stating that the degree of independence of that Team would affect the weight of the evidence and not whether it would be received into evidence.
- B** Studies of plant quality may be admitted into evidence even if the study group was not independent of plant management. Lack of independence of a study group may affect whether a Board will "accept" the evidence because it affects the weight to be accorded to the evidence.
- C** The extent to which management may not have properly controlled plant quality during construction may affect the required intensity of review of the finished construction in order to demonstrate the adequacy of construction.
- LBP-85-40 COMMONWEALTH EDISON COMPANY** (Braidwood Nuclear Power Station, Units 1 and 2), Docket Nos. 50-456-OL, 50-457-OL (ASLBP No. 79-410-03-OL); OPERATING LICENSE, October 4, 1985, MEMORANDUM AND ORDER
- A** The Licensing Board grants a protective order providing for confidential treatment of the names and otherwise identifying information of intervenors' quality assurance witnesses to be disclosed to the other parties during discovery.
- B** The Board weighs the benefit of encouraging confidential deposition testimony upon the prima facie showing of its significance to the proceeding and the witnesses' reluctance to otherwise testify for supportable reasons, against the detriment of inhibiting public access to the information and the cumbersome procedures that a protective order necessitates, and finds the balance in favor of issuing the protective order.
- LBP-85-41 TEXAS UTILITIES ELECTRIC COMPANY, et al.** (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445-OL&OL-2, 50-446-OL&OL-2 (ASLBP No. 79-430-06-OL); OPERATING LICENSE, October 31, 1985, MEMORANDUM AND ORDER
- A** In this Memorandum and Order, the Licensing Board rules on various procedural matters.
- B** When two separate dockets for an operating license case are interrelated, discovery filed in one docket should be considered filed in both and responses should be made unless the request is irrelevant to both dockets.
- C** When two separate dockets for an operating license case are interrelated, evidence filed in one docket should be considered filed in both and may be relied on in the other docket if it is relevant.
- D** Multiple representatives of a party should coordinate their cases.
- E** When a case is unfolding gradually because of a major study that is under way, it is appropriate for a party to request documents that have not yet been created; such documents should be supplied as they become available.
- F** Parties should exchange information voluntarily. Also, when a party believes that discovery requests made of it seem too broad, they should be narrowed by a rule of reason and responded to in the narrowed form.
- G** Errors in design documents are an independent concern, regardless of whether they may be corrected before the plant is completed. Although errors may be made, significant errors should be promptly identified, documented, and corrected with reasonable speed. When Appli-

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

cants become aware of deviations from these principles, they should investigate the root cause of the deviations.

- H The following technical issue is discussed: Quality Assurance for Design.
- LBP-85-42 HOUSTON LIGHTING AND POWER COMPANY, et al. (South Texas Project, Units 1 and 2), Docket Nos. STN 50-498-OL, STN 50-499-OL (ASLBP No. 79-421-07-OL); OPERATING LICENSE, November 5, 1985; MEMORANDUM AND ORDER
- A The Licensing Board explains its earlier summary ruling which granted in part and denied in part an intervenor's motion to reopen the record. The Board permitted incorporation into the record of a document which inadvertently had not been supplied to the intervenor through discovery but declined to reopen the record to include another document which the Board determined was not material to the issues under consideration.
- B Where a record is closed and at least some proposed findings have been filed, but where a decision has not yet been rendered on a question, a motion to reopen the record must satisfy three criteria: (a) the motion must be timely filed; (b) it must address a significant safety (or environmental) issue; and (c) the additional information must potentially be susceptible of altering the result which would be reached in its absence.
- C Where a party seeks to reopen a record to include a new contention, it must demonstrate not only that the criteria for reopening a record are satisfied but also that the factors for late-filed contentions in 10 C.F.R. § 2.714(a) have been satisfied.
- D In evaluating the significance of newly proffered information for purposes of reopening a closed record, a Licensing Board may consider whether the information is new factual information. Differing analyses of 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.
- E Where a motion to reopen the record to consider a late-filed contention fails to discuss the factors bearing upon such contentions set forth in 10 C.F.R. § 2.714(a), the motion could be dismissed on that basis alone.
- F The McGuire doctrine requires advice to a Licensing Board of matters "relevant and material" to issues pending before that Board. LBP-85-6, 2¹ NRC 447, 461 (1985), and cases cited.
- G The stringent standards for reopening a record need not be applied with full force in a situation where (1) the proponent of reopening the record to include a newly discovered document was prevented from offering the document earlier, and (2) the new evidence can be received with little or no burden upon the parties.
- LBP-85-43 COMMONWEALTH EDISON COMPANY (Braidwood Nuclear Power Station, Units 1 and 2), Docket Nos. 50-456, 50-457, OPERATING LICENSE, November 7, 1985; MEMORANDUM OF RATIONALE FOR SUMMARY DISPOSITION OF NEINER FARMS CONTENTION I
- A In this Memorandum and Order the Licensing Board rules that the National Environmental Policy Act (NEPA) does not entitle the intervenor to litigate the possible effects of a proposed transmission line to transport electricity from the Braidwood facility. The Board imposes an operating license condition requiring notice in the event Applicant decides to build and operate a 765-kV transmission line on rights-of-way to and from the Braidwood site.
- B There is no requirement to assess the effects of an overall transmission grid system long-range plan when considering a presently proposed part of the transmission system. *Sierra Club v. Hodel*, 544 F.2d 1036, 1040-41 (9th Cir. 1976); see also *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 19 (8th Cir. 1973) (same reasoning applied in the analogous factual setting of an independently useful highway).
- C The three-prong test to determine whether an agency may confine its environmental analysis under NEPA to the portion of the plan for which approval is being sought is: (1) whether the proposed portion has substantial independent utility; (2) whether 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 a high probability that the entire plan will be implemented in the near future. *Swain v. Brinegar*, 542 F.2d 364, 369 (7th Cir. 1976) (en banc); see also *Duke Power Co. (Amendment*

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

- to SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-651, 14 NRC 307, 313 (1981).
- LBP-85-44 METROPOLITAN EDISON COMPANY, et al. (Three Mile Island Nuclear Station, Unit 2), Docket No. 50-320-OLA (ASLBP No. 80-442-04-LA); OPERATING LICENSE AMENDMENT; November 8, 1985; ORDER
- A The Board's Order grants the parties' joint motion to approve a stipulation, dismisses the Intervenor and dismisses the proceeding involving proposed technical specifications for this plant.
- B A stipulation is approved to further the principles of settlement and compromise of NRC litigation.
- LBP-85-45 HOUSTON LIGHTING AND POWER COMPANY, et al. (South Texas Project, Units 1 and 2), Docket Nos. STN 50-498-OL, STN 50-499-OL (ASLBP No. 79-421-07-OL); OPERATING LICENSE; November 14, 1985; MEMORANDUM AND ORDER
- A The Licensing Board grants (in part) a motion to reopen the record, and permits withdrawal of another such motion.
- B A motion to reopen the record filed prior to decision but subsequent to the filing of certain parties' proposed findings must satisfy the following criteria: (1) the motion must be timely filed; (2) it must address a significant issue, and (3) it must demonstrate that the information sought to be added to the record might potentially alter the result which would be reached in its absence.
- C Even if untimely, a motion to reopen a closed record may present a matter of such gravity that the motion should be granted.
- D A party that attacks the integrity and professional responsibility of an opposing party's counsel has an obligation to assure that the charges have a basis and are accurately documented. Lack of resources is no excuse for baseless charges.
- E Licensing boards have authority to strike pleadings which do not live up to the high standards of practice expected before the Commission.
- LBP-85-46 KERR-McGEE CHEMICAL CORPORATION (West Chicago Rare Earths Facility), Docket No. 40-2061-ML (ASLBP No. 83-495-01-ML); MATERIALS LICENSE; November 14, 1985; MEMORANDUM AND ORDER
- A The Licensing Board rules on intervenor's motion to stay the proceeding.
- B When a party intervenes in an NRC proceeding, that party assumes all of the responsibilities attendant to intervention. The pressures of other professional responsibilities are not a basis for alleviating that burden. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1416 n.33 (1982).
- C The existence of State Court litigation between the same parties as those before the NRC does not prevent the Licensing Board from carrying out its responsibilities under Federal law. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 884-85 (1984).
- LBP-85-47 TEXAS UTILITIES ELECTRIC COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445-OL, 50-446-OL (ASLBP No. 79-430-06-OL); OPERATING LICENSE; November 25, 1985; MEMORANDUM AND ORDER
- A The Licensing Board denies Applicants' motion for reconsideration of an earlier Board order.
- LBP-85-48 KERR-McGEE CHEMICAL CORPORATION (Kress Creek Decontamination), Docket No. 40-2061-SC (ASLBP No. 84-502-01-SC); SHOW CAUSE; November 29, 1985; MEMORANDUM AND ORDER
- A In this Memorandum and Order the Board denies Kerr-McGee's request to postpone further proceedings until completion of related State Court litigation between it and the People of the State of Illinois (People). The Board also dismisses the People's Contentions 1 and 6 for failure to comply with Board-ordered discovery.
- B An inability to complete prehearing preparation because of demands of intensive discovery in related State Court litigation is not adequate justification for postponement of the proceeding. Counsel's failure to ascertain that the People's contentions did not add anything to the proceeding and that the People's discovery responses were not a precondition to proceeding under

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

the established schedule created a delay, and the Board will not grant relief from the consequences of a delay caused by counsel's own factual error.

- C Where the People failed to respond to a discovery order and failed to file an appropriate motion seeking relief from filing dates, the Board dismissed the People's contentions after considering "the relative importance of the unmet obligation, its potential for 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, 1416-20 (1982), quoting Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981).

LBP-85-49 CAROLINA POWER AND LIGHT COMPANY and NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY (Shearon Harris Nuclear Power Plant), Docket No. 50-400-OL (ASLBP No. 82-472-03-OL); OPERATING LICENSE; December 11, 1985; PARTIAL INITIAL DECISION ON EMERGENCY PLANNING AND SAFETY CONTENTIONS

- A In this Partial Initial Decision, the Licensing Board decides several emergency planning and safety issues in the Applicants' favor. The Board also states its reasons for accepting and rejecting numerous contentions based upon the emergency planning exercise for the Shearon Harris facility.

- B Contentions based on an applicant's emergency planning exercise should be considered in light of the fact that they arise at the end of a lengthy public evaluation process and that the exercise has been evaluated by the Federal Emergency Management Agency. Thus, only contentions alleging fundamental flaws in planning should be admitted; those alleging minor or readily correctable problems should be rejected.

- C The following technical issues are discussed: Effectiveness of Sheltering, Fire Protection, Pipe Hanger Welding, Steam Generator Tube Failure Analysis.

DIGESTS
ISSUANCES OF THE ADMINISTRATIVE LAW JUDGES

ALJ-85-1 REICH GEO-PHYSICAL, INC., Docket No. 30-14821 (ASLBP No. 85-508-01-OT) (License Nos. 25-18304-01, EA-84-78); CIVIL PENALTY, December 11, 1985; INITIAL DECISION

A In this initial Decision, the Administrative Law Judge sustains a civil penalty of \$1600.00 imposed against the petitioner by the Director of Investigation and Enforcement for possession, use, storage and transportation of radioactive material in ways not authorized by petitioner's license.

B The Commission's General Statement of Policy and Procedure for NRC Enforcement Actions is, by its express terms, imposed upon the Staff and the Commission's presiding officers. As a matter of fair notice to licensees, the Commission's presiding officers must apply the Enforcement Policy in civil penalty actions.

C The conduct of licensed activities by a technically unqualified person is per se a Severity Level III violation under the Commission's Enforcement Policy.

D Under the Commission's enforcement policy, the authority of an administrative law judge is limited to imposing, mitigating or remitting the civil penalty imposed by the Director, Office of Inspection and Enforcement.

E The Commission's policy statement is silent as to the effect of aggregation of violations. While many violations flowing from the same mistake may be aggregated into a single violation of the same severity level, the violations in this case are cumulative, demonstrating the absence of mistake and a pervasive pattern of disregard for license requirements, and justifying aggregation to a serious Severity Level II.

F Civil penalties will normally be assessed for any willful violation of the Commission requirements regardless of severity level. Even for Severity Level IV violations, civil penalties may be imposed for violations that are similar to previous violations for which effective correction was not taken.

G While adverse publicity resulting from an enforcement action may deter violations of the Commission's regulations to some extent, it is not a reliable or necessarily effective means of assuring continued compliance with those regulations, and in this case was entitled to no mitigating weight.

ALJ-85-2 REICH GEO-PHYSICAL, INC., Docket No. 30-14821 (ASLBP No. 85-508-01-OT) (License Nos. 25-18304-01, EA-84-78); CIVIL PENALTY, December 20, 1985; SUPPLEMENT TO INITIAL DECISION

A In this Supplement to Initial Decision, the Administrative Law Judge authorizes payment of a civil penalty in installments pursuant to arrangements reached between the Licensee and the Director, Office of Inspection and Enforcement.

DIGESTS
ISSUANCES OF THE ADMINISTRATIVE LAW JUDGES

DIGESTS
ISSUANCES OF DIRECTORS' DECISIONS

DD-85-10 COMMONWEALTH EDISON COMPANY AND ALL LIGHT-WATER REACTORS
(Zion Station, Unit 1), Docket No. 50-295; IMMEDIATE ACTION REQUEST; July 3, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

- A** The Director of Nuclear Reactor Regulation denies a petition filed by Zinovy V. Reytblatt seeking an immediate postponement of all containment leak rate tests performed for light-water reactors based on alleged errors in containment leak rate measurement methodology. Petitioner also alleged errors in computer software used to determine containment leak rates. The Director concluded that the current leak rate methodology was adequate to determine containment leak rates. Furthermore, the NRC Staff has reviewed data sets from tests using the allegedly incorrect software and has found that the data have been correctly processed. In addition, NRC inspectors, as a matter of course, independently verify containment leak rate results.
- B** The equation used to calculate containment air mass will produce adequate results if testing is done under stable conditions and test data are properly evaluated. Further, the likelihood that weighting coefficients are manipulated to produce an acceptable test result is small as NRC inspectors regularly observe the tests conducted by licensees and document the results in Inspection Reports.

DD-85-11 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352, 50-353; IMMEDIATE ACTION REQUEST; July 29, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

- A** The Director of the Office of Nuclear Reactor Regulation denies the Petition of Robert L. Anthony and Friends of the Earth (Petitioners) seeking the Directors' immediate initiation of show cause proceedings to revoke the operating license for the Limerick Generating Station Unit 1 of the Philadelphia Electric Company (Licensee). The Petitioners argued that certain exemptions granted to the Licensee were improperly granted and that Licensee Event Reports, Inspection Reports and certain correspondence demonstrate that licensed activities at the Limerick facility are being conducted in an unsafe fashion and warrant license revocation. Finally, Petitioners argue that the Independent Design Verification Program undertaken for the Limerick facility indicates that the design of the facility is inadequate. In his decision, the Director also considered the comments of Mr. Frank Romano submitted on March 11, 1985, and the comments of Mr. Marvin Lewis submitted on February 15, 1985, on issues related to the Limerick facility.
- B** Where no specific factual basis is provided by the Petitioners to support a claim that exemptions were improvidently granted, the Director of the Office of Nuclear Reactor Regulation need take no further action under 10 C.F.R. § 2.206 with respect to Petitioners' claims.
- C** NRC inspection activities may discover violations of NRC requirements both in the construction and operation of facilities. Such violations are generally of minor significance. If truly major deficiencies on the part of a licensee are identified, the agency is authorized to issue orders, including stop-work orders, to assure appropriate remedial action.
- D** Isolated deficiencies in a licensee's program of construction or operation do not necessarily undermine the program to such an extent as to give rise to a significant safety concern. What is required is a careful assessment of the significance of the deficiencies, and the corrective action taken to preclude recurrence.
- E** A request pursuant to § 2.206 for institution of show cause proceedings shall set forth the facts that constitute the bases for the request. In the absence of the specific factual basis called for by the regulation, any inquiry must necessarily be limited.
- F** It is the NRC's policy to pursue all specific allegations with potential safety significance. However, vague and unspecified claims do not warrant further inquiry.

DIGESTS
ISSUANCES OF DIRECTORS' DECISIONS

DIGESTS
ISSUANCES OF DIRECTORS' DECISIONS

- G The remedy afforded by § 2.206 should not be used as a means to reopen issues previously adjudicated. In the absence of any significant new information, neither a party to a Commission adjudicatory proceeding nor a nonparty may raise issues previously adjudicated for consideration under § 2.206.
- DD-85-12 ARIZONA PUBLIC SERVICE COMPANY, et al. (Palo Verde Nuclear Generating Station, Unit 1), Docket No. 50-528; REQUEST FOR ACTION, August 9, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206
- A The Director of the Office of Nuclear Reactor Regulation denies the petition of Mr. Myron L. Scott of the Coalition for Responsible Energy Education which requested delay in the issuance of the PVNGS Unit 1 license until certain concerns were resolved. The Petitioner contended that the incentive regulations adopted by the Arizona Corporation Commission and the fuel load bonus plan adopted by the Licensees had not been adequately reviewed for their potential safety impact and that emergency preparedness of State and local agencies for PVNGS was inadequate due to underfunding.
- DD-85-13 THE DETROIT EDISON COMPANY, et al. (Enrico Fermi Atomic Power Plant, Unit 2), Docket No. 50-341; REQUEST FOR ACTION, August 12, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206
- A The Director of the Office of Inspection and Enforcement denies the petition of Mr. Stanley Nietubicz requesting legal action to rectify an asserted lack of viable evacuation routes under flood conditions for certain areas around the Fermi 2 facility.
- DD-85-14 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440, 50-441; REQUEST FOR ACTION, September 13, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206
- A The Director of Nuclear Reactor Regulation denies a petition under 10 C.F.R. § 2.206 filed by the Ohio Citizens for Responsible Energy which requested that a number of actions be taken in view of the alleged precarious financial condition of the Licensees of the Perry plant.
- B Although the Commission has retained reviews of financial qualifications in some licensing proceedings, institution of enforcement proceedings is not required merely because a licensee may be experiencing financial difficulties. Whether enforcement action should be taken turns on whether financial constraints have had an adverse impact on safety or are substantially likely to affect safety adversely.
- DD-85-15 * ARIZONA PUBLIC SERVICE COMPANY, et al. (Palo Verde Nuclear Generating Station, Units 1 and 2), Docket Nos. 50-528, 50-529; REQUEST FOR ACTION, September 16, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206
- A The Director of the Office of Nuclear Reactor Regulation denies a petition filed by the Coalition for Responsible Energy requesting suspension of the Unit 1 operating license and further licensing activities at Unit 2 until the issue of microbiologically influenced corrosion in the spray pond piping system is resolved.
- DD-85-16 GENERAL ELECTRIC COMPANY (GE Morris Operation Spent Fuel Storage Facility), Docket Nos. 70-1308, 72-1-SP; SPECIAL PROCEEDING, November 4, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206
- A The Director of the Office of Nuclear Material Safety and Safeguards denies the Petition submitted by Catherine Thiel Quigg on behalf of the Illinois Safe Energy Alliance. The Petition requested that the Director of Nuclear Material Safety and Safeguards prepare an environmental impact statement for the General Electric Morris Operation and that the Commission reconsider a decision by the Licensing Board which authorized the Director to renew the license of the General Electric Company to store spent (irradiated) fuel at the facility without requiring a Federal environmental impact statement.
- B NEPA does not require that an environmental impact statement be prepared when an action does not directly or indirectly bring about any change in the environmental status quo.
- C Section 2.206 procedures are not to be used as a vehicle for reconsideration of issues previously decided.
- D NEPA does not require the Commission to reconsider environmental decisions whenever new information developed subsequent to the action becomes available. Rather, it is unnecessary for an agency to reopen the NEPA record unless the new information would clearly mandate a change in result.

DIGESTS
ISSUANCES OF DIRECTORS' DECISIONS

E The function of an environmental impact appraisal is to supply reasons why an action with potentially significant environmental impacts does not require a detailed environmental impact statement. Thus, to pass muster, the appraisal must simply reflect that a hard look was taken at the problem, identify the relevant areas of concern, and make a convincing case that the impact is insignificant.

DD-85-17 MAINE YANKEE ATOMIC POWER COMPANY (Maine Yankee Atomic Power Station), Docket No. 50-309, REQUEST FOR ACTION, November 12, 1985, DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Acting Director of the Office of Nuclear Reactor Regulation denies the petition of the State of Maine asserting that there were a number of alleged deficiencies at the Maine Yankee Atomic Power Station of the Maine Yankee Atomic Power Company associated with environmental qualification of electrical equipment that represented a hazard to continued safe operation of the facility.

B The Licensee's program for environmental qualification of electrical equipment complies with the requirements of 10 C.F.R. § 50.49. Proposed resolutions for each of the environmental deficiencies identified are acceptable. Continued operation of the facility until implementation of the program is complete will not result in undue risk to the public health and safety.

DD-85-18 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352, 50-353, REQUEST FOR ACTION, November 12, 1985, DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Acting Director of Nuclear Reactor Regulation denies a petition under 10 C.F.R. § 2.206 which requested that the NRC stay the activities of the Delaware River Basin Commission until the Licensee complied with certain environmental license conditions.

B The NRC has no authority over the Delaware River Basin Commission (DRBC) and, consequently, may not stay any of its activities or cause any applications before the DRBC to be withdrawn.

C Licensees are expected to adhere to all NRC requirements and license conditions. However, NRC action is inappropriate in the absence of any present violation of a regulation or license condition.

DD-85-20 GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289, SOUTHERN CALIFORNIA EDISON COMPANY (San Onofre Nuclear Generating Station, Unit 1), Docket No. 50-206, WISCONSIN PUBLIC SERVICE CORPORATION (Kewaunee Nuclear Power Plant), Docket No. 50-305, CONNECTICUT YANKEE ATOMIC POWER COMPANY (Haddam Neck Plant), Docket No. 50-213, REQUEST FOR ACTION, December 23, 1985, DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of the Office of Nuclear Reactor Regulation declines to take action based upon alleged equipment qualification deficiencies at specific plants identified in the "Union of Concerned Scientists' Comments on Proposed Rule" submitted on May 23, 1984. The Director concluded that the overall state of equipment qualification of the facilities is adequate to assure protection of the public health and safety.

DIGESTS
ISSUANCE OF DENIAL OF PETITION FOR RULEMAKING

DPRM-85-3 JOHN L. NANTZ, Docket No. PRM-50-35: RULEMAKING DENIAL; July 26, 1985;
DENIAL OF PETITION FOR RULEMAKING

- A The Nuclear Regulatory Commission denies a petition for rulemaking submitted by John L. Nantz. The Petitioner requested that the Commission adopt regulations to establish a formal procedure for Commission review of decisions to close advisory committee meetings or portions of those meetings. The petition is being denied on the grounds that current procedures are adequate to assure that advisory committees' use of exemptions from the requirement for open meetings are adequately justified and because Commission review would be an inefficient and unwarranted use of the Commission's resources.
- B The Commission concludes that current procedures for rulings on closure determinations for advisory committee meetings are adequate.
- C In the absence of any statutory prohibition, the Commission concludes that its delegation of authority to rule on closure determinations for advisory committee meetings is a proper exercise of its authority pursuant to § 161n of the Atomic Energy Act of 1954, as amended.
- D Establishment of a formal procedure for Commission review of advisory committee closures would diverge from a strong policy of the Commission to extricate itself from nonessential procedural matters to conserve its resources for paramount responsibilities.

LEGAL CITATIONS INDEX
CASES

- Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963, 968 (7th Cir. 1983)
need to include evidence of little intrinsic worth in a record: ALAB-624, 22 NRC 782 n.18 (1985)
- Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 503 (1970)
difficulty in determining experts to whom Fed. R. Civ. P. 26(b)(4)(B) applies: LBP-85-38, 22 NRC 613 (1985)
- Ager v. Jane C. Stormont Hospital and Training School, 622 F.2d 496, 501 (10th Cir. 1980)
determining whether a subpoenaed party is an expert specially retained in anticipation of litigation: LBP-85-38, 22 NRC 613 (1985)
- Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974)
standards applied by Boards considering summary disposition motions: LBP-85-27A, 22 NRC 208 (1985); LBP-85-29, 22 NRC 310 (1985)
- American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 540 (1970)
authority to reconsider decision after the filing of a petition for judicial review: CLI-85-14, 22 NRC 179 n.3 (1985)
- Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), ALAB-713, 17 NRC 83, 85 (1983)
scope of appellate sua sponte review: ALAB-822, 22 NRC 771 n.1 (1985)
- Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 384 (1983)
effect on a proceeding of admission of a single additional contention for purpose of justifying interlocutory review: ALAB-817, 22 NRC 475 n.18 (1985)
- B&S Drilling Co. v. Halliburton Oil Well Cementing Co., 24 F.R.D. 1, 4 (1959)
need to divulge source of answer to interrogatory: LBP-85-38, 22 NRC 622 (1985)
- Baki v. B.F. Diamond Construction Co., 71 F.R.D. 179, 182 (D. Md. 1976)
showing necessary to obtain discovery of experts retained in anticipation of litigation but not expected to testify: LBP-85-38, 22 NRC 617 n.16 (1985)
- Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 99 n.12 (1983)
applicability of Council on Environmental Quality regulations in NRC proceedings: ALAB-819, 22 NRC 700 n.21 (1985)
- Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 1), ALAB-111, 7 AEC 417 (1974)
summary disposition in license amendment hearings: LBP-85-29, 22 NRC 310 (1985)
- Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-632, 13 NRC 91, 93 n.2 (1981)
appealability of decision which does not authorize issuance of a license or resolve all pending safety issues: LBP-85-28, 22 NRC 298 n.21 (1985)
- Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-42, 2 NRC 159, 161 (1975)
applicability of Fed. R. Civ. P. 26(b)(4) to NRC proceedings: LBP-85-38, 22 NRC 609 (1985)
- Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-612, 13 NRC 91, 93 n.2 (1981)
appealability of decision which does not authorize issuance of a license or resolve all pending safety issues: LBP-85-28, 22 NRC 298 n.21 (1985)
- BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974)
threshold exclusion of contentions: LBP-85-49, 22 NRC 910 n.1 (1985)

LEGAL CITATIONS INDEX CASES

- Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1241 n.4 (7th Cir. 1985)
regulatory structure for nuclear-powered electric generation; ALAB-818, 22 NRC 663 n.35 (1985)
- Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2098 (1982)
reading of 10 C.F.R. § 50.13 in pari materia with Part 73; LBP-85-27, 22 NRC 137 (1985)
- Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-83-27A, 17 NRC 971, 976-80 (1983)
applicability of Fed. R. Civ. P. 26(b)(4) to NRC proceedings; LBP-85-38, 22 NRC 609, 610 (1985)
- Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-74-9, 7 AEC 196 (1974)
Licensing Board authority to consider challenges to Commission authority to grant exemptions from regulations; LBP-85-33, 22 NRC 444 (1985)
- Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-74-9, 7 AEC 197, 198 (1974)
Commission authority to direct Licensing Board to consider merits of 50.12 request; LBP-85-33, 22 NRC 446 (1985)
- 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)
authority of adjudicatory boards over NRC Staff; ALAB-812, 22 NRC 560 (1985)
- Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-577, 11 NRC 18, 25 (1980)
scope of licensing board authority; ALAB-825, 22 NRC 790 n.12 (1985)
- Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), LBP-78-2, 7 NRC 83, 85 (1978)
circumstances under which standards for reopening a record need not be applied with full force; LBP-85-42, 22 NRC 803 (1985)
- Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), LBP-79-19, 10 NRC 37 (1979)
standard for determining management competence; LBP-85-28, 22 NRC 236 (1985)
- Carstens v. NRC*, 742 F.2d 1546, 1557 (D.C. Cir. 1984), cert. denied, ___ U.S. ___, 86 L. Ed. 2d 694 (1985)
standard for measuring an operating license application; ALAB-819, 22 NRC 741 (1985)
- Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station), CLI-82-33, 16 NRC 1489 (1982)
comparison of standards applied in Staff review of quality assurance deficiencies at other facilities; ALAB-812, 22 NRC 25 (1985)
- Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station), LBP-80-14, 11 NRC 570, 576 (1980)
weight given to intervenor's ability to contribute to sound record in deciding late intervention request; LBP-85-36, 22 NRC 594 (1985)
- Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station, Unit 1), ALAB-727, 17 NRC 760, 770-71 (1983)
use of adversarial evaluation to determine efficiency with which an evacuation can be accomplished; ALAB-818, 22 NRC 677 n.103 (1985)
- Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station, Unit 1), ALAB-727, 17 NRC 760, 775 n.20 (1983)
FEMA findings sufficient for authorization of full-power operating license; ALAB-813, 22 NRC 78 n.91 (1985)
- Citizens for Safe Power, Inc. v. NRC*, 524 F.2d 1291, 1294 n.5 (D.C. Cir. 1975)
amendment of Final Environmental Statement through the adjudicatory process; ALAB-819, 22 NRC 706 (1985)
- Citizens for Safe Power, Inc. v. NRC*, 524 F.2d 1291, 1299-1300 (D.C. Cir. 1975)
litigability of severe accident mitigation measures in NRC proceedings; ALAB-819, 22 NRC 696 n.10 (1985)

