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NUCLEAR REGULATORY COMMISSION ISSUANCES

July 1999

U.S. NUCLEAR REGULATORY COMMISSION

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NUCLEAR REGULATORY COMMISSION ISSUANCES

July 1999

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

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

U.S. NUCLEAR REGULATORY COMMISSION

Prepared by the
Office of the Chief Information Officer
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(301-415-6844)

COMMISSIONERS

Greta J. Dicus, Chairman*
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

G. Paul Bollwerk III, Chief Administrative Judge
Atomic Safety & Licensing Board Panel

*Ms. Dicus began serving as Chairman on July 1, 1999.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Greta Joy Dicus, Chairman
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of **Docket Nos. 40-8681-MLA-5**
40-8681-MLA-6

INTERNATIONAL URANIUM (USA) CORPORATION
(Request for Materials License Amendment)

July 7, 1999

In the interest of minimizing repetitious decisions by the Commission and pleadings by the parties, and repetitious lawsuits in the court of appeals, the Commission places in abeyance Envirocare's appeal of its dismissal from two separate Subpart L proceedings. Envirocare's dismissal from these proceedings was based upon its lack of standing as a mere "competitor" of a licensee. The Commission has already affirmed Envirocare's dismissal on the same ground from two earlier proceedings. The Commission now holds Envirocare's latest appeals in abeyance, pending resolution of federal court litigation on Envirocare's standing.

ORDER

Envirocare of Utah, Inc. ("Envirocare") has appealed its dismissal from two separate Subpart L proceedings, both involving license amendment requests made by the International Uranium (USA) Corporation ("IUSA"). *See* LBP-99-11, 49 NRC 153 (1999); LBP-99-20, 49 NRC 429 (1999). In both proceedings, the Presiding Officer found that Envirocare's asserted "competitor" injury does not fall within the zone of interests of the Atomic Energy Act or the National

Environmental Policy Act. Last year, on the same ground, the Commission affirmed the dismissal of Envirocare from two other license amendment proceedings. *See Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1 (1998); *International Uranium (USA) Corp.* (Receipt of Material from Tonawanda, New York), CLI-98-23, 48 NRC 259 (1998). Envirocare has sought judicial review of the Commission's decisions in *Quivira* and *IUSA*. *See Envirocare v. NRC*, Nos. 98-1426 & 98-1592 (D.C. Cir., consolidated Jan. 12, 1999).

Envirocare's latest appeals acknowledge the Commission's stance on competitor standing. Envirocare seeks only to preserve the opportunity to participate in the IUSA license amendment requests in the event that Envirocare wins its federal court appeal. However, because the competitor standing issues are the same here as in *Quivira* and *IUSA*, the Commission believes that in the interest of minimizing repetitious decisions by the Commission and pleadings by Envirocare, IUSA, and the NRC Staff, and repetitious lawsuits in the court of appeals, the best course is to hold Envirocare's current appeals in abeyance, pending the outcome of Envirocare's petition for judicial review in the D.C. Circuit. Similarly, we would expect that the Presiding Officer will hold in abeyance future hearing requests of Envirocare, if any, that rest solely on Envirocare's interest as an industry competitor.

Accordingly, Envirocare's appeals of LBP-99-11 and LBP-99-20 are hereby held in abeyance pending resolution of the federal court litigation on Envirocare's standing.

IT IS SO ORDERED.

For the Commission[1]

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of July 1999.

[1] Commissioner Diaz was not available for the affirmation of this Order. If he had been present, he would have approved the Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Greta Joy Dicus, Chairman
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of **Docket No. 40-8968-ML**

HYDRO RESOURCES, INC.
(2929 Coors Road, Suite 101,
Albuquerque, NM 87120) **July 23, 1999**

This proceeding concerns a materials license that authorizes Hydro Resources, Inc. (''HRI''), to conduct an *in situ* leach uranium mining and milling operation in Church Rock and Crownpoint, New Mexico, pursuant to 10 C.F.R. Part 40. In this Decision, the Commission considers petitions for review of four partial initial decisions issued by the Presiding Officer in this proceeding: LBP-99-1 (Waste Disposal Issues), 49 NRC 29 (1999); LBP-99-9 (Historic Preservation), 49 NRC 136 (1999); LBP-99-10 (Performance-Based Licensing), 49 NRC 145 (1999); and LBP-99-13 (Financial Assurance), 49 NRC 233 (1999). The Commission partially affirms LBP-99-1, LBP-99-9, and LBP-99-10. The Commission requests that the parties submit briefs on LBP-99-13.

NATIONAL HISTORIC PRESERVATION ACT: REQUIREMENTS

The National Historic Preservation Act contains no prohibition against taking a ''phased review'' of a property.

NATIONAL ENVIRONMENTAL POLICY ACT: REQUIREMENTS

A Supplemental Environmental Impact Statement is not necessary every time new information comes to light after the EIS is finalized. As a general matter,

the agency must consider whether the new information is significant enough to require preparation of a supplement. The new information must present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.

NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT: REQUIREMENTS

Under the Native American Graves Protection and Repatriation Act (NAGPRA), consultation and concurrence of the affected tribe take place prior to the intentional removal from or excavation of Native American cultural items from federal or tribal lands. Where no intentional removal or excavation of cultural items is planned, the applicable regulatory provision is 43 C.F.R. § 10.4, which applies to inadvertent discoveries of human remains, funerary objects, sacred objects, or objects of cultural patrimony. The regulations generally do not require prior consultation or concurrence with the affected tribe for unintentional activities.

MATERIALS LICENSE UNDER PART 40: PERFORMANCE-BASED LICENSING

The use of performance-based licensing concepts in a Part 40 license does not reverse any long-established Commission policy on the use of such regulatory mechanisms. Indeed, it is consistent with the Commission's approach to reactor licensing in 10 C.F.R. § 50.59. It does not run counter to any agency mandate contained in the Atomic Energy Act or any established Commission regulation. If anything, the use of such license conditions is entirely consistent with the Commission's efforts over the years to allow reasonable flexibility in its regulatory framework. It is simply an additional means through which the NRC can decrease the administrative burden of regulation while ensuring the continued protection of public health and safety.