LEGAL CITATIONS INDEX
CASES

- City of Rochester v. United States Postal Service, 541 F.2d 967 (2d Cir. 1976)
need to consider socioeconomic impacts of low-probability event in environmental impact statement; ALAB-819, 22 NRC 704 n.29 (1985)
- Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 2), DD-84-23, 20 NRC 1549, 1553 (1984)
hazard to public health and safety of slowdown or halt in construction of a nuclear plant; DD-85-14, 22 NRC 641-42 (1985)
- Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 752 (1977)
Board authority to request oral testimony where record is insufficient to allow summary disposition; LBP-85-29, 22 NRC 307 (1985)
- Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977)
burden on movant for summary disposition; LBP-85-27A, 22 NRC 208 (1985)
- Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977)
consequence of summary disposition opponent's failure to submit evidence; LBP-85-29, 22 NRC 310 (1985)
- Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1112-13 (1983)
effect on a proceeding of admission of a single additional contention; ALAB-817, 22 NRC 474 n.17, 478 n.12 (1985)
- Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754 (1982)
interlocutory review of decisions admitting one or more additional contentions; ALAB-817, 22 NRC 474 n.15 (1985)
- Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-736, 18 NRC 165, 166 (1983)
appealability of order dismissing some but not all of intervenor's contentions; LBP-85-29, 22 NRC 331 (1985)
- Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 179 (1981)
residency requirements for standing to intervene in operating license proceedings; LBP-85-24, 22 NRC 99 n.7 (1985)
- Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-42, 14 NRC 842, 844-45 (1981)
litigability of "enemy attack" contentions under 10 C.F.R. 50.13; LBP-85-27, 22 NRC 135, 137, 140 (1985)
- Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-89, 16 NRC 1355, 1356 (1982)
obligations of tardy intervention petitioners; ALAB-816, 22 NRC 467 n.22 (1985)
- Columbia Basin Land Protection Ass'n v. Kieppe, 417 F. Supp. 46, 52 (E.D. Wash. 1976), aff'd in part, rev'd in part on other grounds, sub nom. Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585 (9th Cir. 1981)
need for environmental analysis of future overall transmission grid system when considering a proposed part of the transmission system; LBP-85-43, 22 NRC 811 (1985)
- Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1416 n.33 (1982)
pressure of other professional responsibilities as basis for failure to comply with NRC deadline for filing objections; LBP-85-46, 22 NRC 832 n.8 (1985)
- Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1416-20 (1982)
Licensing Board responsibility to explain sanction; LBP-85-48, 22 NRC 849 (1985)

**LEGAL CITATIONS INDEX
CASES**

- Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163 (1984)
effect of fatal flaw in implementation of emergency plans on operating license issuance; LBP-85-31, 22 NRC 431 (1985)
- Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591 (1984)
delay of proceeding by addition of one quality assurance contention; ALAB-817, 22 NRC 478 n.11 (1985)
- Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1598 (1984)
delegation of quality assurance responsibilities; ALAB-812, 22 NRC 22 (1985)
- Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 692-93 (1980)
litigability of contention challenging 10 C.F.R. 50.13; LBP-85-27, 22 NRC 131 n.2 (1985)
- Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-84-2, 19 NRC 36, 209-13 (1984)
post-hearing resolution of emergency planning issues by NRC Staff; LBP-85-27A, 22 NRC 222 (1985)
- Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-84-2, 19 NRC 36, 262-63 (1984)
need for accuracy in evacuation time estimates; LBP-85-27A, 22 NRC 215 (1985)
- Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-84-41, 20 NRC 1203, 1216, aff'd, ALAB-793, 20 NRC 1591 (1984)
NRC Staff testimony in another proceeding as basis for contention; ALAB-817, 22 NRC 472 n.3 (1985)
- Commonwealth Edison Co. (LaSalle County Station, Units 1 and 2), DD-84-6, 19 NRC 891 (1984)
litigation of concerns about containment leak rate testing methodology; DD-85-10, 22 NRC 145 n.1 (1985)
- Commonwealth Edison Co. (Zion Station, Unit 1), DD-85-2, 21 NRC 270 (1985)
litigation of concerns about containment leak rate testing methodology; DD-85-10, 22 NRC 145 n.1 (1985)
- Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 421 (1980)
standard of proof for measuring evidence; ALAB-819, 22 NRC 720 (1985)
- Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980)
scope of Licensing Board jurisdiction conferred by notice of opportunity for hearing; ALAB-825, 22 NRC 791 n.21 & 22 (1985)
- Consolidated Edison Co. of New York (Indian Point Station, Unit 2), ALAB-202, 7 AEC 825, 829-30 (1974)
need for protection of nuclear power plant against band of armed saboteurs; LBP-85-27, 22 NRC 136 (1985)
- Consolidated Edison Co. of New York (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 951 (1974)
termination of proceedings prior to completion of safety analyses; LBP-85-32, 22 NRC 436 n.2 (1985)
- Consolidated Edison Co. of New York (Indian Point, Unit 2), CLI-83-16, 17 NRC 1006, 1010 (1983)
right of States to use emergency planning responsibilities to prohibit reactor operation on nonradiological health and safety grounds; ALAB-818, 22 NRC 671 n.72, 672 n.74 (1985)
- Consolidated Edison Co. of New York (Indian Point, Unit 2), CLI-85-6, 21 NRC 1043, 1057 (1985)
use of probabilistic risk assessments by NRC; ALAB-819, 22 NRC 697 n.13 (1985)
- Consolidated Edison Co. of New York (Indian Point, Unit 2), CLI-85-6, 21 NRC 1043, 1073 (1985)
litigability of severe accident mitigation measures in NRC proceedings; ALAB-819, 22 NRC 696 n.11 (1985)
- Consolidated Edison Co. of New York (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975)
circumstances appropriate for issuance of show cause order; DD-85-11, 22 NRC 152 n.2 (1985)

LEGAL CITATIONS INDEX
CASES

- Consolidated Edison Co. of New York (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 177 (1975)
use of 2.206 procedures as a vehicle for reconsideration: DD-85-16, 22 NRC 855 (1985)
- Consumers Power Co. (Big Rock Point Plant), ALAB-636, 13 NRC 312 (1981)
actions for which an environmental impact statement must be prepared: DD-85-16, 22 NRC 855 (1985)
- Consumers Power Co. (Big Rock Point Plant), ALAB-636, 13 NRC 312, 332 (1981)
need for Staff assessment of alternatives to spent fuel transshipments: LBP-85-34, 22 NRC 491 (1985)
- Consumers Power Co. (Big Rock Point Plant), ALAB-725, 17 NRC 562, 564 n.2, 567-68 (1983)
explanation of K-effective concept: ALAB-816, 22 NRC 463 n.2, 468 n.29 (1985)
- Consumers Power Co. (Big Rock Point Plant), ALAB-795, 21 NRC 1, 2 (1985)
stare decisis effect accorded to Licensing Board conclusions on purely legal matters by Appeal Board affirmance on sua sponte review: ALAB-826, 22 NRC 894 n.6 (1985)
- Consumers Power Co. (Big Rock Point Plant), LBP-84-32, 20 NRC 601, 639-52 (1984)
litigability of risk to nuclear power plants of military airplane crashes: LBP-85-27, 22 NRC 140 (1985)
- Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-33, 4 AEC 701 (1971)
applicability of executive privilege to NRC proceedings: LBP-85-38, 22 NRC 626 (1985)
- Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-106, 6 AEC 182, 184 (1973)
importance of managerial attitude to an applicant's quality assurance program: ALAB-812, 22 NRC 15 n.5 (1985)
- Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645, 647 (1974)
Licensing Board authority to change the scope of its jurisdiction: ALAB-825, 22 NRC 790 n.15 (1985)
- Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-270, 1 NRC 473, 476 (1975) *
need for record support in appellate briefs: ALAB-825, 22 NRC 793 n.29 (1985)
- Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-315, 3 NRC 101, 103 (1976)
burden of proving entitlement to an operating license: ALAB-812, 22 NRC 56 (1985)
- Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-379, 5 NRC 565, 568 n.13 (1977)
applicability of Fed. R. Civ. P. 26(b)(4) to NRC proceedings: LBP-85-38, 22 NRC 610 (1985)
- Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-50, 18 NRC 242, 248 (1983)
applicability of 10 C.F.R. 2.714(a)(1)(iii) to motion to reopen record to admit new contention: LBP-85-42, 22 NRC 799 (1985)
- Cuomo v. NRC, 772 F.2d 972, 974, 976 (D.C. Cir. 1985)
importance of establishing irreparable injury in justifying stay request: ALAB-820, 22 NRC 746 n.8, 747 n.13 (1985)
- Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1066-67 (1983)
FEMA findings sufficient for authorization of full-power operating license: ALAB-813, 22 NRC 78 n.91 (1985)
- Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1069 n.12 (1983)
use of adversarial evaluation to determine efficiency with which an evacuation can be accomplished: ALAB-818, 22 NRC 677 n.103 (1985)
- Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 581 (1978)
applicability of Fed. R. Civ. P. 26(b)(4) to NRC proceedings: LBP-85-38, 22 NRC 609 (1985)
- Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-247, 8 AEC 936, 939 (1974)
test for segmentation of a project for NEPA purposes: LBP-85-43, 22 NRC 811 (1985)
- Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977)
Federal preemption of State laws because they coincidentally prevent reactor operation: ALAB-818, 22 NRC 667 n.56 (1985)
- Duke Power Co. (Amendment to Materials License SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-651, 14 NRC 307 (1981)
need for Staff analysis of dry cask storage alternative to spent fuel transshipment: LBP-85-34, 22 NRC 490 (1985)

LEGAL CITATIONS INDEX
CASES

- Duke Power Co. (Amendment to SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-651, 14 NRC 307, 313 (1981)
test for segmentation of a project for NEPA purposes; LBP-85-43, 22 NRC 810 (1985)
- Duke Power Co. (Amendment to Materials License SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-651, 14 NRC 307, 317 (1981)
function of an environmental impact appraisal; DD-85-16, 22 NRC 856-57 (1985)
- Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 413 (1976)
disposition of improperly briefed issues on appeal; ALAB-813, 22 NRC 66 n.16 (1985)
- Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 465-67 (1982),
aff'd in pertinent part, CLI-83-19, 17 NRC 1041 (1983)
exercise of interlocutory review where test is not strictly satisfied; ALAB-817, 22 NRC 474 n.12 (1985)
- Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467 (1982)
conditional admission of contentions; ALAB-819, 22 NRC 725 (1985)
- Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467 n.12 (1982)
limits on discovery; LBP-85-42, 22 NRC 803 (1985)
- Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982),
aff'd in pertinent part, CLI-83-19, 17 NRC 1041 (1983)
specificity requirement for admission of contentions; ALAB-817, 22 NRC 477 nn.6 & 10 (1985)
- Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1633, 1635 (1984)
most important criterion applied in determining need for a stay; ALAB-820, 22 NRC 746 nn.7 & 8, 749 n.22 (1985)
- Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1633-35 (1984)
specificity required of stay motions; ALAB-814, 22 NRC 196 (1985)
- Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 85 (1985)
litigability of the adequacy of the ANSI Standard for determining performance index for dosimeters; LBP-85-28, 22 NRC 260 n.17 (1985)
- Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985)
Licensing Board authority to decide novel legal questions; LBP-85-49, 22 NRC 910 n.1 (1985)
- Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983)
rules applicable to late-filed emergency planning contentions; LBP-85-49, 22 NRC 909 (1985)
- Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983)
factors balanced for admission of late-filed contentions; ALAB-819, 22 NRC 725 (1985)
- Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980)
five factors to be addressed by petitioner filing amended petition to intervene; LBP-85-36, 22 NRC 592 (1985)
- Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352-53 (1980)
burden of persuasion on lateness factors applied to untimely intervention petition; ALAB-816, 22 NRC 466 n.21 (1985)
- Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-128, 6 AEC 399, 410 (1973)
independence required of quality assurance manager; ALAB-813, 22 NRC 67 (1985)
- Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982)
form of an expert witness's testimony; ALAB-819, 22 NRC 720 (1985)
standard for determining a witness's qualifications as an expert; ALAB-819, 22 NRC 732 n.67 (1985)
- Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 477 (1982)
admissibility of hearsay evidence in administrative proceedings; ALAB-819, 22 NRC 718 (1985)
- Duke Power Co. v. NRC, 770 F.2d 386, 388 (4th Cir. 1985)
reason for NRC adoption of post-TMI emergency planning requirements; ALAB-818, 22 NRC 675 (1985)

LEGAL CITATIONS INDEX
CASES

- Ecology Action v. AEC, 492 F.2d 998, 1001-02 (2d Cir. 1974)
amendment of Final Environmental Statement through the adjudicatory process: ALAB-819, 22 NRC 706 (1985)
- Evans v. Local Union 2127, Int'l Brotherhood of Electrical Workers, AFL-CIO, 313 F. Supp. 1354, 1360 (1969)
need to divulge source of answer to interrogatory: LBP-85-38, 22 NRC 622-23 (1985)
- Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963)
importance of legislative intent in making statutory interpretations: ALAB-818, 22 NRC 668 n.63 (1985)
- Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-553, 10 NRC 12, 14 n.7 (1979)
role of NRC Staff in licensing proceedings: ALAB-812, 22 NRC 56 (1985)
- Florida Power and Light Co. (Turkey Point Nuclear Generating Station, Units 3 and 4), 4 AEC 9, 11 (1967), aff'd, Siegel v. AEC, 400 F.2d 778 (D.C. Cir. 1968)
need for special design features to protect nuclear facility against attacks from enemies of the United States: LBP-85-27, 22 NRC 133 (1985)
- Florida Power and Light Co. (Turkey Point Nuclear Generating Station, Units 3 and 4), 4 AEC 9, 13 (1967), aff'd, Siegel v. AEC, 400 F.2d 778, 783-84 (D.C. Cir. 1968)
basis for Commission exclusion of hostile acts from litigation: LBP-85-27, 22 NRC 133-35 (1985)
- Florida Power and Light Co. (Turkey Point Nuclear Generating Station, Units 3 and 4), LBP-79-21, 10 NRC 183, 190 (1979)
weight given to good cause factor where late intervention petitioner is pro se litigant: LBP-85-36, 22 NRC 594 n.3 (1985)
- General Electric Co. (Vallecitos Nuclear Center, General Electric Test Reactor), LBP-78-33, 8 NRC 461 (1978)
applicability of Fed. R. Civ. P. 26(b)(4) to NRC proceedings: LBP-85-38, 22 NRC 609 (1985)
- General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Units 1 and 2), CLI-85-4, 21 NRC 561, 563 (1985)
use of 2.206 procedures as a vehicle for reconsideration: DD-85-11, 22 NRC 159 (1985); DD-85-16, 22 NRC 855 (1985)
- Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), DD-79-4, 9 NRC 582, 584-85 (1979)
need to reconsider environmental decisions when new information becomes available: DD-85-16, 22 NRC 855 (1985)
- Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1072 (1st Cir. 1980)
amendment of Final Environmental Statement by the hearing record: ALAB-819, 22 NRC 706 n.33 (1985)
- Greene County Planning Board v. FPC, 559 F.2d 1227 (2d Cir. 1976), cert. denied, 434 U.S. 1086 (1978)
need to reconsider environmental decisions when new information becomes available: DD-85-16, 22 NRC 855 (1985)
- Guard v. NRC, 753 F.2d 1144 (D.C. Cir. 1985)
compliance with future emergency planning requirements: LBP-85-35, 22 NRC 525 (1985)
scope of emergency plan medical arrangements: CLI-85-15, 22 NRC 186 (1985)
- Harazimowicz v. McCallister, 78 F.R.D. 319 (E.D. Pa. 1978)
experts to whom Fed. R. Civ. P. 26(b)(4)(B) applies: LBP-85-38, 22 NRC 612 (1985)
- Healy v. Counts, 100 F.R.D. 493, 496 (D. Colo. 1984)
determining whether a subpoenaed party is an expert specially retained in anticipation of litigation: LBP-85-38, 22 NRC 613 (1985)
- Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 384 (1979); ALAB-625, 13 NRC 13 (1981); LBP-82-94, 16 NRC 1399 (1982)
standard for intervention by individual who has had prior experience in NRC proceedings: ALAB-816, 22 NRC 467 n.25 (1985)
- Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393 (1979)
basis for denial of motion for protective order: LBP-85-40, 22 NRC 762 (1985)

LEGAL CITATIONS INDEX
CASES

- Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 523 (1979); ALAB-574, 11 NRC 7, 13 (1980)
authority of Licensing Boards to shorten time period for filing contentions; LBP-85-36, 22 NRC 593 (1985)
- Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979)
right of tardy intervenor to respond to Board action on contention; ALAB-816, 22 NRC 466 n.22 (1985)
- Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546-49 & n.10 (1980)
consideration of a contention's merits at admission stage; ALAB-819, 22 NRC 694 (1985)
- Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-609, 12 NRC 172, 173 n.1 (1980)
standard for intervention by pro se litigants; ALAB-816, 22 NRC 467 n.24 (1985)
- Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 371-74 (1985)
relationship between quality assurance deficiencies and management competence and character; ALAB-812, 22 NRC 15, 48 (1985)
- Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 376-77 (1985)
showing necessary by party challenging cross-examination ruling; ALAB-813, 22 NRC 76 n.78 (1985)
- Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1365 (1982)
source of disqualifying bias; ALAB-819, 22 NRC 721 (1985)
- Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-81-54, 14 NRC 918, 922-23 & n.4 (1981)
need for Licensing Boards to notify the Commission of issues raised sua sponte; ALAB-819, 22 NRC 731 n.64 (1985)
- Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-84-13, 19 NRC 659, 669-98 (1984)
standard for determining management competence; LBP-85-28, 22 NRC 237 (1985)
- Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 447 (1960)
effect on State authority of Federal government's reservation of exclusive jurisdiction over radiological health and safety matters; ALAB-818, 22 NRC 666 n.52 (1985)
- Indian Lookout Alliance v. Volpe, 484 F.2d 11, 19 (8th Cir. 1973)
segmentation of a project for purpose of environmental considerations; LBP-85-43, 22 NRC 812 (1985)
- Inspiration Consol. Copper Co. v. Lumberman Mut. Cas. Co., 60 F.R.D. 205, 210 (S.D.N.Y. 1973)
difficulty in determining experts to whom Fed. R. Civ. P. 26(b)(4)(B) applies; LBP-85-38, 22 NRC 613 n.11 (1985)
- Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-327, 3 NRC 408 (1976)
standards for grant of protective order; LBP-85-40, 22 NRC 761 (1985)
- Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978)
burden for satisfying requirements for grant of motions to reopen; ALAB-812, 22 NRC 14 (1985)
- Kleppe v. Sierra Club, 427 U.S. 390, 400-06 (1976)
extent of environmental review needed for proposed transmission line construction and operation; LBP-85-43, 22 NRC 812 (1985)
- Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 650 & n.25 (1975)
factors taken into account in determining delay and broadening of issues that late intervention will cause; LBP-85-36, 22 NRC 595 (1985)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1339 & n.15 (1984)
purpose of executive privilege; LBP-85-38, 22 NRC 626 (1985)

LEGAL CITATIONS INDEX
CASES

- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984)
responsibilities of parties appealing procedural points; ALAB-816, 22 NRC 468 n.28 (1985)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-800, 21 NRC 386, 392-98 (1985); CLI-85-1, 21 NRC 275 (1985)
effect of Commission immediate effectiveness determination on Appeal Board's determination of a stay motion; ALAB-814, 22 NRC 195 (1985)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-83-13, 17 NRC 741 (1983)
use of utility-sponsored emergency plan instead of State and local government emergency plan; LBP-85-31, 22 NRC 427 (1985)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154 (1984)
regulation governing request for exemption from regulation; LBP-85-33, 22 NRC 446 (1985)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982)
authority of Licensing Boards to impose sanctions; LBP-85-48, 22 NRC 848 (1985)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221 (1983); rev'd on other grounds, ALAB-773, 19 NRC 1333 (1984)
demonstration of executive privilege; LBP-85-38, 22 NRC 626 (1985)
- Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-18, 21 NRC 1637, 1643-44 (1985)
conflict between NRC Office of Investigations and adjudicatory boards; ALAB-812, 22 NRC 47 n.53 (1985)
- Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-220, 8 AEC 93, 94 (1974)
appealability of denial of motion for summary disposition; LBP-85-29, 22 NRC 331 (1985)
- Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983)
showing necessary by party challenging cross-examination ruling; ALAB-813, 22 NRC 76 n.78 (1985)
- Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103-05 (1983)
propriety of post-hearing appraisal of emergency response facilities by NRC Staff; ALAB-819, 22 NRC 710 (1985)
- Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1106-07 (1983)
nature and litigability of emergency plan implementing procedures; LBP-85-27A, 22 NRC 212 n.1, 220 (1985)
- Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1325 n.3 (1983)
timeliness of motions to reopen a record; ALAB-815, 22 NRC 201 n.9 (1985)
- Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089 (1984)
test for reopening a record; ALAB-815, 22 NRC 200 n.4 (1985)
- Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-792, 20 NRC 1585, 1588 (1984)
Appeal Board jurisdiction to consider issues raised in a petition to reopen; ALAB-821, 22 NRC 752 n.5, 753 n.12 (1985)
- Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-797, 21 NRC 6, 8-9 (1985)
test for determining appellate jurisdiction to consider issues raised in motion to reopen; ALAB-821, 22 NRC 752 n.6, 753 n.12 (1985)
- Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 (1985)
factors to be addressed in motions to reopen a record to admit a new contention; LBP-85-42, 22 NRC 798, 801 (1985)

**LEGAL CITATIONS INDEX
CASES**

- Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14, 17 & n.7 (1985)
acceptability of Staff documents as supporting evidence for motions to reopen on quality assurance matters; ALAB-819, 22 NRC 726 n.60 (1985)
- Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 16-44 (1985)
basis required for admission of quality assurance contentions; ALAB-819, 22 NRC 725 (1985)
- Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 54 (1985)
responsibility for providing record support for appellate briefs; ALAB-813, 22 NRC 67 n.22 (1985)
- Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-83-21, 18 NRC 157, 160 (1983), aff'g DD-83-3, 17 NRC 327 (1983)
determining whether financial constraints should lead to enforcement action; DD-85-14, 22 NRC 637-38 (1985)
- Maritime Cinema Service Corp. v. Movies En Route, Inc., 60 F.R.D. 587, 591 (1973)
need to identify persons assisting in preparation of answers to interrogatories; LBP-85-38, 22 NRC 623 (1985)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1298-99 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983)
distinction between Regulatory Guides and regulation; ALAB-819, 22 NRC 710, 737 (1985)
legal force of NUREG criteria; LBP-85-27A, 22 NRC 210 224 (1985)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324 (1982)
jurisdiction to rule on motion to reopen; ALAB-823, 22 NRC 775 (1985)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-729, 17 NRC 814 (1983)
use of post-hearing procedures; LBP-85-32, 22 NRC 436 n.2 (1985)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1206, 1208 (1984)
standard for determining management competence; LBP-85-28, 22 NRC 236 (1985)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1208 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985); CLI-85-9, 21 NRC 1118, 1136-37 (1985)
candor as an element of management's character; ALAB-812, 22 NRC 48 (1985)
- 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)
flexibility of Licensing Boards in regulating hearings; ALAB-819, 22 NRC 727 (1985)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1582 (1984)
test for exercise of Appeal Board's discretionary directed certification authority; ALAB-817, 22 NRC 473 n.10 (1985)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984)
effect on a proceeding of admission of a single additional contention; ALAB-817, 22 NRC 474 n.16 (1985)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1200 n.12 (1985)
explanation of "no significant hazards determination"; ALAB-816, 22 NRC 463 n.4 (1985)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-80-5, 11 NRC 408, 409-10 (1980); LBP-81-32, 14 NRC 381 (1982)
standard for determining management competence; LBP-85-28, 22 NRC 236 (1985)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-80-16, 11 NRC 674 (1980)
criteria for submitting hydrogen control contentions; LBP-85-35, 22 NRC 529 (1985)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-80-16, 11 NRC 674, 675 (1980)
litigability of hydrogen generation issues; ALAB-813, 22 NRC 85 n.136 (1985)

**LEGAL CITATIONS INDEX
CASES**

- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804-05 (1984)
specificity required of stay motions: ALAB-814, 22 NRC 196 (1985)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-5, 21 NRC 565, 569 (1985), *aff'd sub nom. Three Mile Island Alert, Inc. v. NRC*, 771 F.2d 720 (3d Cir. 1985)
strong language by presiding officer or unfavorable rulings as basis for disqualifying bias: ALAB-819, 22 NRC 721 (1985)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985)
burden for satisfying requirements for grant of motions to reopen: ALAB-812, 22 NRC 14 (1985)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-8, 21 NRC 1111, 1114 & n.3 (1985)
critical factor in determining timeliness of motion to reopen: ALAB-815, 22 NRC 202 n.11 (1985)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-456, 7 NRC 63, 65 (1978)
litigability of contention challenging 10 C.F.R. 50.13; LBP-85-27, 22 NRC 131 n.2 (1985)
- Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 14, review denied, CLI-78-19, 8 NRC 295 (1978)
regulatory requirements for emergency planning prior to Three Mile Island accident; ALAB-818, 22 NRC 669 n.64 (1985)
- Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982)
demonstration of late intervention petitioner's ability to contribute to a sound record: ALAB-813, 22 NRC 85 n.134 (1985); LBP-85-36, 22 NRC 594-95 (1985)
- Nader v. Dunlop, 370 F. Supp. 177 (D.D.C. 1973)
requirements for closure of advisory committee meetings: DPRM-85-3, 22 NRC 175 (1985)
- Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972)
examination of environmental issues required by National Environmental Policy Act: ALAB-819, 22 NRC 722 (1985)
- New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 93-94 (1st Cir. 1978)
amendment of Final Environmental Statement through the adjudicatory process: ALAB-819, 22 NRC 706 (1985)
- New England Coalition on Nuclear Pollution v. NRC, 727 F.2d 1127 (D.C. Cir. 1984)
litigability of financial qualifications contentions in operating license proceedings: ALAB-813, 22 NRC 84 n.126 (1985)
- New York v. NRC, 550 F.2d 745, 756-57 (2d Cir. 1977)
speculation about nuclear accidents as "irreparable injury" for purpose of staying a licensing decision: ALAB-820, 22 NRC 748 n.20 (1985)
- Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-249, 8 AEC 980, 987 (1974)
scope of licensing board authority: ALAB-825, 22 NRC 790 n.12 (1985)
- Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), CLI-72-81, 5 AEC 25, 26 (1972)
standard for grant of waiver or exemption from regulations: LBP-85-33, 22 NRC 445 (1985)
- Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 192, *aff'd*, CLI-73-12, 6 AEC 241 (1973), *aff'd sub nom. BPI v. AEC*, 502 F.2d 424 (D.C. Cir. 1974)
need for discovery to produce adequately specific contentions: ALAB-817, 22 NRC 477 n.5 (1985)
- Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298 (1977)
pressure of other professional responsibilities as basis for failure to comply with NRC deadline for filing objections: LBP-85-46, 22 NRC 832 (1985)
- Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275, 276 (1975)
five factors to be addressed by petitioner filing amended petition to intervene: LBP-85-36, 22 NRC 592, 595 (1985)

**LEGAL CITATIONS INDEX
CASES**

- Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813 (1975)
pressure of other professional responsibilities as basis for failure to comply with NRC deadline for filing objections; LBP-85-46, 22 NRC 832 (1985)
- Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 204, 205, 222 (1983)
effect on State authority of Federal government's reservation of exclusive jurisdiction over radiological health and safety matters; ALAB-818, 22 NRC 666 nn.53, 54, 55 (1985)
- Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 205, 207, 208-12, 222 (1983)
authority and responsibilities of NRC regarding nuclear-powered electric generation; ALAB-818, 22 NRC 663 nn.35, 36, 37, 39, 40, 664 n.45 (1985)
- Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 213 (1983)
principles regarding Federal preemption of State laws in context of nuclear regulation; ALAB-818, 22 NRC 661, 665 n.48 (1985)
- Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 216 (1983)
application of State laws to further radiological health and safety objectives; ALAB-818, 22 NRC 665 n.47 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-334, 3 NRC 809, 819 n.24 (1976)
explanation of K-effective concept; ALAB-816, 22 NRC 463 n.2 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 994-95 (1981)
type of information for which reopening a record is warranted; LBP-85-42, 22 NRC 799, 801 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, printed as an Attachment to CLI-82-19, 16 NRC 53 (1982)
litigability of adequacy of security plans in NRC proceedings; ALAB-819, 22 NRC 699 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807, review declined, CLI-83-32, 18 NRC 1309 (1983)
litigability of adequacy of Staff review of licensing application; ALAB-812, 22 NRC 56 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1343 (1983)
Board authority to request oral testimony where record is insufficient to allow summary disposition; LBP-85-29, 22 NRC 307 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344 (1983)
focus of contentions dealing with uncorrected equipment deficiencies; LBP-85-49, 22 NRC 929 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344-45 (1983), aff'd sub nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), vacated in part and reh'g en banc granted on other grounds, 760 F.2d 1320 (1985); ALAB-775, 19 NRC 1361, 1367, 1369-70 (1984)
considerations addressed in examining claims of quality assurance deficiencies in motions to reopen; ALAB-812, 22 NRC 15, 44, 53 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-763, 19 NRC 571, review denied, CLI-84-14, 20 NRC 285 (1984)
effect on a proceeding of adding one quality assurance contention; ALAB-817, 22 NRC 478 n.11 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366-67, aff'd sub nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), vacated in part and reh'g en banc granted on other grounds, 760 F.2d 1320 (1985)
particularity required of evidence supporting motions to reopen; ALAB-812, 22 NRC 14, 43 (1985)

LEGAL CITATIONS INDEX
CASES

- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1368 n.22 (1984)
format standard for evidence supporting motions to reopen on quality assurance contention; ALAB-812, 22 NRC 17 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1369, aff'd sub nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), vacated in part and reh'g en banc granted on other grounds, 760 F.2d 1320 (1985)
timeliness of motions to reopen a record; ALAB-815, 22 NRC 201 n.9 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1379 (1984)
FEMA findings sufficient for authorization of full-power operating license; ALAB-813, 22 NRC 78 n.91 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 833-34 (1984)
scope of medical services arrangements to be made for contaminated injured individuals; ALAB-819, 22 NRC 714 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-782, 20 NRC 838, 841 (1984)
Appeal Board jurisdiction to consider issues raised in a petition to reopen; ALAB-821, 22 NRC 752 n.5 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-811, 21 NRC 1622 (1985)
use of post-hearing procedures; LBP-85-32, 22 NRC 436 n.2 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-76-1, 3 NRC 73, 74 n.1 (1976)
purpose of hearing notices; ALAB-825, 22 NRC 790 n.14 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981)
criteria to be satisfied by motions to reopen; ALAB-812, 22 NRC 14 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 364 (1981)
Licensing Board responsibility to demand compliance with lateness factors of 10 C.F.R. 2.714; LBP-85-36, 22 NRC 592-93 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-6, 13 NRC 443, 444 (1981)
use of 2.206 procedures as a vehicle for reconsideration; DD-85-16, 22 NRC 855 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1714-15 (1982)
standard for grant of motion to reopen that raises previously uncontested issues; ALAB-812, 22 NRC 14 (1985)
- Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5, 19 NRC 953, 964 (1984)
speculation about nuclear accidents as "irreparable injury" for purpose of staying a licensing decision; ALAB-820, 22 NRC 748 n.20 (1985)
- Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 552 (1981)
effect on a proceeding of admission of a single additional contention; ALAB-817, 22 NRC 474 n.17, 478 n.12 (1985)
- Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 954-56 (1982)
need for record support in appellate briefs; ALAB-825, 22 NRC 793 n.29 (1985)
- Permian Basin Area Rate Cases, 390 U.S. 747, 773 (1968)
most important criterion applied in determining need for a stay; ALAB-820, 22 NRC 746 n.7 (1985)

LEGAL CITATIONS INDEX CASES

- Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 405 (1978)
safety significance of isolated deficiencies in a licensee's operational activities; DD-85-11, 22 NRC 162 n.8 (1985)
- Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 405-06 (1978)
responsibility for abating adverse safety impacts caused by a licensee's financial difficulties; DD-85-14, 22 NRC 638 (1985)
- Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-262, 1 NRC 163, 197 n.54 (1975)
basis for judgment of safety of spent fuel transshipments; LBP-85-34, 22 NRC 493 (1985)
- Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 884-85 (1984)
effect on NRC proceedings of State Court litigation; LBP-85-46, 22 NRC 832 (1985)
- Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1446 (1984)
most important criterion applied in determining need for a stay; ALAB-820, 22 NRC 746 n.7 (1985)
- Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 592 & n.6 (1985)
obligation of parties to provide documentary support for allegations; AI AB-812, 22 NRC 54 (1985)
responsibility for providing record support for appellate briefs; ALAB-813, 22 NRC 67 n.22 (1985)
- Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-809, 21 NRC 1605, 1610 n.5 (1985)
standards applied in considering requests for exemptions under 10 C.F.R. 50.12; LBP-85-33, 22 NRC 445 (1985)
- Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), DD-82-13, 16 NRC 2115, 2121 (1982)
responsibility of Director in considering 2,206 requests; DD-85-11, 22 NRC 154 n.4 (1985)
- Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1473 (1982)
test for segmentation of a project for NEPA purposes; LBP-85-43, 22 NRC 810 (1985)
- Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1500 (1982)
contentions postulating enemy attacks against nuclear plants that are litigable under 10 C.F.R. 50.13; LBP-85-27, 22 NRC 140 (1985)
- Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974)
rules applicable to contentions; LBP-85-49, 22 NRC 909 (1985)
- Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 439 (5th Cir. 1981)
test for segmentation of a project for NEPA purposes; LBP-85-43, 22 NRC 810 (1985)
- Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976)
standing to intervene on basis of ratepayer status; ALAB-816, 22 NRC 465 n.19 (1985); LBP-85-24, 22 NRC 98 n.5 (1985)
- Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263 (1979)
need for Staff analysis of dry cask storage alternative to spent fuel transshipment; LBP-85-34, 22 NRC 490 (1985)
- Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979)
scope of Licensing Board jurisdiction conferred by notice of opportunity for hearing; ALAB-825, 22 NRC 790-91 nn.18 & 19 (1985)
- Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 82-83 (1974)
Commission policy on severe accident mitigation measures; ALAB-819, 22 NRC 695 (1985)

LEGAL CITATIONS INDEX
CASES

- Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)
litigability of hydrogen generation issues that are the subject of ongoing rulemaking; ALAB-813, 22 NRC 85 n.135 (1985)
- Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 89-90 (1974)
Licensing Board authority to consider challenges to Commission authority to grant exemptions from regulations; LBP-85-33, 22 NRC 444 (1985)
- Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976)
scope of Licensing Board jurisdiction conferred by notice of opportunity for hearing; ALAB-825, 22 NRC 790 nn 16 & 17 (1985)
- Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-374, 5 NRC 417, 421 (1977)
application of Federal rules and practices in the absence of analogous NRC rules; LBP-85-38, 22 NRC 609 (1985)
- Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977)
test for exercise of Appeal Board's discretionary directed certification authority; ALAB-817, 22 NRC 473 n.10 (1985)
- Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977)
most important criterion applied in determining need for a stay; ALAB-820, 22 NRC 746 n.7 (1985)
- Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 188 (1978)
appellate review of Licensing Board scheduling rulings; ALAB-813, 22 NRC 74 n.68 (1985)
- Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 270-71 (1978)
denial of stay motion for failure to address criteria; ALAB-814, 22 NRC 193 n.1 (1985)
- Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), DD-79-17, 10 NRC 613, 621 (1979)
need to reconsider environmental decisions when new information becomes available; DD-85-16, 22 NRC 855 (1985)
- Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482-83 (1975)
motion for directed certification of ruling allowing intervenors to amend broad, nonspecific contention; ALAB-817, 22 NRC 472 n.1 (1985)
- Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-338, 4 NRC 10, 14 (1976)
influence of a stay movant's showing on one factor on the other factors; ALAB-820, 22 NRC 746 n.8 (1985)
- Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 42-44 (1977), aff'd, CLI-78-1, 7 NRC 1 (1978), aff'd sub nom. *New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87 (1st Cir. 1978)
regulatory requirements for emergency planning prior to Three Mile Island accident; ALAB-818, 22 NRC 669 n.64 (1985)
- Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), DD-79-20, 10 NRC 703, 706-07 (1979)
determination of licensee's financial qualifications to complete plant construction; DD-85-14, 22 NRC 639 (1985)
- Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), DD-82-8, 16 NRC 394, 395 (1982)
determining whether financial constraints should lead to enforcement action; DD-85-14, 22 NRC 638 (1985)

**LEGAL CITATIONS INDEX
CASES**

- Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877, 897 (1974)
light in which the record is viewed for purpose of determining summary disposition motion; LBP-85-27A, 22 NRC 208 (1985); LBP-85-29, 22 NRC 310 (1985)
- Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 496-97 (1983)
applicability of Fed. R. Civ. P. 26(b)(4) to NRC proceedings; LBP-85-38, 22 NRC 609 (1985)
- Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 804 (1979), vacated in part on other grounds, CLI-80-8, 11 NRC 433 (1980)
applicability of 10 C.F.R. 2.714(a)(1)(iii) to motions to reopen a record to admit a new contention; LBP-85-42, 22 NRC 799 n.3 (1985)
standard for grant of untimely motion to reopen; LBP-85-45, 22 NRC 822-23 (1985)
- Public Service Electric and Gas Co. (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 39 (1979)
litigability of severe accident mitigation measures in NRC proceedings; ALAB-819, 22 NRC 696 n.10 (1985)
- Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-648, 14 NRC 34, 36 (1981)
basis for judging appeals; ALAB-819, 22 NRC 720 n.51 (1985)
- Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129-33 (1945)
circumstance inappropriate for Federal preemption of State law; ALAB-818, 22 NRC 667 n.56 (1985)
- Regents of the University of California (UCLA Research Reactor), LBP-84-22 and attachment, 19 NRC 1383 (1984)
consequence of error by counsel in making factual representation; LBP-85-48, 22 NRC 847 (1985)
- Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)
basis for preemption of a State's traditional police powers; ALAB-818, 22 NRC 662 n.32 (1985)
importance of legislative intent in making statutory interpretations; ALAB-818, 22 NRC 668 n.63 (1985)
- Rockford League of Women Voters v. NRC, 679 F.2d 1218 (7th Cir. 1982)
use of 2.206 procedures as a vehicle for reconsideration; DD-85-16, 22 NRC 855 (1985)
- Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981)
appellate review of Licensing Board decisions in the absence of an appeal; ALAB-826, 22 NRC 894 n.5 (1985)
- San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), vacated in part and reh'g en banc granted on other grounds, 760 F.2d 1320 (1985)
need for lengthy Board discussion of contentions devoid of merit; ALAB-812, 22 NRC 42 (1985)
- San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1300 (D.C. Cir. 1984), vacated in part and reh'g en banc granted on other grounds, 760 F.2d 1320 (1985)
need to consider cost of compensation of nuclear power plant accident victims in environmental impact statement; ALAB-819, 22 NRC 703 (1985)
- San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1301, 1302 n.77 (D.C. Cir. 1984), vacated in part and reh'g en banc granted on other grounds, 760 F.2d 1320 (1985)
need to consider low-probability, severe accidents at nuclear facilities; ALAB-819, 22 NRC 697, 698, 701 n.4, 707 (1985)
- Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982)
waiver of attorney-client and work product privileges by disclosure of content of privileged communications; LBP-85-38, 22 NRC 619 n.23 (1985)
- Seiffer v. Topsy's Int'l, Inc., 69 F.R.D. 69, 72-73 & n.3 (D. Kan. 1975)
difficulty in determining experts to whom Fed. R. Civ. P. 26(b)(4)(B) applies; LBP-85-38, 22 NRC 613 (1985)
- Shopping Carts Antitrust Litigation, 95 F.R.D. 299, 306-08 (S.D.N.Y. 1982)
use of very broad interrogatories in NRC proceedings; LBP-85-38, 22 NRC 630 (1985)

LEGAL CITATIONS INDEX
CASES

- Siegel v. AEC, 400 F.2d 778, 782 (D.C. Cir. 1968)
need for protection of nuclear power plant against band of armed saboteurs: LBP-85-27, 22 NRC 136 (1985)
- Siegel v. AEC, 400 F.2d 778, 783-85 (D.C. Cir. 1968)
exclusion of severe accident mitigation issue from NRC adjudicatory proceedings: ALAB-819, 22 NRC 695 n.9 (1985)
- Sierra Club v. Callaway, 499 F.2d 982, 987 (5th Cir. 1974)
need for environmental analysis of future overall transmission grid system when considering a proposed part of the transmission system: LBP-85-43, 22 NRC 811, 812 (1985)
- Sierra Club v. Froehlke, 534 F.2d 1289, 1297-98 (8th Cir. 1976)
test for segmentation of a project for NEPA purposes: LBP-85-43, 22 NRC 810 (1985)
- Sierra Club v. Hodel, 544 F.2d 1036, 1040-41 (9th Cir. 1976)
need for environmental analysis of future overall transmission grid system when considering a proposed part of the transmission system: LBP-85-43, 22 NRC 811, 812 (1985)
- Sierra Club v. Sigler, 695 F.2d 957, 971-72, 974 (5th Cir. 1983)
need for "worst-case" analysis of sabotage risk: ALAB-819, 22 NRC 701 (1985)
- Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248, 250, 255, 260-62, 274-78 (1984)
principles regarding Federal preemption of State laws in context of nuclear regulation: ALAB-818, 22 NRC 661, 663 n.38, 664 n.44, 665 n.47 (1985)
- Sinking of the Barge "Ranger I," 92 F.R.D. 486 (S.D. Tex. 1981)
experts to whom Fed. R. Civ. P. 26(b)(4)(B) applies: LBP-85-38, 22 NRC 612 (1985)
- Sinking of the Barge "Ranger I," 92 F.R.D. 486, 489 (S.D. Tex. 1981)
distinction between experts whose information was not acquired in preparation for trial and those specifically employed in anticipation of litigation: LBP-85-38, 22 NRC 614 (1985)
- South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 892-93, 895 (1981)
weight given to factors (ii), (iii) and (iv) of 10 C.F.R. 2.714(a)(1) in determining admissibility of late-filed contentions: LBP-85-36, 22 NRC 594 (1985)
- 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)
Licensing Board responsibility in light of deficiencies in testimony: ALAB-819, 22 NRC 741 (1985)
role of NRC Staff in licensing proceedings: ALAB-812, 22 NRC 56 (1985)
- Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-212, 7 AEC 986, 991 (1974)
latitude of Licensing Boards in conducting proceedings: ALAB-813, 22 NRC 74 n.67 (1985)
- Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 697 & n.14, aff'd, CLI-82-11, 15 NRC 1383 (1982)
showing necessary by party challenging cross-examination ruling: ALAB-813, 22 NRC 76 n.78 (1985)
- Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 137 (1982)
scope of medical services arrangements to be made for contaminated injured individuals: ALAB-819, 22 NRC 714 n.44 (1985)
- Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 380 n.57 (1983)
FEMA findings sufficient for authorization of full-power operating license: ALAB-813, 22 NRC 78 n.91 (1985)
- Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, 533 (1983), rev'd in part on other grounds, GUARD v. NRC, 753 F.2d 1144, 1150 n.7 (D.C. Cir. 1985)
standard for measuring adequacy of provisions for contaminated injured individuals: ALAB-819, 22 NRC 715 (1985)

LEGAL CITATIONS INDEX
CASES

- Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, 533, 535 n.9 (1983), rev'd in part on other grounds, *GUARD v. NRC*, 753 F.2d 1144, 1146, 1149-50 (D.C. Cir. 1985)
scope of medical services arrangements to be made for contaminated injured individuals: ALAB-819, 22 NRC 711 n.40, 713, 714 n.45 (1985)
- Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-39, 15 NRC 1163, 1216-17 (1982)
Licensing Board delegation to NRC Staff of post-hearing resolution of emergency planning issues: LBP-85-27A, 22 NRC 222 (1985)
- Sperry v. Florida*, 373 U.S. 379 (1963)
Federal preemption of State laws because they coincidentally prevent reactor operation: ALAB-818, 22 NRC 667 n.56 (1985)
- Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981)
authority of Licensing Boards to impose sanctions: LBP-85-48, 22 NRC 848 n.6, 849 (1985)
hearing obligations of pro se intervenors: ALAB-819, 22 NRC 730 (1985)
pressure of other professional responsibilities as basis for failure to comply with NRC deadline for filing objections: LBP-85-46, 22 NRC 832 n.8 (1985)
result of a party's failure to meet deadline for filing objections: LBP-85-46, 22 NRC 830 (1985)
- Surface Mining Regulation Litigation, 627 F.2d 1346, 1362 (D.C. Cir. 1980)
weight given to remarks of individual legislators in determining legislative intent: ALAB-818, 22 NRC 670 n.67 (1985)
- Swain v. Brinegar*, 542 F.2d 364, 369, 370 (7th Cir. 1976)
test for segmentation of a project for NEPA purposes: LBP-85-43, 22 NRC 810, 812 (1985)
- Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 348 (1978)
treatment of issues addressed for first time on appeal: ALAB-819, 22 NRC 699 n.20 (1985)
- Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977)
residency requirements for standing to intervene in operating license proceedings: LBP-85-24, 22 NRC 99 n.7 (1985)
- Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), DD-83-11, 18 NRC 293, 295 (1983)
authority of Director of Nuclear Reactor Regulation over presiding Licensing Board to suspend an operating license proceeding: DD-85-14, 22 NRC 642 n.4 (1985)
- Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367 (N.D. Ill. 1972)
determining whether a subpoenaed party is an expert specially retained in anticipation of litigation: LBP-85-38, 22 NRC 613 (1985)
- Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88 (2d Cir. 1975)
need to consider socioeconomic impacts of low-probability event in environmental impact statement: ALAB-819, 22 NRC 704 n.29 (1985)
- Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1974)
test for segmentation of a project for NEPA purposes: LBP-85-43, 22 NRC 810, 811 (1985)
- Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983)
quality of construction required for plant licensing: ALAB-812, 22 NRC 14, 44 (1985); ALAB-813, 22 NRC 65 n.10 (1985); ALAB-819, 22 NRC 729 (1985)
focus of contentions dealing with uncorrected equipment deficiencies: LBP-85-49, 22 NRC 929 (1985)
standard of compliance with NRC requirements expected for facility operation: DD-85-11, 22 NRC 161 n.7 (1985)
- Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1209-11 (1983)
considerations addressed in examining claims of quality assurance deficiencies in motions to reopen: ALAB-812, 22 NRC 15 (1985)
- Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1444-51 (D.C. Cir. 1984), cert. denied, ___ U.S. ___, 105 S. Ct. 815 (1985)
exclusion of severe accident mitigation issue from NRC adjudicatory proceedings: ALAB-819, 22 NRC 695 n.9 (1985)

LEGAL CITATIONS INDEX
CASES

- Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1448, 1449 (D.C. Cir. 1984)
litigability of adequacy of emergency planning exercises: LBP-85-49, 22 NRC 909-10 & n.1 (1985)
- USM Corp. v. American Aerosols, Inc., 631 F.2d 420, 424-25 (6th Cir. 1980)
determining whether a subpoenaed party is an expert specially retained in anticipation of litigation: LBP-85-38, 22 NRC 613 (1985)
- Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973)
standard for grant of untimely motion to reopen: LBP-85-45, 22 NRC 822 (1985)
- Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 n.12 (1973)
critical factor in determining timeliness of motion to reopen: ALAB-815, 22 NRC 202 n.11 (1985)
- Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978)
pressure of other professional responsibilities as basis for failure to comply with NRC deadline for filing objections: LBP-85-46, 22 NRC 832 (1985)
- Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 456 (1980)
need for Staff consideration of alternatives to spent fuel shipment: LBP-85-34, 22 NRC 490, 492 (1985)
- Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 376-78 (1983)
effect on a proceeding of admission of a single additional contention, for purpose of justifying interlocutory review: ALAB-817, 22 NRC 475 nn.18 & 19 (1985)
- Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974)
applicability of executive privilege to NRC proceedings: LBP-85-38, 22 NRC 626 (1985)
- Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), LBP-75-70, 2 NRC 879, 891 (1975); LBP-76-1, 3 NRC 37 (1976)
litigability of need to clear transmission line rights-of-way: LBP-85-43, 22 NRC 807 n.3 (1985)
- Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958)
criteria applied in passing on stay requests: ALAB-820, 22 NRC 746 n.5 (1985)
- Virginia Sunshine Alliance v. Hendrie, 477 F. Supp. 68, 70 (D.D.C. 1979)
speculation about nuclear accidents as "irreparable injury" for purpose of staying a licensing decision: ALAB-820, 22 NRC 748 n.20 (1985)
- Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977)
criteria applied in passing on stay requests: ALAB-820, 22 NRC 746 n.5 (1985)
- Washington Public Power Supply System (WNP Nos. 4 & 5), DD-82-6, 15 NRC 1761 (1982)
hazard to public health and safety of slowdown or halt in construction of a nuclear plant: DD-85-14, 22 NRC 642 (1985)
- Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-66, 18 NRC 780, 783 (1983)
litigability of contentions postulating enemy attacks against nuclear facilities: LBP-85-27, 22 NRC 135, 140 (1985)
- Washington Public Power Supply System (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 906 (1984)
standard of compliance with NRC requirements expected for facility operation: DD-85-11, 22 NRC 161 n.7 (1985)
- Washington Public Power Supply System (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984)
circumstances appropriate for issuance of show cause order: DD-85-11, 22 NRC 152 n.2 (1985)
- Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1175 (1983)
showing necessary in late-filed contentions to demonstrate petitioner's ability to contribute to the proceeding: LBP-85-49, 22 NRC 914 (1985)

LEGAL CITATIONS INDEX
CASES

- Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1177 (1983)
ability of FEMA to represent an intervenor's interests; LBP-85-49, 22 NRC 914 (1985)
- Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1181 (1983)
showing necessary for a party to demonstrate its ability to contribute to the record of a proceeding; ALAB-813, 22 NRC 85 n.134 (1985)
- Washington Public Power Supply System (WPPSS Nuclear Project Nos. 3 and 5), CLI-77-11, 5 NRC 719, 723 (1977)
circumstances appropriate for petitioning for waiver or exemption from regulations; LBP-85-33, 22 NRC 445 (1985)
- Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 395 (1983)
need for record support in appellate briefs; ALAB-825, 22 NRC 793 n.29 (1985)
- Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 332 (1972)
reliance by expert witnesses on analyses performed by other experts; ALAB-819, 22 NRC 718 (1985)
- Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), CLI-73-4, 6 AEC 6 (1973)
termination of proceedings prior to completion of safety analyses; LBP-85-32, 22 NRC 436 n.2 (1985)
- Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983)
plenary subject matter jurisdiction of NRC Boards; ALAB-825, 22 NRC 790 n.9, 791 n.22 (1985)
- Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), DD-83-13, 18 NRC 721, 722 (1983)
safety significance of isolated deficiencies in a licensee's operational activities; DD-85-11, 22 NRC 161 n.8 (1985)
- Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)
showing necessary for establishing irreparable injury in stay motions; ALAB-820, 22 NRC 747 n.13 (1985)

LEGAL CITATIONS INDEX
REGULATIONS

- 4 C.F.R. 102.11
authorization for payment of civil penalties in installments: ALJ-85-2, 22 NRC 969 n.1 (1985)
- 10 C.F.R. 2.104(c)(4)
litigability of financial qualifications contentions in operating license proceedings: ALAB-813, 22 NRC 84 n.126 (1985)
- 10 C.F.R. 2.105(b)(1)
litigability of adequacy of notice of hearing: ALAB-825, 22 NRC 791 n.23 (1985)
- 10 C.F.R. 2.201
NRC Staff treatment of licensee violations of NRC requirements: DD-85-11, 22 NRC 161 n.7 (1985)
- 10 C.F.R. 2.205(f)
limits on authority of administrative law judge presiding over civil penalty proceeding: ALJ-85-1, 22 NRC 947, 959 (1985)
- 10 C.F.R. 2.206
denial of request for action because of licensees' alleged precarious financial condition: DD-85-14, 22 NRC 636 (1985)
denial of request for action for alleged equipment qualification deficiencies: DD-85-17, 22 NRC 860 (1985); DD-85-20, 22 NRC 972-82 (1985)
denial of request for delay in license issuance pending review of incentive regulations and emergency preparedness: DD-85-12, 22 NRC 449 (1985)
denial of request for legal action to rectify an asserted lack of evacuation routes under flood conditions: DD-85-13, 22 NRC 454 (1985)
denial of request for postponement of containment leak rate tests pending correction of alleged errors in measurement methodology: DD-85-10, 22 NRC 144 (1985)
denial of request for preparation of environmental impact statement for renewal of license to store spent fuel: DD-85-16, 22 NRC 852 (1985)
denial of request for show-cause proceedings and revocation of operating licenses on basis that exemptions were improperly granted to Licensee: DD-85-11, 22 NRC 151 (1985)
denial of request for suspension of operating licenses pending resolution of corrosion in spray pond piping system: DD-85-15, 22 NRC 643 (1985)
denial request that NRC stay Delaware River Basin Commission activities: DD-85-18, 22 NRC 871 (1985)
forum for filing petitions for license amendment suspension or revocation: LBP-85-29, 22 NRC 322 (1985)
procedure for challenging licensee's compliance with license conditions: LBP-85-35, 22 NRC 533 (1985)
- 10 C.F.R. Part 2, Subpart G
applicability of, to legislative format-type hearing: CLI-85-18, 22 NRC 882 (1985)
- 10 C.F.R. 2.700
purpose of hearing notices: ALAB-825, 22 NRC 790 n.13 (1985)
- 10 C.F.R. 2.701
documents that are not part of official record of a proceeding: ALAB-819, 22 NRC 724 n.58 (1985)
- 10 C.F.R. 2.704(c)
support for disqualification motions: CLI-85-15, 22 NRC 185 n.3 (1985)
- 10 C.F.R. 2.708(b)
rejection of stay motion because of illegibility: ALAB-820, 22 NRC 746 n.4 (1985)