MEMORANDUM AND ORDER

INTRODUCTION

This Decision stems from petitions for review of four partial initial decisions by the Presiding Officer in this Subpart L proceeding. Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM"), Southwest Research and Information Center ("SRIC"), Marilyn Morris, and Grace Sam have jointly petitioned the Commission for review of the Presiding Officer's decision on waste

disposal issues in LBP-99-1, 49 NRC 29 (1999). ENDAUM and SRIC have petitioned for review of LBP-99-9 (Historic Preservation), 49 NRC 136 (1999); LBP-99-10 (Performance-Based Licensing), 49 NRC 145 (1999); and LBP-99-13 (Financial Assurance), 49 NRC 233 (1999). Finally, Intervenors Sam and Morris have also petitioned the Commission for review of LBP-99-10. The NRC Staff and Hydro Resources, Inc. (HRI) oppose Commission review of these decisions.[1]

The Commission has considered the petitions for review, and their attendant responses and replies, as well as the record developed before the Presiding Officer. For the reasons given by the Presiding Officer, and for the reasons given below, the Commission partially affirms LBP-99-1, LBP-99-9, and LBP-99-10.[2] The Commission requests that the parties submit briefs on LBP-99-13 in accordance with Commission direction provided in this Decision.

BACKGROUND

This proceeding concerns a materials license that authorizes Hydro Resources, Inc. ("HRI"), to conduct an *in situ* leach uranium mining and milling operation in Church Rock and Crownpoint, New Mexico, pursuant to 10 C.F.R. Part 40. The license (SUA-1508), which was issued by the NRC Staff on January 5, 1998, authorizes HRI to construct and operate ISL uranium mining facilities for a 5-year period on the Church Rock, Unit 1, and Crownpoint sites. HRI's planned ISL uranium recovery process involves two primary operations. The first occurs in the well fields where a mining solution containing a mixture of groundwater, oxygen, and bicarbonate known as lixiviant is injected through wells into an ore zone. The mining solution, in turn, oxidizes and dissolves uranium in the ground. The solution is then withdrawn via production wells. During the second operation, the pregnant lixiviant (i.e., the uranium-bearing mining solution) is processed to

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[1] In addition to their petitions for Commission review of the Presiding Officer's decisions, Intervenors have filed four petitions in the United States Court of Appeals for the District of Columbia seeking judicial review of the same decisions. Twice in recent months we faced similar situations and went on to decide pending appeals on the ground that "simultaneous appeals to the Commission and to the court of appeals are impermissible." *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 186 n.1 (1999). *Accord, Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 336 n.1 (1998). In both cases, the court of appeals agreed with our view and issued orders dismissing, as premature, petitions for judicial review filed in advance of not-yet-issued Commission appellate decisions. *See Dienethal v. NRC*, No. 99-1001 (D.C. Cir., Mar. 31, 1999); *National Whistleblower Center v. NRC*, No. 98-1581 (D.C. Cir. Mar. 31, 1999).

[2] *See* 10 C.F.R. § 2.1253. As discussed in more detail in "Bifurcation Issues" in the "Discussion" section, *infra*, the Commission will address in a later decision the "bifurcation" concerns raised by Intervenors. Thus, our action to uphold the Presiding Officer's decisions here does not extend to those portions of the partial initial decisions that relate to bifurcation. In addition, as explained in note 28, the Commission denies review of one particular issue involving waste disposal.

extract the mined uranium.[3] To date, HRI has not begun licensed activities at the sites.

The Intervenors have raised a number of legal and factual challenges to HRI's license, many of which the Presiding Officer found germane to this proceeding and litigable under Subpart L. *See* LBP-98-9, 47 NRC 261 (1998). In this opinion, the Commission reviews the first four partial initial decisions the Presiding Officer has issued (LBP-99-1, LBP-99-9, LBP-99-10, and LBP-99-13), resolving questions of waste disposal, historic preservation, performance-based licensing, and financial assurance. The Presiding Officer expects to issue additional partial initial decisions by July 23.

DISCUSSION

For the most part, this Commission opinion does not revisit Presiding Officer determinations with which we agree or have no reason to second guess. Because the Presiding Officer has reviewed the extensive record in detail, with the assistance of a technical advisor, the Commission is generally disinclined to upset his findings and conclusions, particularly on matters involving fact-specific issues or where the affidavits or submissions of experts must be weighed.[4] Unless otherwise stated herein, the Commission agrees with the results reached by the Presiding Officer. However, since the petitions for review raise a number of issues that call for further review and elaboration, the Commission has considered several matters in some detail.

In considering this first round of Presiding Officer decisions, the Commission has decided not to request plenary appellate briefs from the parties, except on one issue, financial assurance, where we find the current record and briefs inadequate to complete our review. Given the petitions for review, the responses and replies, and the voluminous pleadings and submissions filed with the Presiding Officer, the Commission does not believe additional briefs are necessary or would enhance its ability to decide these issues. The Presiding Officer is in the process of issuing decisions on the remaining issues in the proceeding. In accordance with its May 3, 1999 Order in this proceeding, the Commission will consider petitions for review of these remaining decisions after all of them have been issued by the Presiding Officer.

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[3] *See* "Final Environmental Impact Statement: To Construct and Operate the Crownpoint Uranium Solution Mining Project," NUREG-1508 (February 1997) (FEIS), at 2-2.

[4] *See, e.g., Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 93 (1998).

Bifurcation Issues

In the fall of 1998 the Presiding Officer issued orders[5] "bifurcating" the proceeding and limiting the current phase to questions concerning the only parcel of property (the so-called "Church Rock Section 8" property) where HRI has indicated that mining activity may begin soon. In issuing these orders, the Presiding Officer reserved until later the consideration of issues pertinent solely to the remaining three properties (i.e., Church Rock Section 17, Unit 1, and Crownpoint sites). Subsequently, the Commission denied Intervenors' petition for interlocutory review of the Presiding Officer's bifurcation decision.[6]

In a footnote to their petition for review of the partial initial decision on Historic Preservation (LBP-99-9), Intervenors ENDAUM and SRIC have raised the bifurcation question anew and claim that the Presiding Officer's action has resulted in impermissible segmentation under the National Environmental Policy Act (NEPA).[7] In their petition on the Financial Assurance partial initial decision (LBP-99-13), Intervenors again have attacked the Presiding Officer's bifurcation decision and argued that the financial assurance requirements must be met for the entire project at the time of licensing. To ensure a unified review of all bifurcation issues raised by the Intervenors, the Commission will address these matters, and any bifurcation issues raised on appeals from subsequent final initial decisions, later, after the Presiding Officer completes his current series of decisions on the "Section 8" property.