LEGAL CITATIONS INDEX REGULATIONS

- 10 C.F.R. 2.708(c), 2.713(a)
Licensing Board authority to strike pleadings; LBP-85-45, 22 NRC 828 (1985)
- 10 C.F.R. 2.711(a)
authority of Licensing Boards to shorten time period for filing contentions; LBP-85-36, 22 NRC 593 (1985)
- 10 C.F.R. 2.714
Board criteria for evaluation of late-filed contentions; ALAB-817, 22 NRC 472 (1985)
deadline for filing petitions to intervene; LBP-85-24, 22 NRC 98 n.1 (1985)
Licensing Board responsibility to demand compliance with lateness factors; LBP-85-36, 22 NRC 592 (1985)
speculation by Appeal Board majority on Licensing Board application of five-factor test to hypothetical late contention; ALAB-817, 22 NRC 478 n.11 (1985)
- 10 C.F.R. 2.714(a)
factors balanced for untimely intervention; ALAB-816, 22 NRC 465 n.14, 466 (1985)
factors to be addressed in motions to reopen a record to admit a new contention; LBP-85-42, 22 NRC 798 (1985)
five factors to be addressed by petitioner filing amended petition to intervene; LBP-85-36, 22 NRC 591-92, 594 (1985)
showing necessary for untimely intervention; ALAB-816, 22 NRC 463 (1985)
- 10 C.F.R. 2.714(a)(1)
admissibility of late-filed contention based on issue raised by Board and dismissed on appeal; ALAB-813, 22 NRC 80 (1985)
applicability of five-factor test to late-filed diesel generator contention; ALAB-813, 22 NRC 82 (1985)
five-factor test for admission of late-filed contentions; ALAB-813, 22 NRC 79 (1985); ALAB-819, 22 NRC 725 (1985); LBP-85-24, 22 NRC 98 n.3 (1985)
need for lateness of an intervention petition to be challenged by another party to trigger application of five-factor test; ALAB-816, 22 NRC 466 (1985)
penalty for failure to address five factors for admission of late-filed contentions; ALAB-816, 22 NRC 468 (1985)
rejection of contention alleging inadequate correction of control room design deficiencies; ALAB-813, 22 NRC 84 (1985)
rules applicable to late-filed emergency planning contentions; LBP-85-49, 22 NRC 909 (1985)
standard for grant of motion to reopen that raises previously uncontested issues; ALAB-812, 22 NRC 14 n.4 (1985)
- 10 C.F.R. 2.714(b)
basis and specificity requirements for admission of contentions; CLI-85-15, 22 NRC 187 (1985)
failure of contention to satisfy basis and specificity requirements for admission; ALAB-819, 22 NRC 693, 725 (1985)
particularity required in evidence supporting motions to reopen; ALAB-812, 22 NRC 14 (1985)
rejection of nonspecific contention; ALAB-817, 22 NRC 473 n.5 (1985)
"vicarious advice of counsel" as cause for late filing of contentions; LBP-85-36, 22 NRC 593 (1985)
- 10 C.F.R. 2.714a
appeal of denial of late intervention; ALAB-816, 22 NRC 465 (1985)
appealability of summary disposition of contention where action terminates party's participation; LBP-85-43, 22 NRC 814 (1985)
- 10 C.F.R. 2.718
allegations of prejudicial rulings by a Licensing Board; CLI-85-15, 22 NRC 185 n.3 (1985)
function of Licensing Boards; ALAB-819, 22 NRC 740 (1985)
- 10 C.F.R. 2.718(a), (e), (f), (h), (i), (j) and (k)
powers of Board presiding over legislative format-type hearing; CLI-85-18, 22 NRC 862 (1985)
- 10 C.F.R. 2.718(e)
flexibility of Licensing Boards in regulating hearings; ALAB-819, 22 NRC 727 (1985)
Licensing Board authority to strike pleadings; LBP-85-45, 22 NRC 828 (1985)

LEGAL CITATIONS INDEX
REGULATIONS

- 10 C.F.R. 2.718(i)
motion for directed certification of ruling allowing intervenors to amend broad, nonspecific contention; ALAB-817, 22 NRC 472 n.1 (1985)
- 10 C.F.R. 2.720(h)(2)(i) and (iii)
use of discovery to flesh out nonspecific contentions; ALAB-817, 22 NRC 477 nn.8 & 9 (1985)
- 10 C.F.R. 2.722(a)(1) and (b)
Board authority to appoint technical interrogator and informal assistant; LBP-85-26, 22 NRC 120 (1985)
- 10 C.F.R. 2.730(c)
filing of answers in support of motions; ALAB-817, 22 NRC 479 n.12 (1985)
motion to strike as reply to answer to summary disposition motion; LBP-85-29, 22 NRC 304 n.1 (1985)
- 10 C.F.R. 2.731
flexibility of Licensing Boards in regulating hearings; ALAB-819, 22 NRC 727 (1985)
- 10 C.F.R. 2.732
burden of proof in civil penalty proceedings; ALJ-85-1, 22 NRC 947 (1985)
- 10 C.F.R. 2.740(b)(1)
limits on discovery; LBP-85-42, 22 NRC 803 (1985)
use of discovery to flesh out nonspecific contentions; ALAB-817, 22 NRC 477 n.7 (1985)
- 10 C.F.R. 2.740(b)(2)
claim of work product privilege for documents relating to decontamination costs; LBP-85-38, 22 NRC 620 (1985)
criteria for claiming work product privilege; LBP-85-38, 22 NRC 621 (1985)
- 10 C.F.R. 2.740(e)(3)
responses to discovery requests for documents not yet in existence; LBP-85-41, 22 NRC 768 (1985)
- 10 C.F.R. 2.742
deadline for service of discovery responses; LBP-85-38, 22 NRC 631, 632 (1985)
- 10 C.F.R. 2.743(b)
consequence of party's failure to tender witness's qualifications or testimony; ALAB-819, 22 NRC 729-30 (1985)
- 10 C.F.R. 2.743(c)
need to include evidence of little intrinsic worth in a record; ALAB-824, 22 NRC 782 n.18 (1985)
particularity required of evidence supporting motions to reopen; ALAB-812, 22 NRC 14 (1985)
- 10 C.F.R. 2.749
applicability of, in operating license amendment proceedings; LBP-85-34, 22 NRC 485 (1985)
standards applied by Boards considering summary disposition motions; LBP-85-27A, 22 NRC 208 (1985); LBP-85-29, 22 NRC 310 (1985)
- 10 C.F.R. 2.749(a)
documents to be filed with summary disposition motions; LBP-85-29, 22 NRC 302 (1985)
filing requirements for opponents of summary disposition motions; LBP-85-29, 22 NRC 302, 305 (1985)
- 10 C.F.R. 2.749(b)
Board authority to request oral testimony where record is insufficient to allow summary disposition; LBP-85-29, 22 NRC 307 n.3 (1985)
burden on party opposing motion for summary disposition; LBP-85-27A, 22 NRC 229, 231 (1985); LBP-85-29, 22 NRC 303 (1985)
- 10 C.F.R. 2.749(d)
standard for grant of summary disposition in license amendment proceedings; LBP-85-29, 22 NRC 310 (1985)
standard for grant of summary disposition motion; LBP-85-27A, 22 NRC 208 (1985)
- 10 C.F.R. 2.751a(d)
objection to admission of amended quality assurance contention; ALAB-817, 22 NRC 476 n.2 (1985)
- 10 C.F.R. 2.752(c)
failure to comply with deadline for filing objections to Prehearing Conference Order; LBP-85-46, 22 NRC 832 (1985)

**LEGAL CITATIONS INDEX
REGULATIONS**

- 10 C.F.R. 2.754(a)
flexibility of Licensing Boards in scheduling the filing of proposed findings; ALAB-819, 22 NRC 727 (1985)
- 10 C.F.R. 2.754(b)
nature of Board's authority to dismiss contentions; LBP-85-35, 22 NRC 521 (1985)
- 10 C.F.R. 2.758
filing of exemption from 10 C.F.R. Part 50, Appendix J, III.D.2(b)(ii); LBP-85-33, 22 NRC 444 (1985)
litigability of hydrogen control contentions; ALAB-813, 22 NRC 86 n.142 (1985)
means for changing regulatory limits of worker exposure to radiation; LBP-85-28, 22 NRC 266 (1985)
petitions for waiver or exemption from 10 C.F.R. Part 50, Appendix J, III.D.2(b)(ii); LBP-85-33, 22 NRC 445-46 (1985)
- 10 C.F.R. 2.758(a)
scope of issues to be considered by a Licensing Board; LBP-85-33, 22 NRC 444 (1985)
- 10 C.F.R. 2.758(b)
litigability of need-for-power and financial qualifications issues in operating license proceedings; ALAB-813, 22 NRC 84 n.127 (1985)
- 10 C.F.R. 2.758a
litigability of contention challenging 10 C.F.R. 50.13; LBP-85-27, 22 NRC 131 n.2 (1985)
- 10 C.F.R. 2.760
function of Licensing Boards; ALAB-819, 22 NRC 740 (1985)
- 10 C.F.R. 2.760(a)
appeal from partial initial decision granting summary disposition of contentions; LBP-85-49, 22 NRC 935 (1985)
limits on Board jurisdiction; LBP-85-35, 22 NRC 518 (1985)
scope of issues litigable in licensing proceedings; LBP-85-33, 22 NRC 446 (1985)
- 10 C.F.R. 2.760(c)
form required for issuance of initial decisions; ALAB-819, 22 NRC 727 n.61 (1985)
- 10 C.F.R. 2.760a
Board authority to raise issues sua sponte; ALAB-813, 22 NRC 80 (1985)
contentions liable for summary disposition; LBP-85-49, 22 NRC 915 (1985)
function of Licensing Boards; ALAB-819, 22 NRC 740 (1985)
limitation on safety matters litigable in management capability proceeding; LBP-85-28, 22 NRC 298 (1985)
sua sponte authority of Licensing Boards to raise safety issues; ALAB-819, 22 NRC 731 n.64 (1985)
- 10 C.F.R. 2.762
appealability of summary disposition of contention where action terminate; party's participation; LBP-85-43, 22 NRC 814 (1985)
appeals from partial initial decision granting summary disposition of contentions; LBP-85-49, 22 NRC 935 (1985)
- 10 C.F.R. 2.762(d)(1)
need for record citations in appellate briefs; ALAB-813, 22 NRC 66 n.16 (1985); ALAB-825, 22 NRC 793 n.29 (1985)
- 10 C.F.R. 2.764(f)(2)
criteria for authorization of facility operation above 5 percent power levels; ALAB-820, 22 NRC 745 n.2 (1985)
effect of Commission immediate effectiveness determination on Appeal Board's determination of a stay motion; ALAB-814, 22 NRC 195 (1985)
- 10 C.F.R. 2.764(f)(2)
scope of Commission review of partial initial decision; CLI-85-15, 22 NRC 185 (1985)
- 10 C.F.R. 2.764(f)(2)(i)
criteria applied in conducting immediate effectiveness review; CLI-85-13, 22 NRC 2-3 (1985)
- 10 C.F.R. 2.764(g)
effect of Commission authorization for full-power license on pending motions to reopen; ALAB-812, 22 NRC 13 n.3 (1985)

LEGAL CITATIONS INDEX REGULATIONS

- effect of Commission immediate effectiveness determination on Appeal Board's determination of a stay motion; ALAB-814, 22 NRC 195 (1985)
- 10 C.F.R. 2.785(b)(i)
motion for directed certification of ruling allowing intervenors to amend broad, nonspecific contention; ALAB-817, 22 NRC 472 n.1 (1985)
- 10 C.F.R. 2.788(a)
deadline for filing stay application; ALAB-814, 22 NRC 195 (1985)
- 10 C.F.R. 2.788(b)
limit on length of stay applications; ALAB-820, 22 NRC 748 n.16 (1985)
- 10 C.F.R. 2.788(e)
criteria applied in passing on stay requests; ALAB-820, 22 NRC 746 n.5 (1985)
denial of stay motion for failure to address criteria of; ALAB-814, 22 NRC 193 n.1 (1985)
factors considered in determining stay requests; CLI-85-14, 22 NRC 178 n.1 (1985)
forum for filing petitions for license amendment suspension or revocation; LBP-85-29, 22 NRC 322 (1985)
most important criterion applied in determining need for a stay; ALAB-820, 22 NRC 746 (1985)
- 10 C.F.R. 2.788(e)(1)
need for Board findings prior to license issuance as ground for stay request; ALAB-814, 22 NRC 193 (1985)
- 10 C.F.R. 2.788(e)(2), (3), (4)
factors to be addressed by stay motions; ALAB-814, 22 NRC 194 (1985)
- 10 C.F.R. Part 2, Appendix C
application of NRC Enforcement Policy to unauthorized handling of byproduct materials; ALJ-85-1, 22 NRC 946 (1985)
description of Systematic Assessment of Licensee Performance process; DD-85-11, 22 NRC 165 (1985)
- 10 C.F.R. Part 2, Appendix C
limitations on civil penalty authority of administrative law judge; ALJ-85-1, 22 NRC 959 (1985)
- 10 C.F.R. Part 2, Appendix C, I
standard of compliance with NRC requirements expected for facility operation; DD-85-11, 22 NRC 161 n.7 (1985)
- 10 C.F.R. Part 2, Appendix C, III
aggregation of violations to a higher severity level; ALJ-85-1, 22 NRC 960 (1985)
consideration of licensee attitude in assessing civil penalty; ALJ-85-1, 22 NRC 962 (1985)
description of severity levels of violations; ALJ-85-1, 22 NRC 959 (1985)
determining safety significance of severity level I and II violations for purpose of determining amount of civil penalty; ALJ-85-1, 22 NRC 961 (1985)
- 10 C.F.R. Part 2, Appendix C, V.B
consideration of a licensee's ability to pay in imposing a penalty; ALJ-85-2, 22 NRC 969 n.1 (1985)
level of violations resulting in civil penalties; ALJ-85-1, 22 NRC 959, 963 (1985)
circumstances appropriate for mitigation of civil penalties; ALJ-85-1, 22 NRC 965 (1985)
- 10 C.F.R. Part 2, Appendix C, V.B.3-V.B.5
standards for increasing or decreasing a civil penalty for a severity level II violation; ALJ-85-1, 22 NRC 964 (1985)
- 10 C.F.R. Part 2, Appendix C, Supp. VI.C.2
safety significance of unauthorized possession and use of two sealed sources of americium-241; ALJ-85-1, 22 NRC 950 (1985)
- 10 C.F.R. Part 2, Appendix C, Supp. VI.C.4
violation level of conduct of licensed activities by technically unqualified person; ALJ-85-1, 22 NRC 952 (1985)
- 10 C.F.R. 20.202(a)
adequacy of Shearon Harris personnel monitoring system; LBP-85-28, 22 NRC 265 (1985)
- 10 C.F.R. Part 21
adequacy of Perry surveillance and maintenance program for diesel generator engines; LBP-85-35, 22 NRC 554 (1985)

LEGAL CITATIONS INDEX REGULATIONS

- reportability of crankshaft oil plug defect; LBP-85-35, 22 NRC 554, 582 (1985)
reportability of nonconformances to NRC; ALAB-812, 22 NRC 29 (1985)
- 10 C.F.R. 30.70, 30.71
applicability of, to cesium-137 and americium-241; ALJ-85-1, 22 NRC 944 (1985)
- 10 C.F.R. 31.8
activities involving use of americium-241 covered by a general license; ALJ-85-1, 22 NRC 944 n.1 (1985)
- 10 C.F.R. Part 50
storage of spent fuel in facility other than where it was generated; ALAB-825, 22 NRC 792 (1985)
- 10 C.F.R. 50.12
Licensing Board authority to consider challenges to Commission authority to grant exemptions from regulations; LBP-85-33, 22 NRC 444 (1985)
- 10 C.F.R. 50.12(a)
request for exemption from 10 C.F.R. Part 50, Appendix J, III.D.2(b)(ii); LBP-85-33, 22 NRC 443 (1985)
- 10 C.F.R. 50.13
litigability of railroad explosion contention; LBP-85-27, 22 NRC 131-33 (1985)
rationale behind regulation; LBP-85-27, 22 NRC 133-34, 139-40 (1985)
- 10 C.F.R. 50.13(a)
interpretation of regulation; LBP-85-27, 22 NRC 135-37 (1985)
- 10 C.F.R. 50.13(b)
interpretation of the word "deploy"; LBP-85-27, 22 NRC 138-40 (1985)
- 10 C.F.R. 50.33(f)
determination of licensee's financial qualifications to complete plant construction; DD-85-14, 22 NRC 641 (1985)
- 10 C.F.R. 50.40(b)
origin of the terms "management competence" and "management capability"; LBP-85-28, 22 NRC 236 n.2 (1985)
- 10 C.F.R. 50.44
compliance of Perry hydrogen control system with; LBP-85-35, 22 NRC 530 (1985)
description of hydrogen control systems at Perry plant; LBP-85-35, 22 NRC 568 (1985)
- 10 C.F.R. 50.44(c)(3)
adequacy of analysis of Perry hydrogen ignition system; LBP-85-35, 22 NRC 551 (1985)
litigability of hydrogen control contentions; ALAB-813, 22 NRC 86 n.141 (1985)
- 10 C.F.R. 50.44(c)(3)(iv), (v), (vi)
content of analysis of hydrogen control systems; LBP-85-35, 22 NRC 530 (1985)
- 10 C.F.R. 50.44(c)(3)(vii)(A), (B)
deadline for submission of analysis of hydrogen control system; LBP-85-35, 22 NRC 530 (1985)
- 10 C.F.R. 50.46(a)(1)
criteria for computer models used to calculate peak cladding temperatures; LBP-85-29, 22 NRC 311 (1985)
- 10 C.F.R. 50.46(b)(1)
adequacy of computer models used to predict peak cladding temperatures; LBP-85-29, 22 NRC 315, 316, 321 (1985)
- 10 C.F.R. 50.47
area to be encompassed by offsite emergency plans; ALAB-818, 22 NRC 658 n.3 (1985)
need for inclusion of evacuation time estimate for special facility in emergency response plan; LBP-85-25, 22 NRC 115, 116 (1985)
standard for determining adequacy of emergency response training; LBP-85-25, 22 NRC 107 (1985)
- 10 C.F.R. 50.47(a) and (b)
vacation of decisions addressing exemption from; CLI-85-16, 22 NRC 459 (1985)
- 10 C.F.R. 50.47(a)(1)
denial of operating licenses because of deficiencies in utility-sponsored emergency plan; LBP-85-31, 22 NRC 427, 428, 431, 432 (1985)
scope of protective measures to be taken during radiological emergencies; ALAB-818, 22 NRC 676 (1985)

**LEGAL CITATIONS INDEX
REGULATIONS**

- 10 C.F.R. 50.47(a)(2)
weight given to FEMA testimony on adequacy of emergency planning exercises; LBP-85-49, 22 NRC 908, 910 (1985)
- 10 C.F.R. 50.47(b)
consequence of failure to satisfy emergency planning standards; ALAB-819, 22 NRC 715 (1985)
- 10 C.F.R. 50.47(b)(2)
adequacy of emergency response times for onsite emergency staff at Shearon Harris; LBP-85-27A, 22 NRC 211 (1985)
minimum onsite staffing required of Licensee for radiological emergency; LBP-85-27A, 22 NRC 209 (1985)
- 10 C.F.R. 50.47(b)(8)
distinction between Regulatory Guides and regulations; ALAB-819, 22 NRC 710 (1985)
need to describe emergency response facilities and equipment in emergency plans; ALAB-819, 22 NRC 709 (1985)
legal force of NUREG criteria; LBP-85-27A, 22 NRC 210 (1985)
- 10 C.F.R. 50.47(b)(10)
consideration of adverse weather conditions in evacuation time estimates; LBP-85-27A, 22 NRC 226 (1985)
effect of conservatism in evacuation time study on protective action decisions during a radiological emergency; LBP-85-27A, 22 NRC 213 (1985)
need to provide potassium iodide to emergency workers; LBP-85-27A, 22 NRC 223 (1985)
requirement for Applicants to make and maintain current evacuation time estimates; LBP-85-27A, 22 NRC 214-15 (1985)
scope of protective measures to be taken during radiological emergencies; ALAB-818, 22 NRC 676 (1985)
- 10 C.F.R. 50.47(b)(11)
means for controlling radiation exposures to emergency workers; LBP-85-35, 22 NRC 567 (1985)
- 10 C.F.R. 50.47(b)(12)
consequence of failure to satisfy emergency planning standards of; ALAB-819, 22 NRC 716 n 48 (1985)
scope of medical services arrangements to be made for contaminated injured individuals; ALAB-819, 22 NRC 711, 714 n 45 (1985); LBP-85-35, 22 NRC 524, 525 (1985)
- 10 C.F.R. 50.47(b)(15)
individuals for whom radiological emergency response training is required; LBP-85-25, 22 NRC 104 (1985)
- 10 C.F.R. 50.47(b)(16)
deadline for submission of emergency plan implementing procedures; LBP-85-27A, 22 NRC 221 (1985)
- 10 C.F.R. 50.47(c)(1)
classification of utility-sponsored offsite emergency plan as "interim compensating action"; ALAB-818, 22 NRC 676 n.94 (1985)
consequence of failure to satisfy emergency planning standards of 50.47(b); ALAB-819, 22 NRC 715, 716 n 48 (1985)
effect of legal impediments to utility-sponsored emergency plan; LBP-85-31, 22 NRC 428 (1985)
- 10 C.F.R. 50.48
regulations and guidance for nuclear plant fire protection protection programs; LBP-85-49, 22 NRC 917 (1985)
- 10 C.F.R. 50.49
adequacy of environmental qualification programs at TMI-1, San Onofre Unit 1, Kewaunee, and Haddam Neck plants; DD-85-20, 22 NRC 972-82 (1985)
electrical equipment that must be qualified; DD-85-20, 22 NRC 980 (1985)
equipment required to be environmentally qualified; LBP-85-28, 22 NRC 268 (1985)
scope of; DD-85-17, 22 NRC 860, 862-63 (1985)
- 10 C.F.R. 50.49(c)(4)
calculation of dose for a radiation environment for purpose of environmental qualification of equipment; LBP-85-28, 22 NRC 285 (1985)

LEGAL CITATIONS INDEX REGULATIONS

- 10 C.F.R. 50.49(g)
extension of equipment qualification deadlines; DD-85-20, 22 NRC 978-79 (1985)
- 10 C.F.R. 50.49(i)
requirements for qualifying hydrogen ignition systems; LBP-85-35, 22 NRC 544 (1985)
- 10 C.F.R. 50.54(m)(2)(i) and (iii)
control room staffing requirements; LBP-85-28, 22 NRC 296 (1985)
- 10 C.F.R. 50.55(e)
adequacy of Perry surveillance and maintenance program for diesel generator engines; LBP-85-35, 22 NRC 554 (1985)
need for disclosure of applicant's internal audits to NRC; ALAB-812, 22 NRC 21 n.15 (1985)
reportability of contractor reports on quality assurance; LBP-85-42, 22 NRC 800 (1985)
reportability of Nonconformance Reports to NRC; ALAB-812, 22 NRC 29 (1985)
- 10 C.F.R. 50.57(a)
findings necessary for issuance of operating licenses; ALAB-813, 22 NRC 64 n.7 (1985);
ALAB-820, 22 NRC 745 n.2 (1985)
- 10 C.F.R. 50.57(a)(3)(i)
quality of construction required for plant licensing; ALAB-812, 22 NRC 15 (1985); ALAB-813, 22
NRC 65 (1985); ALAB-819, 22 NRC 729 (1985)
- 10 C.F.R. 50.59
responsibility for decision as to whether a matter constitutes an unreviewed safety question;
LBP-85-36, 22 NRC 598 (1985)
- 10 C.F.R. 50.72
operating record of Diablo Canyon Unit 2 during first 2 months of operation; CLI-85-14, 22 NRC
182 (1985)
scope of independent review of reportable events at Limerick facility; DD-85-11, 22 NRC 166
(1985)
- 10 C.F.R. 50.73
deadlines for licensee event reports; DD-85-11, 22 NRC 165 (1985)
scope of review to discover existence of personnel error trend at Limerick facility; DD-85-11, 22
NRC 167 (1985)
- 10 C.F.R. 50.81
issuance of operating license condition limiting control over licensees by new facility owner or
lessor; CLI-85-17, 22 NRC 876 (1985)
- 10 C.F.R. 50.91(a)(4)
need for hearing on proposed operating license amendments; LBP-85-29, 22 NRC 302 (1985)
- 10 C.F.R. Part 50, Appendix A
interpretation of the terms "fuel design limit," "anticipated operational occurrence" and
"appropriate margin"; LBP-85-29, 22 NRC 311 (1985)
- 10 C.F.R. Part 50, Appendix A, GDC 1, 2, 4 and 23
equipment required to be environmentally qualified under; LBP-85-28, 22 NRC 268 (1985)
- 10 C.F.R. Part 50, Appendix A, GDC 1, 17
adequacy of Perry compliance with; LBP-85-35, 22 NRC 553 (1985)
- 10 C.F.R. Part 50, Appendix A, GDC 3
regulations and guidance for nuclear plant fire protection programs; LBP-85-49, 22 NRC 917 (1985)
- 10 C.F.R. Part 50, Appendix A, GDC 17
adequacy of emergency diesel generators to satisfy requirements for onsite emergency electrical
power; ALAB-824, 22 NRC 778-82 (1985)
need for onsite electric power system for nuclear power plants; ALAB-813, 22 NRC 79 n.9b (1985)
purpose of emergency diesel generators; LBP-85-35, 22 NRC 551 (1985)
- 10 C.F.R. Part 50, Appendix A, GDC 62
potential of increased spent fuel pool storage capacity for criticality accident; LBP-85-36, 22 NRC
599 (1985)
- 10 C.F.R. Part 50, Appendix B
adequacy of Limerick quality assurance program; ALAB-819, 22 NRC 722 (1985)
adequacy of Perry compliance with; LBP-85-35, 22 NRC 553 (1985)
allegations of deficiencies in Waterford quality assurance program; ALAB-812, 22 NRC 16 (1985)

LEGAL CITATIONS INDEX REGULATIONS

- exemption of paint coatings inside containment from quality assurance requirements of: LBP-85-37, 22 NRC 602 (1985)
- function of quality assurance programs: ALAB-812, 22 NRC 18 (1985)
- independence required of quality assurance manager: ALAB-813, 22 NRC 67 (1985)
- quality assurance requirements for environmental qualification test facilities: LBP-85-28, 22 NRC 288 (1985)
- scope of program for qualifications testing: LBP-85-47, 22 NRC 840 (1985)
- "structural independence" of Shearon Harris construction: inspection: LBP-85-28, 22 NRC 283 (1985)
- 10 C.F.R. Part 50, Appendix B, Introduction
- definition of "quality control": ALAB-812, 22 NRC 18 n.9 (1985); ALAB-813, 22 NRC 63 n.1 (1985)
- means of providing reasonable assurance of a plant's proper construction: ALAB-813, 22 NRC 64 n.8 (1985)
- 10 C.F.R. Part 50, Appendix B, I
- adequacy of Owners Group requalification of diesel generators: LBP-85-35, 22 NRC 553 (1985)
- delegation of quality assurance responsibilities: ALAB-812, 22 NRC 22 (1985)
- primary function of quality assurance: LBP-85-49, 22 NRC 930 (1985)
- 10 C.F.R. Part 50, Appendix B, II
- penalty for inadequate control of activities affecting quality: ALAB-812, 22 NRC 18 (1985)
- 10 C.F.R. Part 50, Appendix B, III and XI
- equipment required to be environmentally qualified under: LBP-85-28, 22 NRC 268 (1985)
- 10 C.F.R. Part 50, Appendix B, V, XVII
- means of complying with documentation requirements of: ALAB-813, 22 NRC 68 (1985)
- 10 C.F.R. Part 50, Appendix B, XV, XVI
- importance of dispositioning of Nonconformance Reports: ALAB-812, 22 NRC 29 (1985)
- 10 C.F.R. Part 50, Appendix B, XVIII
- importance of applicant's audits in providing assurance of construction quality: ALAB-812, 22 NRC 28 (1985)
- 10 C.F.R. Part 50, Appendix E
- area encompassed by offsite emergency plans: ALAB-818, 22 NRC 658 n.3 (1985)
- need for inclusion of evacuation time estimate for special facility in emergency response plan: LBP-85-25, 22 NRC 115, 116 (1985)
- 10 C.F.R. Part 50, Appendix E, IV
- consideration of adverse weather conditions in evacuation time estimates: LBP-85-27A, 22 NRC 226 (1985)
- requirement for Applicants to make and maintain current evacuation time estimates: LBP-85-27A, 22 NRC 214 (1985)
- 10 C.F.R. Part 50, Appendix E, IV C
- categories of emergencies: ALAB-819, 22 NRC 711 n.42 (1985)
- 10 C.F.R. Part 50, Appendix E, IV D.2
- responsibility for activating public notification system during radiological emergency: LBP-85-31, 22 NRC 427 n.2 (1985)
- 10 C.F.R. Part 50, Appendix E, IV E
- need to describe emergency response facilities and equipment in emergency plans: ALAB-819, 22 NRC 709 (1985)
- scope of medical services arrangements to be made for contaminated injured individuals: ALAB-819, 22 NRC 711 (1985)
- 10 C.F.R. Part 50, Appendix E, V
- deadline for submission of emergency plan implementing procedures: LBP-85-27A, 22 NRC 220 (1985)
- 10 C.F.R. Part 50, Appendix J
- appropriateness of grant of exemption from, for Limerick facility: DD-85-11, 22 NRC 153, 155 (1985)
- validity of methodology for containment leak rate tests: DD-85-10, 22 NRC 144 (1985)

LEGAL CITATIONS INDEX REGULATIONS

- 10 C.F.R. Part 50, Appendix J, III.D.2(b)(ii)
requirements for filing of exemption from: LBP-85-33, 22 NRC 443, 444 (1985)
- 10 C.F.R. Part 50, Appendix J, III.D.2(b)(iii)
testing of airlock seals in lieu of testing of entire airlock: LBP-85-33, 22 NRC 443 (1985)
- 10 C.F.R. Part 50, Appendix K
criteria for computer models used to calculate peak cladding temperatures: LBP-85-29, 22 NRC 311, 316, 317 (1985)
- 10 C.F.R. Part 50, Appendix R
applicability of, to plants not operating prior to January 1, 1979: LBP-85-49, 22 NRC 918 n.5 (1985)
- 10 C.F.R. Part 51
applicability of Council on Environmental Quality regulations in NRC proceedings: ALAB-819, 22 NRC 700 (1985)
- 10 C.F.R. 51.14(a)
function of an environmental impact appraisal: DD-85-16, 22 NRC 856 (1985)
- 10 C.F.R. 51.20 (1984)
need for environmental impact analyses of transshipment of spent fuel from one reactor to another: ALAB-825, 22 NRC 792 (1985)
- 10 C.F.R. 51.20(g)(1) (1984)
applicability of Table S-4 to transshipment of spent fuel from one reactor to another: ALAB-825, 22 NRC 793 (1985)
- 10 C.F.R. 51.35
Staff assessments and findings required to obtain exemption from regulations: LBP-85-33, 22 NRC 444 (1985)
- 10 C.F.R. 51.52(b)(3) (1984)
amendment of Final Environmental Statement by adjudicatory hearing record and Licensing Board decision: ALAB-819, 22 NRC 705, 706 (1985)
- 10 C.F.R. 51.52, Table S-4
applicability of, in operating license amendment proceedings: LBP-85-34, 22 NRC 484 (1985)
- 10 C.F.R. 51.73(a)
recirculation of amended Final Environmental Statement: ALAB-819, 22 NRC 707 (1985)
- 10 C.F.R. 51.102 (1985)
need for recirculation of amended Final Environmental Statement: ALAB-819, 22 NRC 705, 706 (1985)
- 10 C.F.R. 51.102(c)
recirculation of amended Final Environmental Statement: ALAB-819, 22 NRC 707 (1985)
- 10 C.F.R. 51.103
need to consider design alternatives for mitigation of severe accidents: ALAB-819, 22 NRC 693 n.3 (1985)
- 10 C.F.R. 51.106(c)
litigability of need-for-power issues in operating license proceedings: ALAB-813, 22 NRC 84 n.126 (1985)
- 10 C.F.R. 51.106(c), (d)
litigability of alternative site issues at operating license stage: ALAB-819, 22 NRC 741 n.83 (1985)
- 10 C.F.R. Part 53
Federal storage of utilities' spent fuel: LBP-85-34, 22 NRC 509 (1985)
necessity for maintaining full core reserve in spent fuel pool: LBP-85-34, 22 NRC 505 (1985)
- 10 C.F.R. Part 70
premise for Commission's issuance of a license to procure and store nuclear fuel: DD-85-14, 22 NRC 639 (1985)
- 10 C.F.R. Part 71
accident conditions that spent fuel casks should be designed to withstand: LBP-85-34, 22 NRC 501 (1985)
employee error in preparing spent fuel casks for shipment: LBP-85-34, 22 NRC 494 (1985)
- 10 C.F.R. 71.5(a)
mode of transport of sealed sources of americium-241 and cesium-137: ALJ-85-1, 22 NRC 957 (1985)

LEGAL CITATIONS INDEX REGULATIONS

- 10 C.F.R. 71.73
design requirements for spent fuel shipping casks, LBP-85-34, 22 NRC 497 (1985)
- 10 C.F.R. Part 72
storage of spent fuel in facility other than where it was generated, ALAB-825, 22 NRC 792 (1985)
- 10 C.F.R. Parts 72 and 73
security requirements for storage of spent fuel, DD-85-16, 22 NRC 857 (1985)
- 10 C.F.R. 72.35
need for NRC review and approval of dry storage cask experiment, DD-85-16, 22 NRC 857 n.4 (1985)
- 10 C.F.R. Part 73
litigability of risk of sabotage in NRC proceedings, ALAB-819, 22 NRC 699 (1985)
reading of 50.13 in pari materia with, LBP-85-27, 22 NRC 137 (1985)
scope of contentions litigable under, LBP-85-27, 22 NRC 138 (1985)
- 10 C.F.R. 73.1(a)
scope of security threats encompassed by, LBP-85-27, 22 NRC 137 (1985)
- 10 C.F.R. 73.1(a)(1) and (b)
scope of threats encompassed by, LBP-85-27, 22 NRC 137-38 (1985)
- 10 C.F.R. 73.37
prevention of sabotage of spent fuel transshipments, LBP-85-34, 22 NRC 502 (1985)
probability of success of sabotage attack against spent fuel shipment, LBP-85-34, 22 NRC 489 (1985)
- 10 C.F.R. 73.45 and 73.46
extent of plant vicinity requiring security protection, LBP-85-27, 22 NRC 138 (1985)
- 10 C.F.R. Part 100
need for written procedures for operation of hydrogen ignition system to be scrutinized in hearing, LBP-85-35, 22 NRC 532 (1985)
potential of increased spent fuel pool storage capacity for criticality accident, LBP-85-36, 22 NRC 599 (1985)
radioactive releases postulated for single double-ended break in a steam generator tube, LBP-85-49, 22 NRC 932 (1985)
- 10 C.F.R. Part 100, Appendix A, III(c)
use of safe shutdown earthquake design basis as means for determining structure's resistance to postulated pipeline explosions, ALAB-819, 22 NRC 739 (1985)
- 10 C.F.R. 150.20
type of license necessary to conduct licensed activities in non-Agreement States, ALJ-85-1, 22 NRC 944 (1985)
- 40 C.F.R. 1502.22
need to consider sabotage as part of "worst-case" analysis, ALAB-819, 22 NRC 698, 699, 701 n.24 (1985)
- 40 C.F.R. 1502.22(b)
applicability of Council on Environmental Quality regulations in NRC proceedings, ALAB-819, 22 NRC 700 (1985)
- 44 C.F.R. Part 350
guidelines for fulfillment of requirements of FEMA's regulations, ALAB-813, 22 NRC 77 n.86 (1985)
- 44 C.F.R. 350.7(b)
need to consider size and configuration of emergency planning zone in partial initial decisions, ALAB-814, 22 NRC 194, 195 (1985)
- 49 C.F.R. Parts 170-189
mode of transport of sealed sources of americium-241 and cesium-137, ALJ-85-1, 22 NRC 957 (1985)
- 49 C.F.R. 172.403
labeling necessary for sealed sources of americium-241 and cesium-137, ALJ-85-1, 22 NRC 957 (1985)
- 49 C.F.R. 178.350-3
labeling necessary for transport of sealed sources of americium-241 and cesium-137, ALJ-85-1, 22 NRC 957 (1985)

LEGAL CITATIONS INDEX
STATUTES

- 28 U.S.C. 2462
statute of limitations bar on NRC enforcement proceeding; CLI-85-18, 22 NRC 884 n.3 (1985)
- Administrative Procedure Act, 5 U.S.C. 554
litigability of adequacy of notice of hearing; ALAB-825, 22 NRC 791 n.23 (1985)
- Administrative Procedure Act, 5, 7, 5 U.S.C. 554, 556
post-hearing resolution of emergency planning deficiencies by NRC Staff; ALAB-819, 22 NRC 708 (1985)
- Atomic Energy Act, 11e
classification of cesium-137 and americium-241 for licensing purposes; ALJ-85-1, 22 NRC 944 (1985)
- Atomic Energy Act, 81
transfer and possession of cesium-137 and americium-241; ALJ-85-1, 22 NRC 944, 950 n.6 (1985)
- Atomic Energy Act, 161n
Commission authority to delegate function of deciding meeting closures; DPRM-85-3, 22 NRC 174 (1985)
- Atomic Energy Act, 182(a), 42 U.S.C. 2232
origin of the terms "management competence" and "management capability"; LBP-85-28, 22 NRC 236 n.2 (1985)
- Atomic Energy Act, 189a, 42 U.S.C. 2239(a)
right of intervenor to hearing on license conditions; CLI-85-13, 22 NRC 3 (1985)
right of public to a hearing; ALAB-813, 22 NRC 82 (1985)
scope of hearing rights under; ALAB-824, 22 NRC 782 n.17 (1985)
- Atomic Energy Act, 189a, 42 U.S.C. 2239a
post-hearing resolution of emergency planning deficiencies by NRC Staff; ALAB-819, 22 NRC 708 (1985)
- Atomic Energy Act, 189a(1), 42 U.S.C. 2239(a)(1)
need for Board to await final FEMA findings before approving emergency response plans; ALAB-813, 22 NRC 78 (1985)
- Atomic Energy Act, 234
applicability of penalties for use of americium-241 for other than licensed activities; ALJ-85-1, 22 NRC 950 n.6 (1985)
maximum civil penalty imposed for unauthorized handling of byproduct materials; ALJ-85-1, 22 NRC 958 (1985)
- Atomic Energy Act, 271, 274(c), 274(k), 42 U.S.C. 2018, 2021(c)(1), 2021(k) (1982)
authority and responsibilities of NRC regarding nuclear-powered electric generation; ALAB-818, 22 NRC 663 n.35 (1985)
- Atomic Energy Act, 274b
NRC authority to transfer byproduct regulatory authority to states; ALJ-85-1, 22 NRC 944 (1985)
- Atomic Energy Act, 42 U.S.C. 2132, 2133
scope of NRC authority; ALAB-825, 22 NRC 790 n.10 (1985)
- Atomic Energy Act, 42 U.S.C. 2133(d), 2232(a)
quality of construction required for plant licensing; ALAB-812, 22 NRC 15 (1985); ALAB-813, 22 NRC 65 (1985); ALAB-819, 22 NRC 729 (1985)
- Atomic Energy Act, 42 U.S.C. 2209
litigability of adequacy of notice of hearing; ALAB-825, 22 NRC 791 n.23 (1985)

LEGAL CITATIONS INDEX STATUTES

- Atomic Energy Act, 42 U.S.C. 2241
scope of licensing board authority; ALAB-825, 22 NRC 790 n.11 (1985)
- Energy Reorganization Act of 1974, 42 U.S.C. 5841(f) and (g)
transfer of regulatory functions from AEC to NRC; ALAB-825, 22 NRC 790 n.10 (1985)
- Energy Reorganization Act of 1974, 42 U.S.C. 5851
finding of discrimination by U.S. Department of Labor director as basis for intervenor's motion for protective order; LBP-85-40, 22 NRC 761 (1985)
nature of confidentiality and risks imposed by protective orders; LBP-85-40, 22 NRC 763 (1985)
- Federal Advisory Committee Act, 8(b)
authority for ruling on appeals of closure determinations for meetings of advisory committees; DPRM-85-3, 22 NRC 174 n.1 (1985)
- Federal Advisory Committee Act, 5 U.S.C. Appendix 1, 10(d)
requirements for closure of advisory committee meetings; DPRM-85-3, 22 NRC 175 (1985)
- Freedom of Information Act, 5 U.S.C. 552
means for producing specific contentions without resorting to discovery; ALAB-817, 22 NRC 477 n.5 (1985)
- National Environmental Policy Act, 102(2)(E), 42 U.S.C. 4332(2)(E)
need for preparation of environmental impact statement to cover proposed receipt, storage, and transshipment of spent fuel assemblies; LBP-85-34, 22 NRC 490 (1985)
need to consider alternatives to shipment of spent fuel; LBP-85-34, 22 NRC 485, 491-93 (1985)
- National Environmental Policy Act, 42 U.S.C. 4321
need to consider design alternatives for mitigation of severe accidents; ALAB-819, 22 NRC 693 (1985)
- National Environmental Policy Act, 42 U.S.C. 4332
need for environmental impact statement for storage of spent fuel at a facility; DD-85-16, 22 NRC 852, 854-55 (1985)
- N.C. Gen. Stat. § 115C-242(6)
use of students as bus drivers during radiological emergency; LBP-85-27A, 22 NRC 229 (1985)
- NRC Authorization Act, 5, Pub. L. No. 97-415, 96 Stat. 2067, 2069 (1983)
use of utility-sponsored offsite emergency plan as substitute for State and local emergency plans; ALAB-818, 22 NRC 667 n.61 (1985)
- NRC Authorization Act, 108, Pub. L. No. 98-553, 98 Stat. 2825, 2827 (1984)
use of utility-sponsored offsite emergency plan as substitute for State and local emergency plans; ALAB-818, 22 NRC 667 n.61 (1985)
- NRC Authorization Act, 109(a), Pub. L. No. 96-295, 109, 94 Stat. 780 (1980)
use of utility-sponsored offsite emergency plan as substitute for State and local emergency plans; ALAB-818, 22 NRC 667, 678-80 (1985)
- Nuclear Waste Policy Act of 1982, 111(a)(5), 42 U.S.C. 10,151(a)(1)
responsibility of utilities for storage of spent fuel; LBP-85-34, 22 NRC 509 (1985)
- Nuclear Waste Policy Act of 1982, 135(b)(2), 42 U.S.C. 10,155(b)(2)
necessity for maintaining full core reserve in spent fuel pool; LBP-85-34, 22 NRC 505 (1985)
- Nuclear Waste Policy Act of 1982, 218(a), 42 U.S.C. 10,198(a)
content of dry cask storage demonstration program; LBP-85-34, 22 NRC 508 (1985)
- Nuclear Waste Policy Act of 1982, 42 U.S.C. 10,155(b)(1)(A), (B) (1982)
Federal storage of utilities' spent fuel; LBP-85-34, 22 NRC 509 (1985)
- Price-Anderson Act, 42 U.S.C. 2210
compensation of nuclear power plant accident victims; ALAB-819, 22 NRC 702 n.26 (1985)
- Uranium Mill Tailings Radiation Control Act, Pub. L. 95-604, 42 U.S.C. 2113
requirement for waste disposal prior to termination of license; LBP-85-38, 22 NRC 614 (1985)

LEGAL CITATIONS INDEX
OTHERS

- Fed. R. Civ. P. 12(h)
waiver of objections to subject matter jurisdiction of Licensing Board: LBP-85-27, 22 NRC 131 n.7 (1985)
- Fed. R. Civ. P. 26(b)(4)
applicability of, to NRC proceedings: LBP-85-38, 22 NRC 609-17 (1985)
- Fed. R. Civ. P. 26(b)(4)(B)
discovery of experts in NRC proceedings: LBP-85-38, 22 NRC 610 (1985)
- Fed. R. Civ. P. 52(a)
general considerations in determining management competence: LBP-85-28, 22 NRC 237 n.4 (1985)
- Fed. R. Civ. P. 56
standards applied by Boards considering summary disposition motions: LBP-85-27, 22 NRC 208 (1985); LBP-85-29, 22 NRC 310 (1985)
- Federal Rules of Evidence 702
form of an expert witness's testimony: ALAB-819, 22 NRC 720 (1985)
standard for determining a witness's qualifications as an expert: ALAB-819, 22 NRC 732 n.67 (1985)
- H.R. Rep. No. 1070, 96th Cong., 2d Sess. 27, reprinted in 1980 U.S. Code Cong. & Ad. News 2260, 2270-71
legislative intent in promulgating emergency planning requirements: ALAB-818, 22 NRC 670 n.65 (1985)
- McCormick on Evidence §§ 339, 341, 357 (3d ed. 1984)
standard of proof for measuring evidence: ALAB-819, 22 NRC 720 n.53 (1985)
- 4 Moore's Federal Practice ¶ 26.60[2], 26-203, ¶ 26.64[4], 26-390 et seq. (1984)
waiver of privilege through discussion of facts that are the subject of a privileged communication: LBP-85-38, 22 NRC 619 (1985)
- 4A Moore's Federal Practice § 33.13 (1984 ed.)
refusal to answer interrogatory on ground that information is known to interrogatory party: LBP-85-38, 22 NRC 625, 629 (1985)
- 4A Moore's Federal Practice § 33.17[2] (1984 ed.)
legal conclusions about which interrogatories may enquire: LBP-85-38, 22 NRC 625 (1985)
- 6 Moore's Federal Practice, ¶ 56.11[1.6]
Board authority to request oral testimony where record is insufficient to allow summary disposition: LBP-85-29, 22 NRC 307 (1985)
- 8 Wright & Miller, Federal Practice and Procedure § 2024, at 209 (1970)
applicability of privilege to documents containing subject matter similar to that in disclosed documents: LBP-85-38, 22 NRC 621 (1985)
- 8 Wright & Miller, Federal Practice and Procedure § 2172, at 538-39 (1970)
need to identify persons assisting in preparation of answers to interrogatories: LBP-85-38, 22 NRC 622 (1985)

SUBJECT INDEX

ACCIDENT(S)

- at Three Mile Island, hydrogen explosion during: LBP-85-30, 22 NRC 332 (1985)
- cask drop, adequacy of dose calculations for: LBP-85-36, 22 NRC 590 (1985)
- degraded core, containment spray availability during: LBP-85-35, 22 NRC 514 (1985)
- degraded core, possibility of diffusion flames occurring in: LBP-85-35, 22 NRC 514 (1985)
- scenario involving rupture of diesel fuel day tanks: LBP-85-49, 22 NRC 899 (1985)

ACCIDENT(S), SEVERE

- consideration of design alternatives for mitigation of: ALAB-819, 22 NRC 681 (1985)
- inclusion of design alternatives to mitigate, in Final Environmental Statement: CLI-85-13, 22 NRC 1 (1985)
- mitigation measures, litigability of: ALAB-819, 22 NRC 681 (1985)
- need to consider, in environmental impact statements: ALAB-819, 22 NRC 681 (1985)

ADJUDICATORY BOARDS

- authority of, over NRC Staff: ALAB-812, 22 NRC 5 (1985)
- obligation of, to do a party's research for it: ALAB-812, 22 NRC 5 (1985)
- standard for disqualification of: ALAB-819, 22 NRC 681 (1985)

ADJUDICATORY HEARINGS

- Commission authority to limit: ALAB-819, 22 NRC 681 (1985)
- on quality assurance deficiencies, scope of: ALAB-812, 22 NRC 5 (1985)
- scope of review of claims of quality assurance deficiencies in: ALAB-813, 22 NRC 59 (1985)

ADMINISTRATIVE LAW JUDGE

- limitations on civil penalty authority of: ALJ-85-1, 22 NRC 941 (1985)

ADVISORY COMMITTEE MEETINGS

- authority to rule on closure determinations for: DPRM-85-3, 22 NRC 173 (1985)

AFFIANTS

- burden on intervenors to demonstrate competence of: LBP-85-29, 22 NRC 300 (1985)

AIRCRAFT

- carburetor icing caused by water vapor emissions from Limerick cooling towers, potential for: ALAB-819, 22 NRC 681 (1985)
- crash risk, consideration of, under 10 C.F.R. 50.13(b): LBP-85-27, 22 NRC 126 (1985)

ALCOHOL ABUSE

- at Waterford site, treatment of: ALAB-812, 22 NRC 5 (1985)

ALLEGATIONS

- with potential safety significance, NRC policy concerning pursuit of: DD-85-11, 22 NRC 149 (1985)

ALTERNATIVES

- to spent fuel transshipment, need for consideration of: LBP-85-34, 22 NRC 481 (1985)

AMENDMENT

- of Environmental Assessment: LBP-85-34, 22 NRC 481 (1985)
- of Final Environmental Statements, by adjudicatory hearing record and Licensing Board decision: ALAB-819, 22 NRC 681 (1985)

See also Operating License Amendment Proceeding(s); Operating License Amendment(s)

AMERICIUM-241

- imposition of civil penalty for unauthorized possession, use, storage and transportation of: ALJ-85-1, 22 NRC 941 (1985)

ANSI STANDARDS

- for determining tolerance limits of thermoluminescent dosimeters, litigability of adequacy of: LBP-85-28, 22 NRC 232 (1985)

SUBJECT INDEX

- ANTICIPATED TRANSIENTS WITHOUT SCRAM**
need for automated standby liquid control system to mitigate consequences of: ALAB-820, 22 NRC 743 (1985)
- APPEAL BOARD(S)**
authority to give binding effect to another agency's regulations: ALAB-819, 22 NRC 681 (1985)
jurisdiction where it has previously considered an issue, resulting in final agency action: ALAB-821, 22 NRC 750 (1985)
review of Licensing Board decisions, in the absence of an appeal: ALAB-826, 22 NRC 893 (1985)
scope of review by: ALAB-819, 22 NRC 681 (1985)
- APPEAL(S)**
appellate review of Licensing Board decisions in the absence of: ALAB-826, 22 NRC 893 (1985)
applicability of new regulations to issues on: ALAB-813, 22 NRC 59 (1985)
basis for Appeal Board judgment of: ALAB-819, 22 NRC 681 (1985)
interlocutory, of Licensing Board ruling admitting contention previously found insufficiently specific: ALAB-817, 22 NRC 470 (1985)
of denials of summary disposition motions: LBP-85-29, 22 NRC 300 (1985)
of purely procedural points, content of: ALAB-816, 22 NRC 461 (1985)
treatment of issues raised for first time on: ALAB-819, 22 NRC 681 (1985)
- APPLICANTS**
for operating licenses, standard of proof to be met by: ALAB-819, 22 NRC 681 (1985)
responsibilities of, concerning technical findings: LBP-85-47, 22 NRC 835 (1985)
responsibility of, for nuclear power plant physical security: LBP-85-27, 22 NRC 126 (1985)
- ATOMIC ENERGY ACT**
effect of, on right of States to authorize punitive damages for radiation injuries: ALAB-818, 22 NRC 651 (1985)
public's hearing rights under: ALAB-813, 22 NRC 59 (1985)
regulations governing facility sale and leaseback financing: CLI-85-17, 22 NRC 875 (1985)
regulatory structure of: ALAB-818, 22 NRC 651 (1985)
safety findings required by, for nuclear power plant licensing: ALAB-813, 22 NRC 59 (1985); ALAB-819, 22 NRC 681 (1985)
scope of hearing rights under: ALAB-824, 22 NRC 776 (1985)
- AUDITS**
of construction work, weight given by Licensing Board to effectiveness of: ALAB-812, 22 NRC 5 (1985)
- AUTHORITY**
legal, of utility to implement offsite emergency response plans: ALAB-818, 22 NRC 651 (1985)
- AUTOMATED STANDBY LIQUID CONTROL SYSTEM**
to mitigate consequences of ATWS, need for: ALAB-820, 22 NRC 743 (1985)
- BIAS**
disqualifying, showing necessary to establish: ALAB-819, 22 NRC 681 (1985)
- BOARDS**
See Adjudicatory Boards: Appeal Board(s); Licensing Board; Presiding Board
- BOLTS, HILTI**
allegations of improper installation of, at Waterford: ALAB-812, 22 NRC 5 (1985)
- BRIEFS, APPELLATE**
content of: ALAB-813, 22 NRC 59 (1985)
record support for: ALAB-825, 22 NRC 785 (1985)
- BURDEN**
of persuasion on lateness factors of 10 C.F.R. 2.714(a): ALAB-816, 22 NRC 461 (1985)
of proof on movant for summary disposition: LBP-85-27A, 22 NRC 207 (1985)
of satisfying requirements of motion to reopen: ALAB-812, 22 NRC 5 (1985)
on petitioner seeking untimely intervention: ALAB-816, 22 NRC 461 (1985)
- CABLES**
coaxial, triaxial and twinax, environmental qualification of: LBP-85-28, 22 NRC 232 (1985)
instrument, leakage currents from: LBP-85-28, 22 NRC 232 (1985)
- CANCER**
risk to public from routine, nonnatural radioactive emissions: ALAB-820, 22 NRC 743 (1985)

SUBJECT INDEX

CASKS

See Dry Cask, Spent Fuel Cask(s)

CERTIFICATION

See Directed Certification

CESIUM-137

imposition of civil penalty for unauthorized possession, use, storage, and transportation of:
ALJ-85-1, 22 NRC 941 (1985)

CHARACTER

and competence, reflection of applicant's remedial quality assurance efforts on: ALAB-812, 22 NRC 5 (1985)

applicants', reflection of applicants' failure to advise Board of contractor report on: LBP-85-45, 22 NRC 819 (1985)

licensee, elements of: ALAB-812, 22 NRC 5 (1985); ALAB-815, 22 NRC 198 (1985)

See also Management Capability, Management Competence

CHEATING

on licensed operator exams, determination of management competence and character on basis of management's response to: ALAB-815, 22 NRC 198 (1985)

CIVIL PENALTIES

for unauthorized possession, use, storage and transportation of cesium-137 and americium-241:
ALJ-85-1, 22 NRC 941 (1985)

largest levied by NRC: LBP-85-28, 22 NRC 232 (1985)

mitigation of: ALJ-85-1, 22 NRC 941 (1985)

payment of, in installments: ALJ-85-2, 22 NRC 968 (1985)

See also Penalty, Sanction(s)

CLADDING

integrity of, during reflood of the core after a loss-of-coolant accident, during normal operation, and during other occurrences other than LOCAs: LBP-85-29, 22 NRC 300 (1985)

temperature, peak, calculation of: LBP-85-29, 22 NRC 300 (1985)

CLOSURE

of advisory committee meetings, authority to rule on: DPRM-85-3, 22 NRC 173 (1985)

COMBUSTIBLE LOADINGS

greater than 240,000 BTU/sq ft, fire protection in areas having: LBP-85-49, 22 NRC 899 (1985)

COMMUNICATIONS

See Ex Parte Communications

COMPUTER MODELS

for predicting peak cladding temperatures: LBP-85-29, 22 NRC 300 (1985)

CONCRETE

containment, integrity of: LBP-85-28, 22 NRC 232 (1985)

CONDITION

of site redress required for dismissal of proceeding: LBP-85-22, 22 NRC 89 (1985)

requiring GPU Nuclear to notify NRC of certain personnel assignments, establishment of procedures for determining whether to lift: CLI-85-19, 22 NRC 886 (1985)

See also License Conditions, Operating License Condition

CONSERVATISMS

use of, in making technical calculations: ALAB-819, 22 NRC 681 (1985)

CONSTRUCTION

finished, of nuclear power plants, factors affecting review of: LBP-85-39, 22 NRC 755 (1985)

quality required for operating license issuance: ALAB-812, 22 NRC 5 (1985); ALAB-813, 22 NRC 59 (1985)

CONTAINMENT

concrete, integrity of: LBP-85-28, 22 NRC 232 (1985)

integrity at Perry plant, analysis of: LBP-85-35, 22 NRC 514 (1985)

isolation valves and leak rate testing program, propriety of NRC grant of exemption from requirements for: DD-85-11, 22 NRC 149 (1985)

leak rate tests, validity of methodology for measurement of: DD-85-10, 22 NRC 143 (1985)