LBP-99-1: Waste Disposal Issues

In situ leach (ISL) or "solution" mining produces two categories of waste: (1) gaseous emissions and airborne particulates resulting from drying of yellowcake and the injection of groundwater with "lixiviant," a mixture of water, dissolved oxygen, and bicarbonate ions; and (2) liquid waste associated with operations including well-field processing and aquifer restoration.[8] A variety of methods exist to address liquid waste disposal and storage at ISL facilities, including the use of evaporation ponds, deep-well injection, land application, and surface discharge under a National Pollutant Discharge Elimination System (NPDES) permit. In the present case, the license limits HRI to the use of lined evaporation ponds for the storage of liquid waste. Once water in the ponds is lost to the atmosphere through surface evaporation, the Licensee must send the resulting sludge to a

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[5] Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation) (September 22, 1999); Memorandum and Order (Reconsideration of the Schedule for the Proceeding) (October 13, 1999).

[6] CLI-98-22, 48 NRC 215 (1998).

[7] Intervenors' Petition for Review of Presiding Officer's Partial Initial Decision LBP-99-9, at 7 n.11 (March 11, 1999).

[8] FEIS at 2-5, 6, 14, and 16.

licensed disposal facility. Currently, the license does not authorize HRI to dispose of material on site. If HRI seeks to employ one or more onsite disposal techniques in the future, it will have to receive approval from NRC and, depending on the method used, other appropriate regulatory bodies.[9]

Intervenors ENDAUM, SRIC, Grace Sam, and Marilyn Morris raised a variety of waste disposal issues before the Presiding Officer and now have raised many of the same matters before the Commission in their petition for review. Their principal concern is that the NRC Staff and the Presiding Officer failed to apply the appropriate regulatory requirements to HRI's application. Specifically, they believe that the Presiding Officer erroneously refused to apply 10 C.F.R. § 40.31(h) and Part 40, Appendix A, in their entirety to ISL mining. According to the Intervenors, this reading of NRC rules frees HRI from complying with a large number of relevant requirements.

The Presiding Officer emphasized that Appendix A was specifically promulgated to address the problems related to mill tailings from conventional milling activities and not those stemming from solution (ISL) mining. Nevertheless, while he found that the criteria in Appendix A do not apply wholesale to the HRI license, he agreed with the NRC Staff that "[s]pecific criteria within Appendix A are applicable to this license only when they explicitly apply to ISL mining."[10] We agree with the Presiding Officer's general conclusion that section 40.31(h) and Part 40, Appendix A, "were designed to address the problems related to mill tailings and not problems related to injection mining."[11] In passing the Uranium Mill Tailings Radiation Control Act (UMTRCA), Congress sought to address the potential harm arising from unregulated uranium tailings piles left at milling sites.[12] Likewise, when the NRC promulgated regulations to implement UMTRCA, it did so with the primary focus of ensuring the control of tailings at sites involving conventional mining and milling.[13] While, as a general matter, Part 40 applies to ISL mining,[14] some of the specific requirements in Part 40, such as many of those found in Appendix A, address hazards posed only by conventional uranium milling operations, and do not carry over to ISL mining. In amending the requirements in Part 40

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[9] *See* SUA-1508, License Condition 11.8. "Prior to land application of waste water, the licensee shall submit and receive from NRC acceptance of a plan outlining how the licensee will monitor constituent buildup in soils resulting from the land application."

[10] LBP-99-1, 49 NRC at 33.

[11] *Id.*

[12] *See* 42 U.S.C. § 7901(a).

[13] *See, e.g.*, 44 Fed. Reg. 50,015 (Aug. 24, 1979); *Uranium Mill Licensing Requirements* (10 CFR Parts 30, 40, 70 & 130), CLI-81-9, 13 NRC 460, 462 (1981); and NUREG-0706, Final Generic Environmental Impact Statement on Uranium Milling (GEIS), dated September 1980.

[14] *See* 10 C.F.R. § 40.4 (definitions of "byproduct material" and "uranium milling").

over the years, NRC has refrained from addressing issues specific to ISL mining and, instead, has generally addressed tailings from conventional operations.[15]

In issuing the HRI license, the Staff appropriately did not insist that HRI meet Part 40 requirements across the board. We agree that those requirements in Part 40, such as many of the provisions in Appendix A, that, by their own terms, apply only to conventional uranium milling activities, cannot sensibly govern ISL mining. At the same time, there are a number of general safety provisions in Part 40, Appendix A, such as Criteria 2, 5A, and 9,[16] that are relevant to ISL mining and, as such, have been appropriately reflected in the license.[17] The current version of Part 40 specifically addresses ISL mining only to a limited extent. In a recent rulemaking proposal (SECY-99-011),[18] the Staff provided some background information on its current approach to ISL mining:

> The current Part 40 regulatory framework for uranium and thorium recovery is difficult to administer. The staff's most significant concern with the current requirements is that they primarily address the regulation of conventional uranium mills, the prevailing method when Part 40 was originally promulgated, not ISL facilities. However, ISL facilities have become the source of most of the uranium production in the United States, which is expected to continue into the foreseeable future. Regulating the ISL facilities in the absence of specific regulatory requirements for ISL recovery activities has become increasingly problematic and more complicated for the staff, which has relied heavily on guidance documents and license conditions in this area, as the recovering uranium production industry seeks to expand ISL facility production and submits new applications for additional facilities.

Until the Commission develops regulatory requirements specifically dedicated to the particular issues raised by ISL mining, we will have no choice but to follow the case-by-case approach taken by our Staff in issuing HRI's license. As the Presiding Officer concluded, the "principal regulatory standards governing this application for a license are 10 C.F.R. § 40.32(c) and (d), which mandate protection of the public health and safety."[19] For the purposes of waste disposal issues, we agree with the Presiding Officer that the license in this case ensures compliance with these general requirements. While Intervenors disagree with the choices made by

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[15] *See e.g.*, 50 Fed. Reg. 41,852 (Oct. 16, 1985), 52 Fed. Reg. 43,553 (Nov. 13, 1987), 55 Fed. Reg. 45,591 (Oct. 30, 1990), and 59 Fed. Reg. 28,220 (June 1, 1994).

[16] Criterion 2 indicates that, in most cases, waste from *in situ* extraction operations should be disposed of at existing large mill tailings disposal sites. Criterion 5A applies to the construction of surface impoundments. Criterion 9 applies to financial surety arrangements.

[17] *See, e.g.*, License Conditions 10.26 (referring to Criterion 5A) and 9.5 (referring to Criterion 9).

[18] On June 17, 1999, the Commission held a public meeting on SECY-99-011 (and on two other NRC Staff papers), at which numerous "stakeholders," including counsel for SRIC and ENDAUM, spoke. After the meeting, the Secretary of the Commission offered all parties to this and other pending proceedings related to uranium recovery an opportunity to submit comments on the meeting discussions to the Commission by July 23. The Commission understands that any comments it receives will discuss generic uranium recovery issues only, not case-specific issues.

[19] LBP-99-1, 49 NRC at 32.

the Staff (and approved by the Presiding Officer), we believe that the requirements imposed on HRI's operations are reasonable and appropriate.

Intervenors' petition for review raises a variety of additional arguments related to waste. None is persuasive. They claim, for example, that HRI has not obtained the necessary approvals under 10 C.F.R. § 20.2002[20] for the disposal of waste through land application. In rejecting this claim, the Presiding Officer relied on a statement in the Safety Evaluation Report (SER) that says " '[c]urrently, HRI would be limited to using either surface discharge (with appropriate State or Federal permits/licenses), brine concentration, waste retention ponds, or a combination of these three options to dispose of [restoration] wastewater.' "[21] The Presiding Officer concluded that HRI need not satisfy section 20.2002 at this time because it has not submitted an application to the Commission for deep-well injection, surface water discharge, or land application. In its reply to Intervenors' petition for review, the Staff clarifies that License Condition (LC) 11.8 specifically requires HRI to submit "and receive NRC acceptance of" a plan prior to land application of wastewater.[22] In addition, License Condition 9.6 specifically requires HRI to dispose of 11e(2) byproduct material from the project at a waste disposal site licensed by the NRC or an Agreement State to receive such material. Accordingly, HRI is not required to submit a section 20.2002 request at this time because the license does not authorize disposal of material at the site. HRI must receive prior NRC approval before it can conduct waste disposal through land application.

Intervenors also renew their claim that the HRI project's FEIS fails to provide a full discussion of the impacts of evaporation ponds and, instead, only covers the impacts from retention ponds. Intervenors apparently believe that these are different types of structures. The Staff, however, has explained that the terms "retention pond" and "evaporation pond" are used interchangeably in the FEIS. We find the Staff's explanation is supported by the FEIS, which specifically indicates that a purpose of "retention ponds" is to promote loss of water through "evaporation."[23]

Intervenors also take issue with the characterization of the "bleed rate" in the technical documents supporting the license. The "production bleed" refers to the amount of water that is withdrawn from production wells in excess of that which is injected into the ground. This practice creates negative pressure which causes uranium-rich lixiviant to flow toward the production wells and prevents lixiviant

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[20] Section 20.2002 requires licensees to "apply to the Commission for approval of proposed procedures, not otherwise authorized in the regulations in this chapter, to dispose of licensed material generated in the licensee's activities."

[21] LBP-99-1, 49 NRC at 35 (citing SER at 26).

[22] *See* NRC Staff's Response to Petition for Review of LBP 99-1 (Staff's Response to Waste Petition) at 7-8 (March 5, 1999).

[23] *See* FEIS at 2-12. "The purpose of retention ponds is to store wastewater until treatment, promote evaporative loss of water that cannot be discharged to the environment, and maintain control of source and 11e(2) by-product material found in the liquid effluents from solution mining."

in the ground from migrating outward.[24] The bleed rate is a percentage of the total amount of the production from the mine zone. Intervenors believe that the FEIS provides inconsistent descriptions of the bleed rate, ranging from 40 gallons per minute (gpm) to 1 gpm. We disagree. The planned bleed rate for HRI's project is 1%. The maximum flow rate allowed in the license is 4000 gpm. As such, the maximum bleed rate that can be expected is 40 gpm.[25] After extraction, the Licensee concentrates the waste from the production bleed. Depending on the treatment technique used, the final waste stream resulting from a 40-gpm bleed rate could be either 1 gpm or 10 gpm. The clean water from this treatment (i.e., the portion of the production bleed that is not waste) will be reinjected elsewhere.[26] These various figures account for the different waste-stream rates identified by the Intervenors. We are unconvinced by Intervenors' arguments regarding the absence of data for manganese, molybdenum, and selenium in the water quality data. As both HRI and the Staff have pointed out,[27] these elements have been measured and are either present only in insignificant amounts or absent altogether.[28]

Intervenors also argue that the Presiding Officer ignored their claims that HRI has violated 10 C.F.R. Part 40, Appendix A, by failing to accommodate foreseeable operations expansions. The language in Appendix A cited by Intervenors refers to "the amenability of the disposal system" to accommodate future expansion.[29] As stated above, HRI is not currently authorized to dispose of waste at the site. Any disposal or subsequent expansion of disposal capacity would require HRI to obtain approval from the NRC.[30] The NRC would consider any consequences arising from such approvals at that time and, thus, detailed examination of the impact from these speculative actions is not necessary or warranted here.[31]

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[24] *See* FEIS at 2-6 and 2-7.

[25] *See* FEIS § 4.3.1, at 4-26.