SUBJECT INDEX

- leaktightness, challenge to use of ASME service level C limits to ensure: LBP-85-35, 22 NRC 514 (1985)
- spray availability during degraded core accident, challenge to: LBP-85-35, 22 NRC 514 (1985)
- CONTAINMENT LEAK RATE TESTING**
- methodology for: DD-85-10, 22 NRC 143 (1985)
- propriety of NRC grant of exemption from requirements for: DD-85-11, 22 NRC 149 (1985)
- CONTENTION(S)**
- addressing flaws in emergency planning exercises, standard for admission of: LBP-85-49, 22 NRC 899 (1985)
- challenging adequacy of Staff review of operating license application, litigability of: ALAB-812, 22 NRC 5 (1985)
- concerning deployment of U.S. weapons, admissibility of: LBP-85-27, 22 NRC 126 (1985)
- conditional admission of: ALAB-819, 22 NRC 681 (1985)
- hydrogen generation, litigability of: ALAB-813, 22 NRC 59 (1985)
- litigability of issues outside the bounds of: ALAB-819, 22 NRC 681 (1985)
- new, standard for reopening a record to include: LBP-85-42, 22 NRC 795 (1985)
- on sabotage, criteria for determining admissibility of: LBP-85-27, 22 NRC 126 (1985)
- previously found insufficiently specific, interlocutory appeal of ruling admitting: ALAB-817, 22 NRC 470 (1985)
- quality assurance, bases for support of: ALAB-819, 22 NRC 681 (1985)
- quality assurance, effect on a proceeding of admission of: ALAB-817, 22 NRC 470 (1985)
- rules applicable to: LBP-85-49, 22 NRC 899 (1985)
- Staff documents as support for: ALAB-819, 22 NRC 681 (1985)
- standard for determining admissibility of: ALAB-819, 22 NRC 681 (1985)
- use of discovery to flesh out: ALAB-817, 22 NRC 470 (1985)
- CONTENTION(S), LATE-FILED**
- factors balanced to determine admissibility of: ALAB-819, 22 NRC 681 (1985)
- in motion to reopen, result of failure to address 2.714(a) criteria for admission of: LBP-85-42, 22 NRC 795 (1985)
- means for party to demonstrate its ability to contribute to the record on issue submitted in: ALAB-813, 22 NRC 59 (1985)
- test for admission of: ALAB-813, 22 NRC 59 (1985)
- CONTINUANCE**
- indefinite, in obligation to respond to summary disposition motions, grant of: LBP-85-32, 22 NRC 434 (1985)
- CONTROL ROOM**
- design deficiencies, correction of, at Catawba: ALAB-813, 22 NRC 59 (1985)
- staffing, regulatory requirements for: LBP-85-28, 22 NRC 232 (1985)
- COOLING SYSTEM**
- See Emergency Core Cooling System; Emergency Feedwater System; Reactor Coolant System
- COOLING TOWER**
- basin break with resulting flooding of Limerick control structure, potential for: ALAB-823, 22 NRC 773 (1985)
- drift, effect of salt deposition from: LBP-85-26, 22 NRC 118 (1985)
- emissions, potential for aircraft carburetor icing from: ALAB-819, 22 NRC 681 (1985)
- CORE**
- integrity of fuel cladding during reflood of: LBP-85-29, 22 NRC 300 (1985)
- spray system at Limerick, adequacy of design of: DD-85-11, 22 NRC 149 (1985)
- See also Emergency Core Cooling System; Reactor Core
- CORRESPONDENCE**
- between NRC Staff and Licensee as basis for alleged safety concerns: DD-85-11, 22 NRC 149 (1985)
- CORROSION**
- microbiologically influenced, in spray pond piping system: DD-85-15, 22 NRC 643 (1985)
- See also Intergranular Stress Corrosion Cracking
- COST-BENEFIT ANALYSIS**
- of alternatives to spent fuel shipments, need for: LBP-85-34, 22 NRC 481 (1985)

SUBJECT INDEX

COUNCIL ON ENVIRONMENTAL QUALITY

regulations, binding nature of, on NRC, ALAB-819, 22 NRC 681 (1985)

COUNSEL

consequence of error by, in making factual representation, LBP-85-48, 22 NRC 843 (1985)
responsibility of, in attacking integrity of opposing counsel, LBP-85-45, 22 NRC 819 (1985)

CRITICAL HEAT FLUX

technical discussion of, LBP-85-29, 22 NRC 300 (1985)

CRITICALITY CONSTANT

explanation of concept of, ALAB-816, 22 NRC 461 (1985)
of 0.95, operation of spent fuel pool with, LBP-85-24, 22 NRC 97 (1985)

CROSS-EXAMINATION

rulings, appellate review of, ALAB-813, 22 NRC 59 (1985)

DAMAGES

punitive, for radiation injuries, effect of Atomic Energy Act on right of States to impose,
ALAB-818, 22 NRC 651 (1985)

DECAY HEAT REMOVAL

from suppression pool during degraded core accident, adequacy of means for, LBP-85-35, 22 NRC
514 (1985)

DECISION(S)

addressing exemption from requirements of 10 C.F.R. 50.47(a) and (b), vacation of, on mootness
grounds, LBP-85-459, 22 NRC 459 (1985)

Commission policy statements affecting, ALAB-819, 22 NRC 681 (1985)

environmental, need for reconsideration of, when new information becomes available, DD-85-16,
22 NRC 851 (1985)

initial, need for submission of, in writing, ALAB-819, 22 NRC 681 (1985)

Licensing Board, appellate sua sponte review of, ALAB-826, 22 NRC 893 (1985)

not authorizing license issuance or resolving all pending safety issues, appealability of, LBP-85-28,
22 NRC 232 (1985)

partial initial, scope of Commission review of, CLI-85-15, 22 NRC 184 (1985)

DECONTAMINATION

of property in reception centers, LBP-85-35, 22 NRC 514 (1985)

protection for bus drivers during an emergency, need for, LBP-85-35, 22 NRC 514 (1985)

DEFICIENCIES

dispositioning of reports on, ALAB-812, 22 NRC 5 (1985)

emergency planning, cited by FEMA, adequacy of offsite emergency plans in light of, LBP-85-35,
22 NRC 514 (1985)

emergency planning, post-hearing resolution of, by NRC Staff, ALAB-819, 22 NRC 681 (1985)

in control room design at Catawba, correction of, ALAB-813, 22 NRC 59 (1985)

in design, construction, and operation of Diablo Canyon, treatment of allegations of, CLI-85-14, 22
NRC 177 (1985)

in environmental qualification of electrical equipment at Maine Yankee, allegations of, DD-85-17,
22 NRC 859 (1985)

See also Quality Assurance Deficiencies

DEPARTURE FROM NUCLEATE BOILING

technical discussion of, LBP-85-29, 22 NRC 300 (1985)

DESIGN

alternatives for mitigation of severe accidents, need for consideration of, ALAB-819, 22 NRC 681
(1985)

alternatives to mitigate severe accident risks, inclusion of, in Final Environmental Statement:
CLI-85-13, 22 NRC 1 (1985)

deficiencies, control room, correction of, at Catawba, ALAB-813, 22 NRC 59 (1985)

documents, identification of errors in, LBP-85-41, 22 NRC 765 (1985)

of spent fuel shipping casks, safety-related features of, LBP-85-34, 22 NRC 481 (1985)

spent fuel pool, high-density rerack, safety of, LBP-85-36, 22 NRC 590 (1985)

DIESEL FUEL

day tanks, accident scenario involving rupture of, LBP-85-49, 22 NRC 899 (1985)

SUBJECT INDEX

DIESEL GENERATORS

at Perry plant, reliability of: LBP-85-35, 22 NRC 514 (1985)
Transamerica Delaval, at Catawba, reliability of: ALAB-813, 22 NRC 59 (1985)

DIRECTED CERTIFICATION

authority, discretionary, test for exercise of: ALAB-817, 22 NRC 470 (1985)

DISCLOSURE

waiver of attorney-client and work product privileges through: LBP-85-38, 22 NRC 604 (1985)

DISCOVERY

access to plant components removed for design deficiencies as: LBP-85-32, 22 NRC 434 (1985)
filed in one docket when two separate dockets for a case are interrelated, treatment of: LBP-85-41,
22 NRC 765 (1985)

implications of misrepresentation order: LBP-85-47, 22 NRC 835 (1985)

infringement of intervenor's hearing rights because of expedited schedule for: CLI-85-15, 22 NRC
184 (1985)

of documents not yet in existence: LBP-85-41, 22 NRC 765 (1985)

of nonwitness experts: LBP-85-38, 22 NRC 604 (1985)

request, broad, treatment of: LBP-85-41, 22 NRC 765 (1985)

sanction for failure to comply with order for: LBP-85-48, 22 NRC 843 (1985)

use of, to flesh out contentions: ALAB-817, 22 NRC 470 (1985)

DISQUALIFICATION

of adjudicatory boards, standard for: ALAB-819, 22 NRC 681 (1985)

of Licensing Board, support of motion for: CLI-85-15, 22 NRC 184 (1985)

DOCKETS

separate but interrelated, treatment of discovery and evidence filed in: LBP-85-41, 22 NRC 765
(1985)

DOCUMENTATION

of equipment qualification at Kewaunee, adequacy of: DD-85-20, 22 NRC 971 (1985)

DOCUMENTS

design, identification of errors in: LBP-85-41, 22 NRC 765 (1985)

Staff, as support for contentions: ALAB-819, 22 NRC 681 (1985)

DOSE

assessments during radiological emergency, training necessary to perform: LBP-85-27A, 22 NRC
207 (1985)

calculations for cask drop accident: LBP-85-36, 22 NRC 590 (1985)

DOSIMETERS

thermoluminescent, accuracy of: LBP-85-28, 22 NRC 232 (1985)

DRUG ABUSE

at Waterford site, treatment of: ALAB-812, 22 NRC 5 (1985)

DRY CASK

storage as alternative to spent fuel transshipments: LBP-85-34, 22 NRC 481 (1985)

DRYWELL POOL

loads from hydrogen combustion: LBP-85-35, 22 NRC 514 (1985)

EFFECTIVENESS

of authorization for operating license, denial of request for stay of: CLI-85-14, 22 NRC 177 (1985)

See also Immediate Effectiveness

ELECTRIC GENERATION

nuclear-powered, regulatory structure for: ALAB-818, 22 NRC 651 (1985)

ELECTRICAL EQUIPMENT

at Maine Yankee, adequacy of environmental qualification of: DD-85-17, 22 NRC 859 (1985)

at TMI-1, San Onofre Unit 1, Kewaunee, and Haddam Neck plants, adequacy of environmental
qualification of: DD-85-20, 22 NRC 971 (1985)

at Waterford, flood damage to: ALAB-812, 22 NRC 5 (1985)

environmental qualification of: LBP-85-28, 22 NRC 232 (1985)

ELECTROMAGNETIC PULSE

caused by nuclear missile or other weapon, need to protect nuclear plants against effects of:
LBP-85-27, 22 NRC 126 (1985)

SUBJECT INDEX

EMERGENCY ACTION LEVEL

indicators, incomplete, in emergency plan, LBP-85-35, 22 NRC 514 (1985)

EMERGENCY CORE COOLING SYSTEM

evaluation models, adequacy of, LBP-85-29, 22 NRC 300 (1985)

EMERGENCY FEEDWATER SYSTEM

at TMI-1, adequacy of environmental qualification of, DD-85-20, 22 NRC 971 (1985)

EMERGENCY PLAN(S)

content of, regarding minimum staffing a Licensee should have during an emergency, LBP-85-27A, 22 NRC 207 (1985)

content of, regarding onsite and offsite preparedness, ALAB-818, 22 NRC 651 (1985)

deficiencies in, with respect to hospital designations and medical services, LBP-85-35, 22 NRC 514 (1985)

effect of State statutes prohibiting utility from implementing, LBP-85-31, 22 NRC 410 (1985)

implementing procedures, litigability of, LBP-85-27A, 22 NRC 207 (1985)

length of, LBP-85-27A, 22 NRC 207 (1985)

Limerick, onsite, adequacy of facility and equipment descriptions in, ALAB-819, 22 NRC 681 (1985)

need for completion of emergency action level indicators in, LBP-85-35, 22 NRC 514 (1985)

nuclear power plant operation in light of deficiencies in, ALAB-818, 22 NRC 651 (1985)

offsite, adequacy of, in light of planning deficiencies cited by FEMA, LBP-85-35, 22 NRC 514 (1985)

offsite, legal authority of utility to implement, ALAB-818, 22 NRC 651 (1985)

scope of medical services arrangements to be included in, CLI-85-15, 22 NRC 184 (1985)

standard for judging sufficiency of content of, ALAB-819, 22 NRC 681 (1985)

utility-sponsored, as substitute for State and local government plans, ALAB-818, 22 NRC 651 (1985)

EMERGENCY PLANNING

deficiencies, post-hearing resolution of, by NRC Staff, ALAB-819, 22 NRC 681 (1985)

effect of lack of State and local government participation in, LBP-85-31, 22 NRC 410 (1985)

exercise, standard for admission of contentions on, LBP-85-49, 22 NRC 899 (1985)

need for final FEMA findings on, as prerequisite to licensing, ALAB-813, 22 NRC 59 (1985)

regulations, premise for, ALAB-819, 22 NRC 681 (1985)

requirements, scope of medical services arrangements to be made for contaminated injured individuals, ALAB-819, 22 NRC 681 (1985)

standards of 10 C.F.R. 50.47(b), result of failure to satisfy, ALAB-819, 22 NRC 681 (1985)

EMERGENCY PLANNING ZONE

need for installation of independent data monitoring systems in, LBP-85-35, 22 NRC 514 (1985)

protection factors of structures in, LBP-85-49, 22 NRC 899 (1985)

protective actions to be developed for, ALAB-818, 22 NRC 651 (1985)

EMERGENCY PREPAREDNESS

of State and local agencies, adequacy of, in light of underfunding, DD-85-12, 22 NRC 449 (1985)

EMERGENCY WORKERS

provision of potassium iodide to, LBP-85-27A, 22 NRC 207 (1985)

requirements for training of, LBP-85-25, 22 NRC 101 (1985)

ENFORCEMENT

actions, institution of, on basis of licensee's financial constraints, DD-85-14, 22 NRC 635 (1985)

history of Brunswick nuclear plant, LBP-85-28, 22 NRC 232 (1985)

policy on civil penalty actions, ALJ-85-1, 22 NRC 941 (1985)

proceedings, bar on, because of statute of limitations, CLI-85-18, 22 NRC 877 (1985)

ENVIRONMENT

radiation, calculation of dose for, LBP-85-28, 22 NRC 232 (1985)

ENVIRONMENTAL ANALYSIS

test for determining whether to segment, LBP-85-43, 22 NRC 805 (1985)

ENVIRONMENTAL ASSESSMENT

content of, concerning alternative uses of available resources, LBP-85-34, 22 NRC 481 (1985)

of method for site redress, need for, LBP-85-22, 22 NRC 89 (1985)

SUBJECT INDEX

ENVIRONMENTAL EFFECTS

of transshipment of spent fuel casks vs. construction of dry cask storage facility; LBP-85-34, 22 NRC 481 (1985)

ENVIRONMENTAL IMPACT APPRAISAL

function of; DD-85-16, 22 NRC 851 (1985)

ENVIRONMENTAL IMPACT STATEMENT

need for inclusion of remote and highly speculative consequences in; ALAB-819, 22 NRC 681 (1985)

need for preparation of, for spent fuel pool expansion; LBP-85-36, 22 NRC 590 (1985)

need for, to store spent fuel at a facility; DD-85-16, 22 NRC 851 (1985)

need to consider low-probability, severe accidents in; ALAB-819, 22 NRC 681 (1985)

See also Final Environmental Statement

ENVIRONMENTAL QUALIFICATION

adequacy of documentation of, at Kewaunee; DD-85-20, 22 NRC 971 (1985)

effect of physical orientation of equipment on; LBP-85-28, 22 NRC 232 (1985)

of electrical equipment at Maine Yankee, adequacy of; DD-85-17, 22 NRC 859 (1985)

of electrical equipment at TMI-1, San Onofre Unit 1, Kewaunee, and Haddam Neck plants, adequacy of; DD-85-20, 22 NRC 971 (1985)

of electrical equipment; LBP-85-28, 22 NRC 232 (1985)

EQUIPMENT

effect of physical orientation of, on environmental qualification; LBP-85-28, 22 NRC 232 (1985)

safety-related, lack of visual inspection of, at Waterford; ALAB-812, 22 NRC 5 (1985)

survivability, adequacy of analysis of; LBP-85-35, 22 NRC 514 (1985)

See also Electrical Equipment; Safety Equipment

EVACUATION

adversarial evaluation to determine efficiency in accomplishing; ALAB-818, 22 NRC 651 (1985)

of schools during radiological emergency, use of students as bus drivers for; LBP-85-27A, 22 NRC 207 (1985)

routes through flood areas, denial of 2.206 petition requesting legal action to rectify; DD-85-13, 22 NRC 454 (1985)

EVACUATION TIME ESTIMATES

accuracy of methodology for compiling; CLI-85-15, 22 NRC 184 (1985)

factors considered in making; LBP-85-27A, 22 NRC 207 (1985)

need for analysis of worst-case scenarios for; LBP-85-25, 22 NRC 101 (1985)

need for review of, by State or local organizations; LBP-85-35, 22 NRC 514 (1985)

requirements for making and maintaining current; LBP-85-27A, 22 NRC 207 (1985)

use of conservatism in; LBP-85-27A, 22 NRC 207 (1985)

EVIDENCE

admissibility of studies of plant quality as, where study group was not independent of management; LBP-85-39, 22 NRC 755 (1985)

filed in one docket when two separate dockets for a case are interrelated, treatment of; LBP-85-41, 22 NRC 765 (1985)

hearsay, admissibility of, in administrative proceedings; ALAB-819, 22 NRC 681 (1985)

of little intrinsic value, need to include in a record; ALAB-824, 22 NRC 776 (1985)

supporting, for reopening of record, nature of; ALAB-812, 22 NRC 5 (1985)

EX PARTE COMMUNICATIONS

from Office of Investigations, Board reliance on, in making licensing decisions; ALAB-812, 22 NRC 5 (1985)

EXEMPTION(S)

from regulations, filing of petitions for; LBP-85-33, 22 NRC 442 (1985)

from regulations, standards applied by Commission in considering requests for; LBP-85-33, 22 NRC 442 (1985)

from requirements of 10 C.F.R. 50.47(a) and (b), vacation of decision addressing, on mootness grounds; LBP-85-459, 22 NRC 459 (1985)

improvidently granted, support for claim of; DD-85-11, 22 NRC 149 (1985)

of paint coatings in containment from quality assurance requirements; LBP-85-37, 22 NRC 601 (1985)

SUBJECT INDEX

EXPERTS

nonwitness, discovery of, LBP-85-38, 22 NRC 604 (1985)
to whom Fed. R. Civ. P. 26(b)(4) is applicable, LBP-85-38, 22 NRC 604 (1985)

EXPLOSIVES

effect of, on spent fuel shipping casks, LBP-85-34, 22 NRC 481 (1985)
from Federal ammunition plant, hazard to Braidwood facility from railroad transport of, LBP-85-27,
22 NRC 126 (1985)

FEDERAL EMERGENCY MANAGEMENT AGENCY

final findings on emergency planning, need for, as prerequisite to licensing, ALAB-813, 22 NRC 59
(1985)

FINAL ENVIRONMENTAL STATEMENT

amendment of, by adjudicatory hearing record and Licensing Board decision, ALAB-819, 22 NRC
681 (1985)

scope of design alternatives to mitigate severe accidents to be included in, CLI-85-13, 22 NRC 1
(1985)

See also Environmental Impact Statement

FINANCIAL QUALIFICATIONS

issues, litigability of, in operating license proceedings, ALAB-813, 22 NRC 59 (1985)
of licensees, institution of enforcement actions on basis of, DD-85-14, 22 NRC 635 (1985)

FINANCIAL RESOURCES

disparity in, as demonstration of exceptional circumstances under Fed. R. Civ. P. 26(b)(4)(B),
LBP-85-38, 22 NRC 604 (1985)

FINDINGS

safety, required by Atomic Energy Act for operating license issuance, ALAB-812, 22 NRC 5
(1985); ALAB-813, 22 NRC 59 (1985)

safety, required for nuclear power plant licensing, ALAB-819, 22 NRC 681 (1985)

technical, scope of, LBP-85-47, 22 NRC 835 (1985)

FIRE BARRIERS

cable tray, qualification of, LBP-85-49, 22 NRC 899 (1985)

factors controlling location of, LBP-85-49, 22 NRC 899 (1985)

FIRE PROTECTION SYSTEM

at Harris Plant, adequacy of, LBP-85-49, 22 NRC 899 (1985)

FIRES

secondary, in containment, initiated by hydrogen burning, potential for, LBP-85-35, 22 NRC 514
(1985)

FLOOD

damage to electrical equipment at Waterford, ALAB-812, 22 NRC 5 (1985)

FLOODING

of evacuation routes, DD-85-13, 22 NRC 454 (1985)

of Limerick control structure resulting from cooling tower basin break, potential for, ALAB-823, 22
NRC 773 (1985)

FUEL

design limits, interpretation of, LBP-85-29, 22 NRC 300 (1985)

See also Diesel Fuel; Spent Fuel

FUEL LOAD

bonus plan, safety impact of, DD-85-12, 22 NRC 449 (1985)

GALLIONELLA

corrosion in spray pond piping system influenced by, DD-85-15, 22 NRC 643 (1985)

GENERATORS

emergency, capacity/power demand margins for, ALAB-824, 22 NRC 776 (1985)

See also Diesel Generators; Steam Generator Tube

HEALTH

impacts, human, of a severe accident, scope of Final Environmental Statement consideration of,
ALAB-819, 22 NRC 681 (1985)

HEALTH AND SAFETY

responsibilities of Nuclear Regulatory Commission, ALAB-818, 22 NRC 651 (1985)

SUBJECT INDEX

HEARING RIGHTS

granted by Atomic Energy Act, scope of: ALAB-824, 22 NRC 776 (1985)
infringement of, through adverse procedural rulings: CLI-85-15, 22 NRC 184 (1985)
of members of the public under Atomic Energy Act: ALAB-813, 22 NRC 59 (1985)
on license conditions: CLI-85-13, 22 NRC 1 (1985)

HEARING(S)

Applicant's Management Plan as a proper focus for: LBP-85-32, 22 NRC 434 (1985)
legislative-format, establishment of procedures to govern: CLI-85-18, 22 NRC 877 (1985)
need for, prior to issuance of spent fuel pool license amendments: LBP-85-36, 22 NRC 590 (1985)
See also Adjudicatory Hearings; Licensing Hearings; Notice of Hearing

HEAT TRANSFER COEFFICIENTS

calculation of: LBP-85-29, 22 NRC 300 (1985)

HYDROGEN

detonation in Three Mile Island containment: LBP-85-30, 22 NRC 332 (1985)

HYDROGEN CONTROL SYSTEMS

standard of acceptance of: LBP-85-35, 22 NRC 514 (1985)

HYDROGEN GENERATION

contentions, litigability of: ALAB-813, 22 NRC 59 (1985)

HYDROGEN IGNITOR SYSTEM

questions to be answered in evaluating preliminary analysis of: LBP-85-35, 22 NRC 514 (1985)

IMMEDIATE EFFECTIVENESS

determination, effect of, on Appeal Board's determination of a stay motion: ALAB-814, 22 NRC 198 (1985)

INMATES

at State correctional institution, evacuation of, during radiological emergency: LBP-85-25, 22 NRC 101 (1985)

INSPECTION PROGRAM

NRC Staff, objectives of: DD-85-11, 22 NRC 149 (1985)

INSPECTORS

QA/QC, at Waterford, adequacy of qualifications of: ALAB-812, 22 NRC 5 (1985)

INTERGRANULAR STRESS CORROSION CRACKING

caused by high interpass temperatures on welds, potential for: ALAB-813, 22 NRC 59 (1985)

INTERPRETATION

of 10 C.F.R. Part 50, Appendix A: ALAB-824, 22 NRC 776 (1985)
of the phrases and terms "directed against the facility," "enemy of the United States," and
"deployment": LBP-85-27, 22 NRC 126 (1985)
statutory, weight given to legislative intent in: ALAB-818, 22 NRC 651 (1985)

INTERROGATORIES

need to designate who composed answer to: LBP-85-38, 22 NRC 604 (1985)
scope of: LBP-85-38, 22 NRC 604 (1985)

INTERVENORS

criteria for establishing standing of, in operating license amendment proceedings: LBP-85-24, 22
NRC 97 (1985)
pro se, hearing obligations of: ALAB-819, 22 NRC 681 (1985)

INTERVENTION

in operating license amendment proceedings, standing for: ALAB-816, 22 NRC 461 (1985)
petition, effect of withdrawal of: LBP-85-23, 22 NRC 95 (1985)
petition, late-filed in operating license amendment proceeding, dismissal of: LBP-85-24, 22 NRC 97
(1985)
responsibilities attendant to: LBP-85-46, 22 NRC 830 (1985)
untimely, by pro se litigant, five-factor test for: LBP-85-36, 22 NRC 590 (1985)
untimely, five-factor test for: ALAB-816, 22 NRC 461 (1985)

JURISDICTION

appellate, where the Appeal Board has previously considered an issue, resulting in final agency
action: ALAB-821, 22 NRC 750 (1985)
enlargement of, by licensing boards: ALAB-825, 22 NRC 785 (1985)
NRC, over Delaware River Basin Commission: DD-85-18, 22 NRC 870 (1985)

SUBJECT INDEX

- plenary subject matter, in NRC proceedings, ALAB-825, 22 NRC 785 (1985)
- to rule on motion to reopen, ALAB-823, 22 NRC 773 (1985)
- LAWS**
 - State, exercising historic police powers, Federal preemption of, ALAB-818, 22 NRC 651 (1985)
- LEAK RATE(S)**
 - data falsifications at TMI-2, hearing to identify persons involved in, CLI-85-18, 22 NRC 877 (1985)
 - testing, propriety of NRC grant of exemption from requirements for, DD-85-11, 22 NRC 149 (1985)
 - validity of methodology for measurement of, DD-85-10, 22 NRC 143 (1985)
- LETTERS OF AGREEMENT**
 - regarding availability of school buses, need for, LBP-85-35, 22 NRC 514 (1985)
- LICENSE CONDITIONS**
 - appropriateness of NRC action in the absence of, DD-85-18, 22 NRC 870 (1985)
- LICENSED OPERATOR**
 - training at TMI, adequacy of, ALAB-826, 22 NRC 893 (1985)
- LICENSEE EVENT REPORTS**
 - as basis for allegation of inadequate design and poor plant performance, DD-85-11, 22 NRC 149 (1985)
- LICENSEE(S)**
 - character, elements of, ALAB-812, 22 NRC 5 (1985)
 - control over, by new facility owner or lessor, CLI-85-17, 22 NRC 875 (1985)
- LICENSING**
 - for spent fuel storage at a facility other than where it was generated, ALAB-825, 22 NRC 785 (1985)
- LICENSING BOARD(S)**
 - authority to impose sanctions, LBP-85-48, 22 NRC 843 (1985)
 - authority to strike pleadings, LBP-85-45, 22 NRC 819 (1985)
 - enlargement of jurisdiction by, ALAB-825, 22 NRC 785 (1985)
 - flexibility of, to regulate hearings and designate order of procedure, ALAB-819, 22 NRC 681 (1985)
 - jurisdiction, scope of, in NRC proceedings, ALAB-825, 22 NRC 785 (1985)
 - reliance on ex parte information from Office of Investigations in making licensing decisions, ALAB-812, 22 NRC 5 (1985)
 - responsibilities in light of the existence of State Court litigation between the same parties as those before the NRC, LBP-85-46, 22 NRC 830 (1985)
 - responsibility of, to submit initial decisions in writing, ALAB-819, 22 NRC 681 (1985)
 - scope of authority of, ALAB-825, 22 NRC 785 (1985)
 - scope of sua sponte authority of, LBP-85-49, 22 NRC 899 (1985)
- LICENSING HEARINGS**
 - exclusion of final stages of major safety study from, LBP-85-32, 22 NRC 434 (1985)
- LOGGING OPERATIONS**
 - well and coal mine, unauthorized handling of byproduct materials in, ALJ-85-1, 22 NRC 941 (1985)
- MANAGEMENT CAPABILITY**
 - of Shearon Harris applicants, LBP-85-28, 22 NRC 232 (1985)
 - relevance of applicants' management of one facility to its capability for managing another facility, LBP-85-28, 22 NRC 232 (1985)
- MANAGEMENT COMPETENCE**
 - factors determining, ALAB-815, 22 NRC 198 (1985)
- MANAGEMENT PLAN**
 - Applicant's, as sole basis for continued litigation in operating license proceeding, LBP-85-32, 22 NRC 434 (1985)
- MATERIAL FALSE STATEMENT**
 - by GPU Nuclear management, establishment of proceeding to resolve issue of, CLI-85-19, 22 NRC 886 (1985)
 - mailgram by Licensee management stating erroneous information as, LBP-85-30, 22 NRC 332 (1985)
- MEDICAL SERVICES**
 - arrangements for contaminated injured individuals, scope of emergency planning requirements for, ALAB-819, 22 NRC 681 (1985); CLI-85-15, 22 NRC 184 (1985)