[26] *See* NRC Staff's Response to Intervenor Presentations on Liquid Waste Disposal Issues at 30, December 16, 1998. "[C]lean water from reverse osmosis or brine concentration will be reinjected into the Westwater Canyon Formation where individual constituent concentrations are less than those found in the native ground water, and that aquifer recharge will be performed pursuant to 40 C.F.R. §§ 144-148 of EPA's regulations." *Id.*

[27] *See* HRI's Response to Intervenors' November 9, 1998 Briefs in Opposition to Application for a Materials License with Respect to Liquid Waste Disposal Issues at 51 (December 9, 1998); NRC Staff's Response to Intervenor Presentations on Liquid Waste Disposal Issues at 35 (December 16, 1998).

[28] Intervenors have also raised concerns regarding the Presiding Officer's treatment of "two restoration flow descriptions" in the FEIS. However, the concern, which includes a claim that the Presiding Officer adopted a Staff position regarding restoration flow information, is too vague to justify merits review under the Commission's standards. *See* 10 C.F.R. § 2.786(b). In addition, it does not contain a reference to the Presiding Officer's decision. Therefore, we do not take review of this particular matter.

[29] *See* 10 C.F.R. Part 40, Appendix A (Introduction).

[30] *See* License Condition 11.8, SER at 7.0, and FEIS at 2.1.2.

[31] These potential future authorizations also fall outside of the scope of this limited proceeding. Intervenors' Petition for Review of Presiding Officer's Partial Initial Decision (Waste Petition) at 26 (December 16, 1998). Similarly, Intervenors' concerns about land application data do not appear germane to this proceeding, given that the HRI license at issue here does not authorize such activities.

Intervenors believe that the FEIS fails to include an adequate discussion of retention ponds.[32] However, impacts to soils from evaporation pond construction are described on pages 4-6 through 4-14 of the FEIS, along with estimates of disturbed acreage of various alternatives.[33] *See* Staff's Response to Waste Petition at 31. Intervenors also claim that the Presiding Officer neglected their concern regarding the adequacy of pond liners. The Presiding Officer, however, specifically addressed this argument in 49 NRC at 36-37 of his decision.[34]

For the preceding reasons, the Commission declines to overturn the Presiding Officer's conclusions regarding waste disposal issues in LBP-99-1.

LBP-99-9: Historic Preservation

In their petition for review, Intervenors ENDAUM and SRIC assert that NRC has failed to comply with section 106 of the National Historic Preservation Act (NHPA) and applicable regulatory provisions such as 36 C.F.R. § 800.3(c). In particular, they argue that the Staff has inappropriately "phased" its historic preservation compliance process. Intervenors acknowledge that the regulations allow for phased NHPA compliance but argue that the Staff has not completed the necessary section 106 review for any part of the project. In addition, they claim that the Staff has failed to make a reasonable and good-faith effort to identify historic properties and has not applied the appropriate criteria to determine any adverse effect on identified properties.

The Presiding Officer considered the range of arguments and testimony regarding NHPA compliance and concluded that Intervenors had failed to demonstrate any violation of the Act.[35] We see no reason to revisit the Presiding Officer's conclusions in detail. Intervenors have offered no compelling argument against the type of phased compliance utilized by the Staff and have failed to identify any significant defect in the Staff's NHPA compliance. Both the Presiding Officer and the Commission have already addressed the issue of phased compliance in decisions issued at earlier stages in this proceeding.[36] While the previous adjudicatory decisions concerned a stay motion, we see no reason to depart from our

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[32] *See* Waste Petition at 9.

[33] Similarly, Intervenors incorrectly state that the FEIS fails to address the adequacy of pond liners. *See* FEIS at 4-25 to 4-26; *see also* HRI License Condition 10.5 (providing additional safeguards). In addition, contrary to Intervenors' assertion, the FEIS does discuss evaporation ponds in the land use section. *See* FEIS 3-53 to 3-55.

[34] Intervenors also argue that the "FEIS does not address the impacts of HRI's plan to use existing ponds." Waste Petition at 9. As HRI indicated before the Presiding Officer, however, HRI does not plan to use any of the existing ponds for operations related to Section 8. *See* HRI's Response to Intervenors' November 9, 1998 Briefs (Waste) at 48 (December 7, 1998).

[35] LBP-99-9, 49 NRC 136 (1999).

[36] *See* LBP-98-5, 47 NRC 119, 125 (1998); CLI-98-8, 47 NRC 314, 323-24 (1998).

fundamental conclusion that phased compliance is acceptable under applicable law.[37] In their petition, Intervenors offer a vague argument that the Presiding Officer has impermissibly shifted the "burden of proof" on this issue. However, in challenging the license, it is incumbent upon the Intervenors to identify, with some specificity, what the alleged deficiencies are. Based on his review of the arguments made by Intervenors and the responses from HRI and the Staff, the Presiding Officer reasonably found that Intervenors had failed to identify deficiencies with the Staff's compliance.[38]

Intervenors also present the Commission with a variety of alleged National Environmental Policy Act (NEPA) violations and factual errors on cultural and historical issues. In particular, they argue that the FEIS sets out a plan for identifying cultural resource impacts but does not contain a complete evaluation of the proposed action's impacts on cultural resources. The Presiding Officer found that the treatment of cultural resources in the FEIS was acceptable because both the FEIS and the license require that "if unidentified cultural resources or human remains are found during the project activities, the activity would cease, protective action and consultation would occur, and artifacts and human remains would be evaluated for their significance."[39] Intervenors claim that since the FEIS was completed before the Staff had finished its section 106 compliance for Section 8, the FEIS does not contain a description of the actual cultural resource impacts on Section 8 but instead simply lays out a plan to consider those impacts.[40] The Staff, in its response, essentially argues that any concern with the information published in the FEIS has been cured because the studies conducted for the 106 process were completed and released before NRC issued the license in January 1998.[41]

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[37] "[W]e are not convinced by Petitioners' argument that the NRC and HRI are prohibited from taking a 'phased review' approach to complying with the NHPA — the legal position that forms the foundation of Petitioners' NHPA arguments regarding severe, immediate, and irreparable injury. The statute itself contains no such prohibition, federal case law suggests none, and the supporting regulations are ambiguous on the matter, even when read in the light most favorable to Petitioners." 47 NRC at 323-24 (footnotes omitted).

[38] The Commission notes that both the New Mexico State Historic Preservation Department and the Navajo National Historic Preservation Department responded to NRC Staff consultation requests with letters concurring with the conclusion that there would be "no effect" on all cultural resources within the parcel. *See* LBP-99-9, 49 NRC at 142.

[39] LBP-99-9, 49 NRC at 143.

[40] *See* FEIS at 3-73 through 3-77.

[41] After publication of the FEIS in February 1997, the Staff received a report prepared by the Museum of New Mexico's Officer of Archaeological Studies (Blinman, "Cultural Resources Inventory of Proposed Uranium Solution Extraction and Monitoring Facilities at the Church Rock Site and Proposed Surface Irrigation Facilities North of the Crownpoint Site, McKinley County, New Mexico"). This report was entered into the hearing record. *See* Hearing Record ACN 9704140140 (April 4, 1997). On June 19, 1997, the Staff provided copies of the report for review and comment to (1) the New Mexico State Historic Preservation Officer; (2) the Navajo Nation Historic Preservation Department (NNHPD); (3) Roger Anyon, Director of the Pueblo of Zuni Heritage and Historic Preservation Officer; and (4) Leigh Jenkins, Director of the Hopi Cultural Preservation Office. NRC Staff's Response to Petition for Review of LBP-99-9 at 6 (March 22, 1999).

The Staff has completed its review of the cultural resource impacts that will result from the conduct of licensed activities on Section 8. The FEIS contains much of this information. However, some of the supporting documents were completed after the FEIS was published. Even if one assumes that the FEIS did not contain all the information considered by the Staff in its decision, the overall record for the licensing action includes a complete analysis of the cultural resources for Section 8. *Cf. Claiborne Enrichment Center,* 47 NRC at 94 (adding post-FEIS Board findings to "environmental record"). We find the Staff's approach here acceptable. A Supplemental Environmental Impact Statement is not necessary "every time new information comes to light after the EIS is finalized."[42] As a general matter, the agency must consider whether the new information is significant enough to require preparation of a supplement. The new information must present "a seriously different picture of the environmental impact of the proposed project from what was previously envisioned."[43] In this case, the public had access to the relevant information and the agency decision makers considered that information before a final decision on the matter was reached.[44] The new information did not present a "seriously different" view of the environmental impacts. We do not find any legal flaw with its later release and consideration and, therefore, decline to alter the Presiding Officer's decision.

Finally, Intervenors have raised a Native American Graves Protection and Repatriation Act (NAGPRA) issue that they believe was not adequately addressed by the Presiding Officer. In LBP-99-9, the Presiding Officer dismissed Intervenors' NAGPRA claims with regard to the Church Rock Section 8 property because the Act only applies to the disposition of Native American cultural items excavated or discovered on federal or tribal lands. According to the Presiding Officer, Section 8 does not consist of such lands. In its petition for review, Intervenors take issue with this finding, claiming that portions of sites in question are federal or tribal land. While we defer to the Presiding Officer's factual finding on this matter, we note that the Staff appears to have complied with NAGPRA whether or not federal or tribal land exists at the site. Under NAGPRA, consultation and concurrence of the affected tribe take place prior to the "*intentional* removal from or excavation of Native American cultural items from Federal or tribal lands." 25 U.S.C. § 3002(c) (emphasis added). However, HRI does not plan any the intentional removal or excavation of cultural items. The applicable regulatory provision in this instance is 43 C.F.R. § 10.4, which applies to inadvertent discoveries of "human remains, funerary objects, sacred objects, or objects of cultural patrimony."[45] The

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[42] *Marsh v. Oregon,* 490 U.S. 360, 373, 109 S. Ct. 1851, 1859 (1989).

[43] *Sierra Club v. Froehlke,* 816 F.2d 205, 210 (5th Cir. 1987); *see also South Trenton Residents Against 29 v. Federal Highway Administration,* No. 98-5226, 1999 WL 294717, at 4 (3rd Cir. May 5, 1999).

[44] *See, e.g., Friends of the River v. Federal Energy Regulatory Commission,* 720 F.2d 93, 106-07 (D.C. Cir. 1983).

[45] 43 C.F.R. § 10.4(b).

regulations generally do not require prior consultation or concurrence with the affected tribe for these kinds of "unintentional" activities.

LBP-99-10: Performance-Based Licensing

The Presiding Officer's decision in LBP-99-10 addresses a series of Intervenor concerns with the incorporation of "performance-based licensing" concepts into the HRI license, and upheld the Licensee's performance-based approach. The Commission received two separate petitions for review of this decision, one from ENDAUM and SRIC and the other from Grace Sam and Marilyn Morris. The primary concern raised by both sets of Intervenors is that the license permits HRI to make certain changes to its operations without prior approval by the NRC. In particular, License Condition 9.4 allows the Licensee to make changes to its facilities or processes, alter its standard operating procedures, and conduct tests or experiments, without NRC approval, so long as such actions do not conflict with the requirements of the license, do not cause degradation in the safety or environmental commitments made by HRI, and are consistent with NRC's findings in NUREG-1508, and the FEIS and SER for the project. If these conditions are not met, HRI must seek a license amendment. Determinations to make changes under License Condition 9.4 must be made by HRI's Safety and Environmental Review Panel (SERP) and reported to the NRC annually. The decisions of the panel must be submitted to NRC.

Intervenors claim that this license condition impermissibly delegates threshold safety determinations from the NRC to HRI and gives the Licensee unilateral discretion in these matters. According to Intervenors, neither the Atomic Energy Act, the Administrative Procedure Act, nor 10 C.F.R. Part 40 allows for such "performance-based licensing." Citing *Citizens Awareness Network v. NRC*,[46] Intervenors ENDAUM and SRIC also claim that the Staff's decision to apply performance-based licensing in the Part 40 context is impermissible because it was accomplished without issuance of any Commission regulations or policy.