SUBJECT INDEX

- to be provided during radiological emergency, need for agreement with Red Cross for; LBP-85-31, 22 NRC 410 (1985)
- MISREPRESENTATION ORDER**
 - discovery implications of; LBP-85-47, 22 NRC 835 (1985)
- MODELS**
 - See Computer Models
- MONITORING**
 - equipment, thyroid, at relocation centers, adequacy of; LBP-85-31, 22 NRC 410 (1985)
 - of impact of salt deposition from cooling tower drift on agricultural lands, program for; LBP-85-26, 22 NRC 118 (1985)
- MONITORING SYSTEMS**
 - independent data, need for installation of, in Emergency Planning Zone; LBP-85-35, 22 NRC 514 (1985)
- MOGTNESS**
 - vacation of decision addressing exemption from requirements of 10 C.F.R. 50.47(a) and (b) on grounds of; LBP-85-459, 22 NRC 459 (1985)
- MOTION TO REOPEN**
 - burden of satisfying requirements of; ALAB-812, 22 NRC 5 (1985)
 - criteria to be satisfied by, where record is closed, some proposed findings have been filed, but no decision has been rendered; LBP-85-42, 22 NRC 795 (1985)
 - filed prior to decision but subsequent to the filing of proposed findings, criteria to be satisfied by; LBP-85-45, 22 NRC 819 (1985)
 - jurisdiction to rule on; ALAB-823, 22 NRC 773 (1985)
 - particularity required of material supporting; ALAB-812, 22 NRC 5 (1985)
 - result of failure to address 2.714(a) criteria for admission of late-filed contentions in; LBP-85-42, 22 NRC 795 (1985)
 - that raises previously uncontested issues, criteria for acceptance of; ALAB-812, 22 NRC 5 (1985)
 - untimely, grant of; LBP-85-45, 22 NRC 819 (1985)
 - See also Reopening, Reopening a Record
- MOTION TO STRIKE**
 - summary disposition response and accompanying affidavits; LBP-85-29, 22 NRC 300 (1985)
- NATIONAL ENVIRONMENTAL POLICY ACT**
 - extent of safety measures required by; ALAB-819, 22 NRC 681 (1985)
 - need for assessment of effects of overall transmission grid system when considering proposed transmission line; LBP-85-43, 22 NRC 805 (1985)
 - requirements for environmental impact statements for storage of spent fuel at a facility; DD-85-16, 22 NRC 851 (1985)
- NEED FOR POWER**
 - issues, litigability of, in operating license proceedings; ALAB-813, 22 NRC 59 (1985)
- NONCONFORMANCE REPORTS**
 - dispositioning of, at Waterford; ALAB-812, 22 NRC 5 (1985)
- NOTICE OF HEARING**
 - purpose of; ALAB-825, 22 NRC 785 (1985)
- NOTIFICATION**
 - of NRC by GPU Nuclear of certain personnel assignments, establishment of procedures for determining whether to lift requirement for; CLI-85-19, 22 NRC 886 (1985)
- NRC POLICY**
 - concerning delegation of authority to rule on nonessential procedural matters; DPRM-85-3, 22 NRC 173 (1985)
 - concerning protection of plants against an enemy attack; LBP-85-27, 22 NRC 126 (1985)
 - on litigation of severe accident mitigation measures; ALAB-819, 22 NRC 681 (1985)
 - to pursue allegations with potential safety significance; DD-85-11, 22 NRC 149 (1985)
 - See also Policy Statements
- NRC PROCEEDINGS**
 - application of Fed. R. Civ. P. 26(b)(4) in; LBP-85-38, 22 NRC 604 (1985)
 - effect on, of State Court proceeding involving the same parties as those before the NRC; LBP-85-46, 22 NRC 830 (1985)

SUBJECT INDEX

- intensive discovery in related State Court litigation as justification for postponement of: LBP-85-48, 22 NRC 843 (1985)
- See also Operating License Proceedings; Operating License Amendment Proceedings; Show Cause Proceeding
- NRC STAFF**
- authority of NRC adjudicator boards over: ALAB-812, 22 NRC 5 (1985)
 - documents as support for conclusions: ALAB-819, 22 NRC 681 (1985)
 - inspection program, objectives: DD-85-11, 22 NRC 149 (1985)
 - post-hearing resolution of emergency planning deficiencies by: ALAB-819, 22 NRC 681 (1985)
 - post-hearing resolution of license conditions by: CLI-85-13, 22 NRC 1 (1985)
 - responsibilities: ALAB-812, 22 NRC 5 (1985)
 - review of operating license application: litigability of contention challenging adequacy of: ALAB-812, 22 NRC 5 (1985)
- NUCLEAR POWER PLANT(S)**
- construction, legality of State enactment of moratorium on: ALAB-818, 22 NRC 651 (1985)
 - licensing requirements for protection of, against attacks by an enemy of the United States: LBP-85-27, 22 NRC 126 (1985)
 - responsibility for handling beyond-design-basis threats against: LBP-85-27, 22 NRC 126 (1985)
 - water-cooled, applicability of General Design Criterion 17 to: ALAB-824, 22 NRC 776 (1985)
- NUCLEAR REGULATORY COMMISSION**
- authority to direct Board to consider merits of request for exemption from regulations: LBP-85-33, 22 NRC 442 (1985)
 - authority to limit adjudicatory hearings: ALAB-819, 22 NRC 681 (1985)
 - binding nature of Council on Environmental Quality's regulations on: ALAB-819, 22 NRC 681 (1985)
 - challenges to authority of: LBP-85-33, 22 NRC 442 (1985)
 - delegation of authority by, to rule on closure determinations for advisory committee meetings: DPRM-85-3, 22 NRC 173 (1985)
 - health and safety responsibilities of: ALAB-818, 22 NRC 651 (1985)
 - jurisdiction over Delaware River Basin Commission: DD-85-18, 22 NRC 870 (1985)
 - responsibilities of, under NEPA: ALAB-819, 22 NRC 681 (1985)
 - review of partial initial decisions, scope of: CLI-85-15, 22 NRC 184 (1985)
- See also NRC Policy; NRC Proceedings; NRC Staff
- OFFICE OF INVESTIGATIONS**
- Board reliance on ex parte information in making licensing decisions: ALAB-812, 22 NRC 5 (1985)
- OPERATING LICENSE**
- application, litigability of contention challenging adequacy of NRC Staff review of: ALAB-812, 22 NRC 5 (1985)
 - authorization, need for final FEMA findings on adequacy of emergency response plans as prerequisite to: ALAB-813, 22 NRC 59 (1985)
 - conditions, hearing rights on: CLI-85-13, 22 NRC 1 (1985)
 - denial of request for stay of effectiveness of authorization for issuance of: CLI-85-14, 22 NRC 177 (1985)
 - emergency planning requirements necessary for obtaining: ALAB-818, 22 NRC 651 (1985)
 - issuance, safety finding necessary for: ALAB-812, 22 NRC 5 (1985)
- OPERATING LICENSE AMENDMENT PROCEEDING(S)**
- availability of summary disposition in: LBP-85-29, 22 NRC 300 (1985)
 - basis for standing to intervene in: ALAB-816, 22 NRC 461 (1985)
 - residency requirements to establish standing to intervene in: LBP-85-24, 22 NRC 97 (1985)
 - treatment of late-filed intervention petitions in: LBP-85-24, 22 NRC 97 (1985)
- OPERATING LICENSE AMENDMENT(S)**
- for spent fuel pool expansion, need for hearing prior to issuance of: LBP-85-36, 22 NRC 590 (1985)
 - permitting receipt and storage of spent fuel assemblies transhipped from another nuclear facility: LBP-85-34, 22 NRC 481 (1985)
 - suspension or revocation of: LBP-85-29, 22 NRC 300 (1985)
 - to permit receipt and storage of spent fuel assemblies, affirmance of decision authorizing: ALAB-822, 22 NRC 771 (1985)

SUBJECT INDEX

OPERATING LICENSE APPLICATIONS

standard for measuring: ALAB-819, 22 NRC 681 (1985)

OPERATING LICENSE CONDITION

prohibiting control over licensees by new facility owner or lessor: CLI-85-17, 22 NRC 875 (1985)
requiring notice of construction and operation of transmission line: LBP-85-43, 22 NRC 805 (1985)

OPERATING LICENSE PROCEEDINGS

Applicant's Management Plan as sole basis for continued litigation in: LBP-85-32, 22 NRC 434 (1985)

litigability of adequacy of security plans in: ALAB-819, 22 NRC 681 (1985)

litigability of alternative site issues in: ALAB-819, 22 NRC 681 (1985)

litigability of need for power and financial qualifications issues in: ALAB-813, 22 NRC 59 (1985)

termination of, when there are analyses to be completed: LBP-85-32, 22 NRC 434 (1985)

OPERATING RECORD

for Diablo Canyon Unit 2: CLI-85-14, 22 NRC 177 (1985)

OPERATORS

See Licensed Operator; Valve Operators

ORDER

See Misrepresentation Order; Protective Order

ORIENTATION

physical, of equipment, effect on environmental qualification of: LBP-85-28, 22 NRC 232 (1985)

OWNERSHIP

facility, creditor regulations governing: CLI-85-17, 22 NRC 875 (1985)

PAINT

core and sump blockage by: LBP-85-37, 22 NRC 601 (1985)

in containment, exemption of, from quality assurance requirements: LBP-85-37, 22 NRC 601 (1985)

PENALTY

for failure to provide adequate support for issues on appeal: ALAB-813, 22 NRC 59 (1985)

See also Civil Penalties; Sanction(s)

PHYSICAL SECURITY

of nuclear plants, responsibility for handling beyond-design-basis threats to: LBP-85-27, 22 NRC 126 (1985)

PIPE HANGER(S)

safety-related, fabrication of: ALAB-812, 22 NRC 5 (1985)

welds at Harris Plant, adequacy of remedial measures taken to correct defects in: LBP-85-49, 22 NRC 899 (1985)

PIPE SUPPORTS

at Diablo Canyon, scope of NRC review of: CLI-85-14, 22 NRC 177 (1985)

temporary, use of, at Waterford: ALAB-812, 22 NRC 5 (1985)

PIPELINE

rupture, natural gas, effects of, on Limerick nuclear plant: ALAB-819, 22 NRC 681 (1985)

PIPING SYSTEMS

at Diablo Canyon, scope of NRC review of: CLI-85-14, 22 NRC 177 (1985)

PLEADINGS

Licensing Board authority to strike: LBP-85-45, 22 NRC 819 (1985)

POLICY STATEMENTS

Commission, affecting a decision: ALAB-819, 22 NRC 681 (1985)

See also NRC Policy

POPULATIONS

transport-dependent, to be evacuated during radiological emergency, means for identifying: CLI-85-13, 22 NRC 1 (1985)

POSTPONEMENT

of NRC proceeding, intensive discovery in related State Court litigation as justification for: LBP-85-48, 22 NRC 843 (1985)

POTASSIUM IODIDE

provision of, to emergency workers: LBP-85-27A, 22 NRC 207 (1985)

POWER

See Need for Power

SUBJECT INDEX

PREEMPTION

Federal, of State statutes: ALAB-818, 22 NRC 651 (1985)

PREJUDICE

to intervenors from adverse procedural rulings: CLI-85-15, 22 NRC 184 (1985)

PRESIDING BOARD

for legislative-format hearing, authorization of appointment of: CLI-85-18, 22 NRC 877 (1985)

PRIVILEGE

attorney-client or work product, waiver of, through disclosure: LBP-85-38, 22 NRC 604 (1985)

executive, invocation of, in NRC proceedings: LBP-85-38, 22 NRC 604 (1985)

work product, application of: LBP-85-38, 22 NRC 604 (1985)

PROBABILISTIC RISK ASSESSMENT

of the effects of sabotage, litigability of need for: ALAB-819, 22 NRC 681 (1985)

PROOF

standard concerning the completeness and persuasiveness of: LBP-85-47, 22 NRC 835 (1985)

standard of, that applicants for operating licenses must meet: ALAB-819, 22 NRC 681 (1985)

See also Burden

PROTECTION

of nuclear power plants against attacks by an enemy of the United States, licensing requirements for: LBP-85-27, 22 NRC 126 (1985)

See also Fire Protection

PROTECTION FACTORS

of emergency planning zone structures: LBP-85-49, 22 NRC 899 (1985)

PROTECTIVE ACTIONS

use of radioprotective drugs as: LBP-85-27A, 22 NRC 207 (1985)

PROTECTIVE ORDER

factors weighed in determining need for: LBP-85-40, 22 NRC 759 (1985)

QUALIFICATION(S)

as expert witness, basis for: ALAB-819, 22 NRC 681 (1985)

of cable tray fire barriers: LBP-85-49, 22 NRC 899 (1985)

of QA/QC inspectors at Waterford, adequacy of: ALAB-812, 22 NRC 5 (1985)

of welders at Waterford, adequacy of: ALAB-812, 22 NRC 5 (1985)

testing, scope of program for: LBP-85-47, 22 NRC 835 (1985)

See also Environmental Qualification, Financial Qualifications

QUALITY ASSURANCE

breakdown at Waterford, extent of: ALAB-812, 22 NRC 5 (1985)

contention, effect on a proceeding of admission of: ALAB-817, 22 NRC 470 (1985)

contentions, bases for support of: ALAB-819, 22 NRC 681 (1985)

remedies applied by applicant, reflection of, on Applicant's character and competence: ALAB-812, 22 NRC 5 (1985)

requirements, exemption of paint coatings in containment from: LBP-85-37, 22 NRC 601 (1985)

QUALITY ASSURANCE DEFICIENCIES

resolution of: ALAB-812, 22 NRC 5 (1985)

scope of adjudicatory hearings on: ALAB-812, 22 NRC 5 (1985)

scope of review of claims of: ALAB-813, 22 NRC 59 (1985)

standard for reopening record on: ALAB-812, 22 NRC 5 (1985)

QUALITY ASSURANCE PROGRAMS

at Waterford, adequacy of: ALAB-812, 22 NRC 5 (1985)

importance of managerial attitude to: ALAB-812, 22 NRC 5 (1985)

scope of, required for nuclear power plant licensing: ALAB-819, 22 NRC 681 (1985)

QUALITY ASSURANCE/QUALITY CONTROL

relevance of extent of, to intensity of review of finished construction: LBP-85-39, 22 NRC 755 (1985)

RADIATION

effects on lubricants and seals: LBP-85-28, 22 NRC 232 (1985)

environment, calculation of dose for: LBP-85-28, 22 NRC 232 (1985)

injuries, effect of Atomic Energy Act on State's right to impose punitive damages for: ALAB-818, 22 NRC 651 (1985)

SUBJECT INDEX

RADIOACTIVE BYPRODUCT MATERIALS

imposition of civil penalty for unauthorized possession, use, storage and transportation of; ALJ-85-1, 22 NRC 941 (1985)

RADIOACTIVE EMISSIONS

cancer risk to public from routine, nonnatural; / LAE-820, 22 NRC 743 (1985)

RATEPAYER

status as basis for standing to intervene; LBP 85-24, 22 NRC 97 (1985)

REACTOR COOLANT SYSTEM

leak rate data falsifications at TMI-2, hearing to identify persons involved in; CLI-85-18, 22 NRC 877 (1985)

REACTOR CORE

damage following Three Mile Island accident; LBP-85-30, 22 NRC 332 (1985)

See also Core

REACTORS

boiling water, capacity/power demand margins for emergency generators in; ALAB-824, 22 NRC 776 (1985)

RECEPTION CENTERS

handling of contaminated property in; LBP-85-35, 22 NRC 514 (1985)

See also Relocation Centers

RECONSIDERATION

of environmental decisions when new information becomes available, need for; DD-85-16, 22 NRC 851 (1985)

of misrepresentation memorandum, denial of motion for; LBP-85-47, 22 NRC 835 (1985)

use of 2.206 petitions as vehicles for; DD-85-16, 22 NRC 851 (1985)

RECORD(S)

management system at Waterford, adequacy of; ALAB-812, 22 NRC 5 (1985)

need to include evidence of little intrinsic value in; ALAB-824, 22 NRC 776 (1985)

See also Operating Record

REGULATIONS

applicable to appellate proceedings; ALAB-825, 22 NRC 785 (1985)

applicable to enemy attacks on nuclear plants; LBP-85-27, 22 NRC 126 (1985)

challenges to, in operating license proceedings; LBP-85-27, 22 NRC 126 (1985)

compliance of pro se litigants with procedural requirements of; LBP-85-36, 22 NRC 590 (1985)

distinction between Regulatory Guides and; ALAB-819, 22 NRC 681 (1985)

emergency planning, premise for; ALAB-819, 22 NRC 681 (1985)

filing of petitions for exemptions from, or waivers of; LBP-85-33, 22 NRC 462 (1985)

governing new owner or lessor of a facility; CLI-85-17, 22 NRC 875 (1985)

incentive, potential safety impact of; DD-85-12, 22 NRC 449 (1985)

interpretation of 10 C.F.R. Part 50, Appendix A; ALAB-824, 22 NRC 776 (1985)

interpretation of; LBP-85-34, 22 NRC 481 (1985)

not in effect until time of appeal of a decision, applicability of; ALAB-813, 22 NRC 59 (1985)

of Council on Environmental Quality, effect of, on NRC; ALAB-819, 22 NRC 681 (1985)

See also NRC Regulations

REGULATORY GUIDES

distinction between regulations and; ALAB-819, 22 NRC 681 (1985)

RELOCATION CENTERS

for evacuees, identification, location and adequacy of; LBP-85-31, 22 NRC 410 (1985)

See also Reception Centers

REMOTE SHUTDOWN SYSTEM REDUNDANCY

propriety of NRC grant of exemption from requirements for; DD-85-11, 22 NRC 149 (1985)

REOPENING

of issues previously adjudicated, use of 2.206 procedures for; DD-85-11, 22 NRC 149 (1985)

REOPENING A RECORD

circumstances in which standards for, need not be applied with full force; LBP-85-42, 22 NRC 795 (1985)

criteria for; ALAB-812, 22 NRC 5 (1985); ALAB-813, 22 NRC 198 (1985)

determining significance of new information for purpose of; LBP-85-42, 22 NRC 795 (1985)

SUBJECT INDEX

- nature of supporting evidence for: ALAB-812, 22 NRC 5 (1985)
- on quality assurance deficiencies, standard for: ALAB-812, 22 NRC 5 (1985)
- to include a new contention, standard for: LBP-85-42, 22 NRC 795 (1985)
- See also Motion to Reopen
- REPRESENTATIVES**
 - multiple, of one party, obligations of: LBP-85-41, 22 NRC 765 (1985)
- RESISTANCE TEMPERATURE DETECTORS**
 - thermal aging of: LBP-85-28, 22 NRC 232 (1985)
- REVIEW**
 - immediate effectiveness, criteria applied in conducting: CLI-85-13, 22 NRC 1 (1985)
 - interlocutory, standard for: ALAB-817, 22 NRC 470 (1985)
 - of claims of quality assurance deficiencies in adjudicatory hearings, scope of: ALAB-813, 22 NRC 59 (1985)
 - of evacuation time estimates by State or local organizations, need for: LBP-85-35, 22 NRC 514 (1985)
 - of partial initial decisions by Commission, scope of: CLI-85-15, 22 NRC 184 (1985)
- REVIEW, APPELLATE**
 - of Licensing Board cross-examination rulings: ALAB-813, 22 NRC 59 (1985)
 - of Licensing Board decisions in the absence of an appeal: ALAB-826, 22 NRC 893 (1985)
 - of Licensing Board scheduling rulings: ALAB-813, 22 NRC 59 (1985)
 - scope of: ALAB-819, 22 NRC 681 (1985)
 - sua sponte, scope of: ALAB-822, 22 NRC 771 (1985)
- REVOCAATION**
 - of license amendments: LBP-85-29, 22 NRC 300 (1985)
- RISK**
 - of cancer from routine, nonnatural radioactive emissions: ALAB-820, 22 NRC 743 (1985)
 - of military aircraft crash, consideration of, under 10 C.F.R. 50.13(b): LBP-85-27, 22 NRC 126 (1985)
 - to surrounding community from operation of spent fuel pool: LBP-85-24, 22 NRC 97 (1985)
 - See also Probabilistic Risk Assessment
- ROLE STRAIN**
 - in adult school bus drivers: LBP-85-49, 22 NRC 899 (1985)
- RULEMAKING**
 - effect of, on appellate proceedings: ALAB-825, 22 NRC 785 (1985)
 - effect of, on ongoing proceeding: ALAB-813, 22 NRC 59 (1985)
- RULES**
 - applicable to all contentions: LBP-85-49, 22 NRC 899 (1985)
- RULES OF PRACTICE**
 - access to plant components removed for design deficiencies as discovery: LBP-85-32, 22 NRC 434 (1985)
 - admissibility of contentions concerning deployment of U.S. weapons: LBP-85-27, 22 NRC 126 (1985)
 - admissibility, as evidence, of studies of plant quality where study group was not independent of management: LBP-85-39, 22 NRC 755 (1985)
 - Appeal Board jurisdiction where it has previously considered an issue, resulting in final agency action: ALAB-821, 22 NRC 750 (1985)
 - appellate review of Licensing Board cross-examination rulings: ALAB-813, 22 NRC 59 (1985)
 - appellate review of Licensing Board scheduling rulings: ALAB-813, 22 NRC 59 (1985)
 - Applicant's Management Plan as a proper focus for hearings: LBP-85-32, 22 NRC 434 (1985)
 - application of Fed. R. Civ. P. 26(b)(4) in NRC proceedings: LBP-85-38, 22 NRC 604 (1985)
 - application of work product privilege: LBP-85-38, 22 NRC 604 (1985)
 - availability of summary disposition in license amendment hearings: LBP-85-29, 22 NRC 300 (1985)
 - bases for support of quality assurance contentions: ALAB-819, 22 NRC 681 (1985)
 - Board reliance on ex parte information from Office of Investigations in making licensing decisions: ALAB-812, 22 NRC 5 (1985)
 - burden of persuasion on lateness factors of 10 C.F.R. 2.714(a): ALAB-816, 22 NRC 461 (1985)
 - burden of satisfying requirements of motion to reopen: ALAB-812, 22 NRC 5 (1985)

SUBJECT INDEX

- burden on petitioner seeking untimely intervention; ALAB-816, 22 NRC 461 (1985)
- circumstances in which standards for reopening a record need not be applied with full force; LBP-85-42, 22 NRC 795 (1985)
- Commission policy statements affecting a decision; ALAB-819, 22 NRC 681 (1985)
- conditional admission of contentions; ALAB-819, 22 NRC 681 (1985)
- content of 2,206 petitions for institution of show cause proceedings; DD-85-10, 22 NRC 149 (1985)
- content of appellate briefs; ALAB-813, 22 NRC 59 (1985); ALAB-816, 22 NRC 461 (1985)
- criteria applied to stay requests; ALAB-814, 22 NRC 198 (1985); ALAB-820, 22 NRC 743 (1985)
- criteria for acceptance of motion to reopen that raises previously uncontested issues; ALAB-812, 22 NRC 5 (1985)
- criteria for determining admissibility of contentions on sabotage; LBP-85-27, 22 NRC 126 (1985)
- criteria for reopening a record; ALAB-812, 22 NRC 5 (1985); ALAB-815, 22 NRC 198 (1985)
- criteria to be satisfied by motion to reopen filed prior to decision but subsequent to the filing of proposed findings; LBP-85-45, 22 NRC 819 (1985)
- criteria to be satisfied by motion to reopen where record is closed, some proposed findings have been filed, but no decision has been rendered; LBP-85-41, 22 NRC 795 (1985)
- determining significance of new information for purpose of reopening a record; LBP-85-42, 22 NRC 795 (1985)
- discovery of documents not yet in existence; LBP-85-41, 22 NRC 765 (1985)
- discovery of nonwitness experts; LBP-85-38, 22 NRC 604 (1985)
- disparity in financial resources as demonstration of exceptional circumstances under Fed. R. Civ. P. 26(b)(4)(B); LBP-85-38, 22 NRC 604 (1985)
- effect of Commission immediate effectiveness determination on Appeal Board's determination of a stay motion; ALAB-814, 22 NRC 198 (1985)
- effect on a proceeding of admission of single quality assurance contention; ALAB-817, 22 NRC 479 (1985)
- exceptions to when Fed. R. Civ. P. 26(b)(4) is applicable; LBP-85-38, 22 NRC 604 (1985)
- factors balanced to determine admissibility of late-filed contentions; ALAB-819, 22 NRC 681 (1985)
- factors weighed in determining need for protective order; LBP-85-49, 22 NRC 759 (1985)
- five-factor test for untimely interventions; ALAB-816, 22 NRC 461 (1985)
- grant of indefinite continuance in obligation to respond to summary disposition motions; LBP-85-32, 22 NRC 434 (1985)
- grant of untimely motions to reopen; LBP-85-45, 22 NRC 819 (1985)
- hearing obligations of pro se intervenors; ALAB-819, 22 NRC 681 (1985)
- importance of "irreparable injury" factor in determining stay requests; ALAB-820, 22 NRC 743 (1985)
- intensive discovery in related State Court litigation as justification for postponement of NRC proceeding; LBP-85-48, 22 NRC 843 (1985)
- invocation of executive privilege in NRC proceedings; LBP-85-38, 22 NRC 604 (1985)
- jurisdiction to rule on motion to reopen; ALAB-823, 22 NRC 773 (1985)
- Licensing Board responsibilities in light of the existence of State Court litigation between the same parties as those before the NRC; LBP-85-46, 22 NRC 830 (1985)
- litigability of contentions challenging adequacy of Staff review of operating license application; ALAB-812, 22 NRC 5 (1985)
- litigability of issues outside the bounds of a contention; ALAB-819, 22 NRC 681 (1985)
- litigability of need-for-power and financial qualifications issues in operating license proceedings; ALAB-813, 22 NRC 59 (1985)
- means for a party to demonstrate its ability to contribute to the record on issue submitted in late-filed contentions; ALAB-813, 22 NRC 59 (1985)
- means of claiming executive privilege; LBP-85-38, 22 NRC 604 (1985)
- means of determining whether expert is required for litigation; LBP-85-38, 22 NRC 604 (1985)
- nature of supporting evidence for reopening of record; ALAB-812, 22 NRC 5 (1985)
- need to designate who composed answer to interrogatories; LBP-85-38, 22 NRC 604 (1985)
- notice of intervention by pro se litigant, five-factor test for; LBP-85-36, 22 NRC 590 (1985)
- particularly required of material supporting motion to reopen; ALAB-812, 22 NRC 5 (1985)
- penalty for failure to provide adequate support for issues on appeal; ALAB-813, 22 NRC 59 (1985)
- purpose of executive privilege; LBP-85-38, 22 NRC 604 (1985)