In rejecting these arguments, the Presiding Officer found that the license condition in question "demonstrates that the license has been carefully thought through so that HRI might make low-risk changes in its mode of operation without advance approval but *may not alter its license* or make high-risk changes in its operations."[47] In addition, he disagreed with Intervenors' arguments regarding the authority of the NRC to apply performance-based licensing in the Part 40 context, finding that they had failed to identify any rule or statute prohibiting it. The Presiding Officer also pointed favorably to an analogous practice that has been followed for years in the reactor context under 10 C.F.R. § 50.59.

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[46] 59 F.3d 284 (1st Cir. 1995).

[47] LBP-99-10, 49 NRC at 147 (emphasis in original).

The Commission sees no reason to reverse the Presiding Officer's conclusion. License Condition 9.4 simply identifies types of minor operational modifications, without significant safety or environmental impact, that HRI may make without obtaining a license amendment from NRC. The use of this licensing concept in HRI's license is consistent with well-publicized Commission direction to the Staff to employ risk-informed and performance-based concepts in NRC regulatory activities.[48] The Commission has also repeatedly and clearly called for use of probabilistic risk assessment concepts, whenever possible, in nuclear regulatory matters.[49] We believe that the license condition in question here is consistent with the Commission's overall direction to the Staff. It is sensible regulatory policy to allow licensees on their own to make minor adjustments and modifications that have little safety or environmental impact. To require license amendments for all changes, no matter how inconsequential, would burden both licensees and the NRC, to no good end.

Despite Intervenors' suggestion to the contrary, there appears to be no similarity between the facts here and those in *Citizens Awareness Network*. The Court in that case stated:

> The prior Commission policy regarding decommissioning, embodied in 10 C.F.R. § 50.59 and explicated in the Commission's published Statement of Consideration, required NRC approval of a decommissioning plan before a licensee undertook any major structural changes to a facility. This policy was developed through a lengthy notice and comment period, with substantial public participation. [Citations omitted.] The Commission adhered to this policy for almost five years, reiterating its position in at least two adjudicatory decisions. Then, rather suddenly, the Commission circulated two internal Staff memos that completely reversed this settled policy, without any notice to the affected public. More troubling, however, was the Commission's failure to provide in those memos, or anywhere else, any justification or reasoning whatsoever for the change.[50]

The use of performance-based licensing concepts in the HRI license does not reverse any long-established Commission policy on the use of such regulatory mechanisms. Indeed, it is consistent with the Commission's approach to reactor licensing in 10 C.F.R. § 50.59. It does not run counter to any agency mandate contained in the Atomic Energy Act or any established Commission regulation. If anything, the use of license conditions such as 9.4 is entirely consistent with the Commission's efforts over the years to allow reasonable flexibility in its regulatory framework. It is simply an additional means through which the NRC can decrease the administrative burden of regulation while ensuring the continued protection of

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[48] *See, e.g.*, Staff Requirements — COMSECY-96-061 — Risk Informed, Performance-Based Regulation (DSI-12), April 15, 1997; "Use of Probabilistic Risk Assessment Methods in Nuclear Regulatory Activities; Final Policy Statement," 60 Fed. Reg. 42,622 (Aug. 16, 1995).

[49] *See id.* at 42,628-29.

[50] *Citizens Awareness Network*, 59 F.3d at 291.

public health and safety. In addition, the NRC Staff has provided a clear, reasoned basis for the employment of this concept in the *in situ* leach mining context,[51] a rationale that we agree with and hereby adopt.

The Intervenors exaggerate the amount of discretion the license affords HRI. License Condition 9.4 sets out an organized procedure that informs the Licensee of the type of operational changes that require specific approval from the NRC. It does not grant HRI unfettered discretion to make all decisions free of regulatory oversight. Rather, it allows HRI the flexibility to make only those changes that are consistent with existing license conditions and applicable regulations and do not result in any degradation in the Licensee's responsibility to conduct its activities in a manner that is protective of public health and safety. Any changes made by the Licensee must be fully documented and reported to the NRC annually. HRI will be subject to NRC enforcement action if it takes an action that is inconsistent with License Condition 9.4.

ENDAUM and SRIC also claim that License Condition 9.4 violates NEPA by authorizing actions without any consideration of their environmental impacts. We disagree. The Staff has considered the impacts of HRI's licensed activities in the FEIS published in February 1997. By its own terms, License Condition 9.4 requires HRI to apply for a license amendment if any change, test, or experiment it undertakes is not consistent with the findings in the FEIS. If the action contemplated by HRI does require a license amendment, NRC will have to follow the necessary NEPA compliance measures consistent with the regulations in 10 C.F.R. Part 51. Accordingly, the condition is fully consistent with the Commission's requirements and sound NEPA practice.

In addition to their specific concerns with License Condition 9.4, Intervenors ENDAUM and SRIC have also raised a variety of alleged inconsistencies and irregularities in the license itself. The Presiding Officer rejected some of these claims as being outside the scope of this particular partial initial decision and called on the Intervenors to raise their claims with respect to specific substantive issues addressed elsewhere in the proceeding. In their April 1, 1999 motion before the Commission for leave to reply to responses from HRI and the Staff, Intervenors attempt to clarify their concerns and argue that "(t)he issue that ENDAUM and SRIC have raised here is that the performance based license issued to HRI (SUA-1508) violates applicable law and regulations because it incorporates

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[51] "The performance-based license condition is structured such that uranium recovery licensees are required to submit applications for all license amendments, unless they can demonstrate that the provisions specified in the performance-based license condition have been satisfied. In addition, the performance-based license condition requires that a summary of all changes made under the condition be provided to NRC in an annual report. Therefore, the performance-based license condition provides the same degree of flexibility contained in the regulations and licenses for other nuclear facilities, and is consistent with established NRC policy." *See* "Staff Efforts to Reduce Regul[illegible] Impact on Uranium Recovery Licensees," Memorandum from James M. Taylor, Executive Director of Operat[illegible] to the Commission, August 26, 1994.

the inconsistent and self-contradictory terms of the application."[52] We decline to disturb the Presiding Officer's decision on this point. Intervenors appear to argue that several alleged inconsistencies and confusing items in the license are the direct result of a performance-based licensing policy. Like the Presiding Officer, we fail to see the connection. The Presiding Officer appropriately declined to consider these concerns in the context of LBP-99-10.