SUBJECT INDEX

- record support for appellate briefs; ALAB-825, 22 NRC 785 (1985)
 - remedial actions imposed by NRC for major deficiencies on part of licensees; DD-85-11, 22 NRC 149 (1985)
 - reopening of record to consider quality assurance deficiencies, standard for; ALAB-812, 22 NRC 5 (1985)
 - responsibilities attendant to intervention; LBP-85-46, 22 NRC 830 (1985)
 - responsibilities of multiple representatives of a party; LBP-85-41, 22 NRC 765 (1985)
 - responsibilities of NRC Staff; ALAB-812, 22 NRC 5 (1985)
 - responsibility of counsel attacking integrity of opposing counsel; LBP-85-45, 22 NRC 819 (1985)
 - responsibility of parties to advise Licensing Board of matters relevant and material to issues pending before the Board; LBP-85-42, 22 NRC 795 (1985)
 - result of failure to address 2.714(a) criteria for admission of late-filed contentions in motion to reopen a record; LBP-85-42, 22 NRC 795 (1985)
 - sanction for failure to comply with discovery order; LBP-85-48, 22 NRC 843 (1985)
 - scope of interrogatories; LBP-85-38, 22 NRC 604 (1985)
 - scope of Licensing Board authority to strike pleadings; LBP-85-45, 22 NRC 819 (1985)
 - standard for determining admissibility of contentions; ALAB-819, 22 NRC 681 (1985)
 - standard for grant of summary disposition; LBP-85-29, 22 NRC 300 (1985)
 - standard for interlocutory review; ALAB-817, 22 NRC 470 (1985)
 - standard for overcoming executive privilege; LBP-85-38, 22 NRC 604 (1985)
 - standard for reopening a record to include a new contention; LBP-85-42, 22 NRC 795 (1985)
 - standard of acceptance for hydrogen control systems; LBP-85-35, 22 NRC 514 (1985)
 - standard of proof that applicants for operating licenses must meet; ALAB-819, 22 NRC 681 (1985)
 - support for claim that exemptions were improvidently granted; DD-85-11, 22 NRC 149 (1985)
 - test for admission of late-filed contentions; ALAB-813, 22 NRC 59 (1985)
 - test for exercise of discretionary directed certification authority; ALAB-817, 22 NRC 470 (1985)
 - timeliness of motions to reopen a record; ALAB-815, 22 NRC 198 (1985)
 - timeliness of request for stay; ALAB-814, 22 NRC 198 (1985)
 - treatment of broad discovery requests; LBP-85-41, 22 NRC 765 (1985)
 - treatment of discovery and evidence filed in one docket when two separate dockets for a case are interrelated; LBP-85-41, 22 NRC 765 (1985)
 - use of 2.206 petitions as vehicles for reconsideration; DD-85-16, 22 NRC 851 (1985)
 - use of 2.206 procedures to reopen issues previously adjudicated; DD-85-11, 22 NRC 149 (1985)
 - use of stipulations in NRC litigation; LBP-85-44, 22 NRC 816 (1985)
 - waiver of attorney-client and work product privileges through disclosure; LBP-85-38, 22 NRC 604 (1985)
 - waiver of executive privilege; LBP-85-38, 22 NRC 604 (1985)
- RULINGS**
- cross-examination, appellate review of; ALAB-813, 22 NRC 59 (1985)
 - procedural, infringement of hearing rights through; CLI-85-15, 22 NRC 184 (1985)
 - scheduling, appellate review of; ALAB-813, 22 NRC 59 (1985)
- SABOTAGE**
- contentions, criteria for determining admissibility of; LBP-85-27, 22 NRC 126 (1985)
 - extent of analysis of, in design and operating procedures for new nuclear plants; ALAB-819, 22 NRC 681 (1985)
 - need for nuclear power plants to protect against; ALAB-819, 22 NRC 681 (1985)
 - of spent fuel shipments, scenarios for, and chance of success of; LBP-85-34, 22 NRC 481 (1985)
- SAFETY**
- components that are not part of primary hydrogen control system, challenges to adequacy of; LBP-85-35, 22 NRC 514 (1985)
 - findings required by Atomic Energy Act for issuance of operating license; ALAB-812, 22 NRC 5 (1985)
 - findings required for nuclear power plant licensing; ALAB-813, 22 NRC 59 (1985); ALAB-819, 22 NRC 681 (1985)
 - impact of State incentive regulations; DD-85-12, 22 NRC 449 (1985)
 - measures, extent of, required by National Environmental Policy Act; ALAB-819, 22 NRC 681 (1985)

SUBJECT INDEX

- of spent fuel pool high-density rerack design: LBP-85-36, 22 NRC 590 (1985)
- significance of unauthorized handling of americium-241 and cesium-137: ALJ-85-1, 22 NRC 941 (1985)
- study, exclusion of, from licensing hearings: LBP-85-32, 22 NRC 434 (1985)
- See also Health and Safety
- SAFETY EQUIPMENT**
 - control and power availability to: LBP-85-49, 22 NRC 899 (1985)
- SALT DEPOSITION**
 - from cooling tower drift, impact of, on productivity of agricultural lands near Palo Verde plant: LBP-85-26, 22 NRC 118 (1985)
- SANCTION(S)**
 - for failure to comply with discovery order: LBP-85-48, 22 NRC 843 (1985)
 - Licensing Board authority to impose: LBP-85-48, 22 NRC 843 (1985)
 - See also Civil Penalties; Penalty
- SCHEDULING**
 - rulings, appellate review of: ALAB-813, 22 NRC 59 (1985)
- SCHOOL BUS DRIVERS**
 - role strain in, during emergency evacuation: LBP-85-49, 22 NRC 899 (1985)
 - use of students as, during radiological emergency evacuation: LBP-85-27A, 22 NRC 207 (1985)
- SCHOOL BUSES**
 - need for letters of agreement regarding availability during radiological emergency: LBP-85-35, 22 NRC 514 (1985)
- SCHOOLS**
 - evacuation of, by student bus drivers during radiological emergency: LBP-85-27A, 22 NRC 207 (1985)
- SECURITY**
 - See Physical Security
- SECURITY PLANS**
 - litigability of, in licensing proceedings: ALAB-819, 22 NRC 681 (1985)
- SEGMENTATION**
 - of environmental analysis, test for: LBP-85-43, 22 NRC 805 (1985)
- SHELTERING**
 - effectiveness, concepts involved in determining: LBP-85-49, 22 NRC 899 (1985)
- SHOW CAUSE PROCEEDING**
 - on basis of improvidently granted exemptions: DD-85-11, 22 NRC 149 (1985)
- SHUTDOWN**
 - See Remote Shutdown System Redundancy
- SITE REDRESS**
 - need for environmental assessment of method for: LBP-85-22, 22 NRC 89 (1985)
- SITES**
 - alternative, litigability of, in operating license proceeding: ALAB-819, 22 NRC 681 (1985)
- SPENT FUEL**
 - shipments, need to consider alternatives to: LBP-85-34, 22 NRC 481 (1985)
 - shipping casks, safety-related design features of: LBP-85-34, 22 NRC 481 (1985)
 - transshipment of: LBP-85-34, 22 NRC 481 (1985)
- SPENT FUEL ASSEMBLIES**
 - affirmance of decision authorizing operating license amendment to permit receipt and storage of: ALAB-822, 22 NRC 771 (1985)
- SPENT FUEL CASK(S)**
 - effect of explosives on: LBP-85-34, 22 NRC 481 (1985)
 - for shipment, employee error in preparing: LBP-85-34, 22 NRC 481 (1985)
 - handling procedures: LBP-85-34, 22 NRC 481 (1985)
- SPENT FUEL POOL**
 - boiling event, need for site-specific analysis of dose limits of: LBP-85-36, 22 NRC 590 (1985)
 - expansion, need for hearing prior to issuance of license amendments for: LBP-85-36, 22 NRC 590 (1985)

SUBJECT INDEX

- expansion, need for preparation of environmental impact statement for; LBP-85-36, 22 NRC 590 (1985)
- modification of technical specifications governing; ALAB-816, 22 NRC 461 (1985)
- operation of, with criticality constant of 0.95; LBP-85-24, 22 NRC 97 (1985)
- SPENT FUEL STORAGE**
 - in fuel pool at another facility; ALAB-825, 22 NRC 785 (1985)
 - need for environmental impact statement for; DD-85-16, 22 NRC 851 (1985)
- SPRAY POND**
 - pipng system, microbiologically influenced corrosion in; DD-85-15, 22 NRC 643 (1985)
- STANDBY GAS TREATMENT SYSTEM**
 - propriety of NRC grant of exemption from requirements for, regarding refueling connection to; DD-85-11, 22 NRC 149 (1985)
- STANDING TO INTERVENE**
 - in operating license amendment proceeding, basis for; ALAB-816, 22 NRC 461 (1985)
 - in operating license amendment proceedings, residency requirements for; LBP-85-24, 22 NRC 97 (1985)
 - on basis of ratepayer status; ALAB-816, 22 NRC 461 (1985); LBP-85-24, 22 NRC 97 (1985)
- STARE DECISIS EFFECT**
 - accorded to Licensing Board conclusions on purely legal matters by Appeal Board affirmance on sua sponte review; ALAB-826, 22 NRC 893 (1985)
- STATUTE OF LIMITATIONS**
 - NRC actions authorized following expiration of; CLI-85-18, 22 NRC 877 (1985)
- STATUTES**
 - State, Federal preemption of; ALAB-818, 22 NRC 651 (1985)
 - State, prohibiting utility from implementing emergency plans; LBP-85-31, 22 NRC 410 (1985)
- STAY**
 - motions, criteria to be addressed by; ALAB-814, 22 NRC 198 (1985); ALAB-820, 22 NRC 743 (1985)
 - motions, effect of immediate effectiveness determination on Appeal Board's determination of; ALAB-814, 22 NRC 198 (1985)
 - of effectiveness of authorization for operating license, denial of request for, for failure to meet criteria of 10 C.F.R. 2.788(e); CLI-85-14, 22 NRC 177 (1985)
 - of effectiveness of Licensing Board decision, criteria applied in determining whether to grant; CLI-85-13, 22 NRC 1 (1985)
 - timeliness of request for; ALAB-814, 22 NRC 198 (1985)
- STEAM GENERATOR TUBE**
 - failure analysis at Harris Plant, adequacy of; LBP-85-49, 22 NRC 899 (1985)
- STIPULATIONS**
 - use of, in NRC litigation; LBP-85-44, 22 NRC 816 (1985)
- SUMMARY DISPOSITION**
 - appealability of denial of motion for; LBP-85-29, 22 NRC 300 (1985)
 - burden of proof on movant for; LBP-85-27A, 22 NRC 207 (1985)
 - burden on opponent of motion for; LBP-85-27A, 22 NRC 207 (1985)
 - in license amendment hearings, availability of; LBP-85-29, 22 NRC 300 (1985)
 - motions, grant of indefinite continuance in obligation to respond to; LBP-85-32, 22 NRC 434 (1985)
 - oral testimony on; LBP-85-29, 22 NRC 300 (1985)
 - standard for grant of; LBP-85-27A, 22 NRC 207 (1985); LBP-85-29, 22 NRC 300 (1985)
- SUPPRESSION POOL**
 - bypass, challenges to containment integrity from; LBP-85-35, 22 NRC 514 (1985)
- SUSPENSION**
 - of license amendments; LBP-85-29, 22 NRC 300 (1985)
- SYSTEMATIC ASSESSMENT OF LICENSEE PERFORMANCE**
 - reports on Carolina Power and Light facilities; LBP-85-28, 22 NRC 232 (1985)
- TECHNICAL SPECIFICATIONS**
 - governing spent fuel storage pool, modification of; ALAB-816, 22 NRC 461 (1985)

SUBJECT INDEX

- TEMPERATURE**
peak cladding, computer models of: LBP-85-29, 22 NRC 300 (1985)
See also Resistive Temperature Detectors
- TERMINATION**
of operating license proceedings when there are analyses to be completed: LBP-85-32, 22 NRC 434 (1985)
of proceeding because of withdrawal of petition to intervene: LBP-85-23, 22 NRC 95 (1985)
- TESTIMONY**
by one expert witness on analyses performed by other experts: ALAB-819, 22 NRC 681 (1985)
oral, on summary disposition: LBP-85-29, 22 NRC 300 (1985)
technical, requirements for: ALAB-819, 22 NRC 681 (1985)
- TESTIMONY, EXPERT**
definition of: ALAB-819, 22 NRC 681 (1985)
lacking scientific basis, weight given to: ALAB-819, 22 NRC 681 (1985)
- TESTING**
qualifications, scope of program for: LBP-85-47, 22 NRC 835 (1985)
See also Containment Leak Rate Testing
- THERMAL AGING**
of resistance temperature detectors: LBP-85-28, 22 NRC 232 (1985)
- THYROID**
monitoring equipment at relocation centers, adequacy of: LBP-85-31, 22 NRC 410 (1985)
- TIMELINESS**
of motions to reopen a record: ALAB-815, 22 NRC 198 (1985)
of request for stay: ALAB-814, 22 NRC 198 (1985)
- TRAINING**
licensed operator, at TMI, adequacy of: ALAB-826, 22 NRC 893 (1985)
necessary to make dose assessments during radiological emergencies: LBP-85-27A, 22 NRC 207 (1985)
of emergency response workers, requirements for: LBP-85-25, 22 NRC 101 (1985)
program for Shearon Harris nuclear plant personnel, adequacy of: LBP-85-28, 22 NRC 232 (1985)
- TRANSMISSION LINE**
proposed, litigability of effects of: LBP-85-43, 22 NRC 805 (1985)
- TRANSMITTERS**
ITT-Barton, environmental qualification of: LBP-85-28, 22 NRC 232 (1985)
- TRANSPORT**
of explosive materials from Federal ammunition plant, hazard to Braidwood facility from: LBP-85-27, 22 NRC 126 (1985)
- VACATION**
of decision addressing exemption from requirements of 10 C.F.R. 50.47(a) and (b): LBP-85-459, 22 NRC 459 (1985)
- VALVE OPERATORS**
Limoisque, at TMI-1, adequacy of environmental qualification of: DD-85-20, 22 NRC 971 (1985)
- VALVE(S)**
active, stress allowables for: LBP-85-41, 22 NRC 765 (1985)
containment isolation, propriety of NRC grant of exemption from requirements for: DD-85-11, 22 NRC 149 (1985)
operators, Limoisque, environmental qualification of: LBP-85-28, 22 NRC 232 (1985)
safety-related, at Waterford, inspection and maintenance of: ALAB-812, 22 NRC 5 (1985)
- VIOLATION(S)**
NRC policy on aggregation of, to a higher severity level: ALJ-85-1, 22 NRC 941 (1985)
of NRC requirements, treatment of: DD-85-11, 22 NRC 149 (1985)
of regulations governing handling of byproduct materials: ALJ-85-1, 22 NRC 941 (1985)
- WAIVER(S)**
of attorney-client and work product privileges through disclosure: LBP-85-38, 22 NRC 604 (1985)
of executive privilege: LBP-85-38, 22 NRC 604 (1985)
of regulations, filing of petitions for: LBP-85-33, 22 NRC 442 (1985)

SUBJECT INDEX

WEATHER

adverse, consideration of, in estimating evacuation times, LBP-85-27A, 22 NRC 207 (1985)

WELD ROD

reliability of Waterford traceability records on, ALAB-812, 22 NRC 5 (1985)

WELDERS

adequacy of qualifications of, at Waterford, ALAB-812, 22 NRC 5 (1985)

WELDING

of stainless steel tubing at Waterford, adequacy of, ALAB-812, 22 NRC 5 (1985)

WELDS

defective, adequacy of analysis of, LBP-85-35, 22 NRC 514 (1985)

pipe hanger, at Harris Plant, adequacy of remedial measures taken to correct defects in, LBP-85-49, 22 NRC 899 (1985)

WITHDRAWAL

of intervention petition, effect of, on proceeding, LBP-85-23, 22 NRC 95 (1985)

WITNESS, EXPERT

basis for qualification as, ALAB-819, 22 NRC 681 (1985)

testimony on analyses performed by other experts, ALAB-819, 22 NRC 681 (1985)

ZONE

See Emergency Planning Zone

FACILITY INDEX

- BRAIDWOOD NUCLEAR POWER STATION, Units 1 and 2; Docket Nos. 50-456, 50-457
OPERATING LICENSE; July 30, 1985; MEMORANDUM DETAILING RATIONALE IN
SUPPORT OF JUNE 21, 1985 ORDER ON ADMISSIBILITY OF NEINER FARMS
CONTENTION 4 (RAILROAD EXPLOSION); LBP-85-27, 22 NRC 126 (1985)
OPERATING LICENSE; September 6, 1985; MEMORANDUM AND ORDER; ALAB-817, 22
NRC 470 (1985)
OPERATING LICENSE; October 4, 1985; MEMORANDUM AND ORDER; LBP-85-40, 22
NRC 759 (1985)
OPERATING LICENSE; November 7, 1985; MEMORANDUM OF RATIONALE FOR
SUMMARY DISPOSITION OF NEINER FARMS CONTENTION 1; LBP-85-43, 22 NRC
805 (1985)
- CATAWBA NUCLEAR STATION, Units 1 and 2; Docket Nos. 50-413-OL, 50-414-OL
OPERATING LICENSE; July 26, 1985; DECISION; ALAB-813, 22 NRC 59 (1985)
OPERATING LICENSE; November 21, 1985; DECISION; ALAB-825, 22 NRC 785 (1985)
- CLINTON POWER STATION, Unit 2; Docket No. 50-462-OL
OPERATING LICENSE; July 11, 1985; MEMORANDUM AND ORDER; LBP-85-22, 22 NRC
89 (1985)
- COMANCHE PEAK STEAM ELECTRIC STATION, Units 1 and 2; Docket Nos. 50-445-OL&OL-2,
50-446-OL&OL-2 (ASLBP No. 79-430-06-OL)
OPERATING LICENSE; August 29, 1985; MEMORANDUM AND ORDER; LBP-85-32, 22
NRC 434 (1985)
OPERATING LICENSE; September 18, 1985; MEMORANDUM; LBP-85-37, 22 NRC 601
(1985)
OPERATING LICENSE; November 25, 1985; MEMORANDUM AND ORDER; LBP-85-47, 22
NRC 835 (1985)
- COMANCHE PEAK STEAM ELECTRIC STATION, Units 1 and 2; Docket Nos. 50-445-OL&OL-2,
50-446-OL&OL-2 (ASLBP No. 79-430-06-OL)
OPERATING LICENSE; October 2, 1985; MEMORANDUM AND ORDER; LBP-85-39, 22
NRC 105 (1985)
OPERATING LICENSE; October 31, 1985; MEMORANDUM AND ORDER; LBP-85-41, 22
NRC 765 (1985)
- DIABLO CANYON NUCLEAR POWER PLANT, Units 1 and 2; Docket Nos. 50-275-OL, 50-323-OL
OPERATING LICENSE; August 1, 1985; MEMORANDUM AND ORDER; CLI-85-14, 22
NRC 177 (1985)
- ENRICO FERMI ATOMIC POWER PLANT, Unit 2; Docket No. 50-341
REQUEST FOR ACTION; August 12, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R.
§ 2.206; DD-85-13, 22 NRC 454 (1985)
- GE MORRIS OPERATION SPENT FUEL STORAGE FACILITY; Docket Nos. 70-1308, 72-1-SP
SPECIAL PROCEEDING; November 4, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R.
§ 2.206; DD-85-16, 22 NRC 851 (1985)
- HADDAM NECK PLANT; Docket No. 50-213
REQUEST FOR ACTION; December 23, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R.
§ 2.206; DD-85-20, 22 NRC 971 (1985)
- KEWAUNEE NUCLEAR POWER PLANT; Docket No. 50-305
REQUEST FOR ACTION; December 23, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R.
§ 2.206; DD-85-20, 22 NRC 971 (1985)

FACILITY INDEX

- KRESS CREEK DECONTAMINATION; Docket No. 40-2061-SC (ASLBP No. 84-502-01-SC)
SHOW CAUSE; September 26, 1985; MEMORANDUM AND ORDER; LBP-85-38, 22 NRC 604 (1985)
SHOW CAUSE; November 29, 1985; MEMORANDUM AND ORDER; LBP-85-48, 22 NRC 843 (1985)
- LIMERICK GENERATING STATION, Units 1 and 2; Docket Nos. 50-352, 50-353
IMMEDIATE ACTION REQUEST; July 29, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; DD-85-11, 22 NRC 149 (1985)
OPERATING LICENSE; July 22, 1985; FOURTH PARTIAL INITIAL DECISION; LBP-85-25, 22 NRC 101 (1985)
OPERATING LICENSE; July 24, 1985; MEMORANDUM; CLI-85-13, 22 NRC 1 (1985)
OPERATING LICENSE; August 8, 1985; MEMORANDUM AND ORDER; CLI-85-15, 22 NRC 184 (1985)
OPERATING LICENSE; August 13, 1985; MEMORANDUM AND ORDER; ALAB-814, 22 NRC 191 (1985)
OPERATING LICENSE; September 19, 1985; ORDER; CLI-85-16, 22 NRC 459 (1985)
OPERATING LICENSE; October 22, 1985; DECISION; ALAB-819, 22 NRC 681 (1985)
OPERATING LICENSE; November 19, 1985; MEMORANDUM AND ORDER; ALAB-823, 22 NRC 773 (1985)
REQUEST FOR ACTION; November 12, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; DD-85-18, 22 NRC 870 (1985)
- MAINE YANKEE ATOMIC POWER STATION; Docket No. 50-309
REQUEST FOR ACTION; November 12, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; DD-85-17, 22 NRC 857 (1985)
- NORTH ANNA POWER STATION, Units 1 and 2; Docket Nos. 50-338-OLA-1, 50-339-OLA-1
OPERATING LICENSE AMENDMENT; September 3, 1985; INITIAL DECISION; LBP-85-34, 22 NRC 481 (1985)
OPERATING LICENSE AMENDMENT; November 1, 1985; MEMORANDUM AND ORDER; ALAB-822, 22 NRC 771 (1985)
- PALO VERDE NUCLEAR GENERATING STATION, Unit 1; Docket No. 50-528
REQUEST FOR ACTION; August 9, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; DD-85-12, 22 NRC 449 (1985)
- PALO VERDE NUCLEAR GENERATING STATION, Unit 1; Docket No. STN 50-528 (Application in Respect of a Sale and Leaseback Financing Transaction by Public Service Company of New Mexico)
OPERATING LICENSE AMENDMENT; December 12, 1985; ORDER; CLI-85-17, 22 NRC 875 (1985)
- PALO VERDE NUCLEAR GENERATING STATION, Units 1 and 2; Docket Nos. 50-528, 50-529
REQUEST FOR ACTION; September 16, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; DD-85-15, 22 NRC 643 (1985)
- PALO VERDE NUCLEAR GENERATING STATION, Units 2 and 3; Docket Nos. STN 50-529-OL, STN 50-530-OL (ASLBP No. 80-447-01-OL)
OPERATING LICENSE; July 22, 1985; ORDER DISMISSING PROCEEDING; LBP-85-26, 22 NRC 118 (1985)
- PERRY NUCLEAR POWER PLANT, Units 1 and 2; Docket Nos. 50-440, 50-441
OPERATING LICENSE; August 30, 1985; MEMORANDUM AND ORDER; LBP-85-33, 22 NRC 442 (1985)
OPERATING LICENSE; September 3, 1985; CONCLUDING PARTIAL INITIAL DECISION ON EMERGENCY PLANNING, HYDROGEN CONTROL AND DIESEL GENERATORS; LBP-85-35, 22 NRC 514 (1985)
OPERATING LICENSE; October 24, 1985; MEMORANDUM AND ORDER; ALAB-820, 22 NRC 743 (1985)
REQUEST FOR ACTION; September 13, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; DD-85-14, 22 NRC 635 (1985)
- PILGRIM NUCLEAR POWER STATION; Docket No. 50-293-OLA
OPERATING LICENSE AMENDMENT; July 19, 1985; MEMORANDUM AND ORDER; LBP-85-24, 22 NRC 97 (1985)

FACILITY INDEX

- OPERATING LICENSE AMENDMENT; September 5, 1985; DECISION; ALAB-816, 22 NRC 461 (1985)
- SAN ONOFRE NUCLEAR GENERATING STATION, Unit 1; Docket No. 50-206
REQUEST FOR ACTION; December 23, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; DD-85-20, 22 NRC 971 (1985)
- SHEARON HARRIS NUCLEAR POWER PLANT; Docket No. 50-400-OL (ASLBP No. 82-472-03-OL)
OPERATING LICENSE; August 14, 1985; REASONS SUPPORTING SUMMARY DISPOSITION OF EMERGENCY PLANNING CONTENTIONS; LBP-85-27A, 22 NRC 207 (1985)
OPERATING LICENSE; August 20, 1985; PARTIAL INITIAL DECISION ON SAFETY CONTENTIONS; LBP-85-28, 22 NRC 232 (1985)
OPERATING LICENSE; December 11, 1985; PARTIAL INITIAL DECISION ON EMERGENCY PLANNING AND SAFETY CONTENTIONS; LBP-85-49, 22 NRC 899 (1985)
- SHOREHAM NUCLEAR POWER STATION, Unit 1; Docket No. 50-322-OL
OPERATING LICENSE; November 21, 1985; DECISION; ALAB-824, 22 NRC 776 (1985)
- SHOREHAM NUCLEAR POWER STATION, Unit 1; Docket No. 50-322-OL-3 (Emergency Planning)
OPERATING LICENSE; August 26, 1985; CONCLUDING PARTIAL INITIAL DECISION ON EMERGENCY PLANNING; LBP-85-31, 22 NRC 410 (1985)
OPERATING LICENSE; October 18, 1985; DECISION; ALAB-818, 22 NRC 651 (1985)
- SOUTH TEXAS PROJECT, Units 1 and 2; Docket Nos. STN 50-498-OL, STN 50-499-OL (ASLBP No. 79-421-07-OL)
OPERATING LICENSE; November 5, 1985; MEMORANDUM AND ORDER; LBP-85-42, 22 NRC 795 (1985)
OPERATING LICENSE; November 14, 1985; MEMORANDUM AND ORDER; LBP-85-45, 22 NRC 819 (1985)
- THREE MILE ISLAND NUCLEAR STATION, Unit 1; Docket No. 50-289
REQUEST FOR ACTION; December 23, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; DD-85-20, 22 NRC 971 (1985)
SPECIAL PROCEEDING; August 19, 1985; PARTIAL INITIAL DECISION ON THE REMANDED ISSUE OF THE DIECKAMP MAILGRAM; LBP-85-30, 22 NRC 332 (1985)
SPECIAL PROCEEDING; August 29, 1985; MEMORANDUM AND ORDER; ALAB-815, 22 NRC 198 (1985)
SPECIAL PROCEEDING; October 25, 1985; MEMORANDUM AND ORDER; ALAB-821, 22 NRC 750 (1985)
SPECIAL PROCEEDING; December 18, 1985; DECISION; ALAB-826, 22 NRC 893 (1985)
- THREE MILE ISLAND NUCLEAR STATION, Unit 1; Docket Nos. 50-289-RA, 50-289-EW
SPECIAL PROCEEDING; December 19, 1985; ORDER; CLI-85-19, 22 NRC 886 (1985)
- THREE MILE ISLAND NUCLEAR STATION, Unit 2; Docket No. 50-320-OLA (ASLBP No. 80-442-04-LA)
OPERATING LICENSE AMENDMENT; November 8, 1985; ORDER; LBP-85-44, 22 NRC 816 (1985)
- TRAINING AND RESEARCH REACTOR; Docket No. 50-223-SP (ASLBP No. 85-509-02-SP)
SPECIAL PROCEEDING; July 19, 1985; MEMORANDUM AND ORDER; LBP-85-23, 22 NRC 95 (1985)
- TURKEY POINT NUCLEAR GENERATING PLANT, Units 3 and 4; Docket Nos. 50-250-OLA-1, 50-251-OLA-1 (ASLBP No. 84-496-03-LA) (Vessel Flux Reduction)
OPERATING LICENSE AMENDMENT; August 16, 1985; ORDER; LBP-85-29, 22 NRC 300 (1985)
- TURKEY POINT NUCLEAR GENERATING PLANT, Units 3 and 4; Docket Nos. 50-250-OLA-2, 50-251-OLA-2 (ASLBP No. 84-504-07-LA) (Spent Fuel Pool Expansion)
OPERATING LICENSE AMENDMENT; September 16, 1985; MEMORANDUM AND ORDER; LBP-85-36, 22 NRC 590 (1985)
- WATERFORD STEAM ELECTRIC STATION, Unit 3; Docket No. 50-382-OL
OPERATING LICENSE; July 11, 1985; DECISION; ALAB-812, 22 NRC 5 (1985)

FACILITY INDEX

WEST CHICAGO RARE EARTHS FACILITY; Docket No. 40-2061-ML (ASLBP No. 83-495-01-ML)
MATERIALS LICENSE; September 26, 1985; MEMORANDUM AND ORDER; LBP-85-38, 22
NRC 604 (1985)
MATERIALS LICENSE; November 14, 1985; MEMORANDUM AND ORDER; LBP-85-46, 22
NRC 830 (1985)
ZION STATION, Unit 1; Docket No. 50-295
IMMEDIATE ACTION REQUEST; July 3, 1985; DIRECTOR'S DECISION UNDER 10 C.F.R.
§ 2.206; DD-85-10, 22 NRC 143 (1985)

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