LBP-99-13: Financial Assurance

In their March 30, 1999 petition for review on LBP-99-13, Intervenors ENDAUM and SRIC take issue with many of the conclusions made by the Presiding Officer regarding HRI's compliance with NRC's financial assurance requirements. In essence, Intervenors believe that HRI must comply with the financial requirements contained in both 10 C.F.R. § 40.36 and 10 C.F.R. Part 40, Appendix A. In particular, they insist that the surety requirements in Appendix A must be met before NRC issues a license.

The Staff has acknowledged that the financial assurance requirements in Criterion 9 of Appendix A to Part 40 do in fact apply to HRI. The license itself requires HRI to submit an NRC-approved surety arrangement as a prerequisite to operating under a license.[53] However, it is unlikely that HRI will begin operation in the near future and it has yet to submit final surety arrangements. Thus, the question has arisen whether the surety is due before licensing or only before operation. Similarly, Criterion 9 also requires that the amount of funds to be ensured be "based on Commission-approved cost estimates in a Commission-approved plan."[54] Pursuant to Criterion 9, this plan must be submitted by the Applicant along with its environmental report, prior to licensing. Criterion 9 does not specify what constitutes "a plan" in early stages of licensing or *when* the Licensee must receive NRC approval for its plan.

The Presiding Officer reasonably concluded that the surety requirement in 10 C.F.R. § 40.36 does not apply to this license. *See* LBP-99-13, 49 NRC at 235. By its own wording, Criterion 9 does not require the creation of a surety arrangement until operations begin. However, our rules on financial assurance *plans* are much less clear. Further proceedings are necessary to clarify whether and when HRI submitted a plan in this case and the extent to which Intervenors may contest that plan.

In their latest filing, Intervenors claim that "HRI admits that a financial assurance plan does not exist although HRI submitted its ER's six years ago and a

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[52] *See* ENDAUM's and SRIC's Motion for Leave to Reply to the Responses Filed by HRI and the NRC Staff to ENDAUM's and SRIC's Petition for Review of LBP-99-10 (Performance-Based Licensing) at 4-5 (April 1, 1999).

[53] License Condition 9.5.

[54] 10 C.F.R. Part 40, Appendix A, Criterion 9.

license was issued in January. 1998."[55] In addition, in their view, the Staff failed to follow NRC regulations when it did not review and approve the plan prior to granting the license. Before the Presiding Officer, HRI argued that it had in fact submitted information regarding decommissioning costs — tantamount to a "financial plan" — in response to an NRC Staff Request for Information (RAI) containing "detailed plans addressing the full-cycle economics of the CUP as part of its license application."[56] The Staff's views on whether the RAI response meets the provisions of Criterion 9 are unclear. For its part, the Staff has indicated that it

> is in the process of evaluating this [HRI's financial assurance] plan, which was recently amended by HRI in response to comments received from the State of New Mexico. [Citations omitted.] Accordingly, until the Staff completes and documents its evaluation of HRI's surety arrangements, the record on which the Presiding Officer must base his decisions will be incomplete in this regard, and the issue is thus not yet ripe for his review. In short, there was nothing for the Presiding Officer to analyze in this regard, contrary to the Petitioners' implication.

NRC Staff's Response to Petition for Review of LBP 99-13 at 4-5 (April 14, 1999). In its brief before the Presiding Officer, the Staff indicated that it is in the process of reviewing "surety materials" submitted by HRI.[57] In its response to Intervenors' petition to review, HRI added that "Intervenors' complaint that the Presiding Officer failed to determine the adequacy of HRI's financial assurance plan is premature; there is, as yet, no approved plan to determine the adequacy of."[58]

Confusion, obviously, permeates this issue. The various statements of the parties raise several unanswered questions. To clarify these positions, the Commission requests that the parties submit briefs addressing the arguments raised in Intervenor's petition for review of LBP-99-13. In doing so, the parties should also address the following questions:

(1) Was financial assurance information submitted by HRI adequate to meet the requirements for licensing?

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[55] ENDAUM's and SRIC's Reply in Response to HRI's and the NRC Staff's Responses to Petitions for Review of LBP-99-10 (Performance-Based Licensing Issues) and LBP-99-13 (Financial Assurance for Decommissioning) at 4 (May 10, 1999).

[56] *See* [HRI's] Response to Intervenors' Briefs with Respect to [HRI's] Technical and Financial Qualifications and Financial Assurance for Decommissioning at 19 (February 11, 1999) citing to RAI Q1-92.

[57] *See* NRC Staff's Response to Intervenors' Presentations on Technical Qualification, Financial, and Decommissioning Issues at 3 n.4 (February 18, 1999). The Staff attached two HRI letters to their brief: (1) a June 25, 1997 letter that contained a "Churchrock Section 8 Financial Assurance Plan" that HRI submitted to the State of New Mexico Environment Department, and (2) a December 11, 1998 letter containing draft versions of "Performance Bond, Performance Guarantee Bond and Trust Agreement for the Crownpoint Project."

[58] [HRI's] Opposition to Intervenors' Petition for Review of Presiding Officer's Partial Initial Decision LBP-99-13 at 3 (April 13, 1999).

(2) If HRI is correct in its assertion that an approved financial assurance plan is not a prerequisite to the issuance of a license, what is the meaning of the Staff's assertion in its response that "the issue is thus not yet ripe for . . . [the Presiding Officer's] . . . review?"

CONCLUSION

For the reasons stated in this decision, the Commission hereby partially *affirms* LBP-99-1, LBP-99-9, and LBP-99-10. The Commission will address Intervenors' claims regarding bifurcation in a later decision. The Commission requests that the parties submit briefs on LBP-99-13 consistent with the directions set out above. After reviewing these briefs, the Commission will consider whether to hold oral argument. The Commission sets the following briefing schedule:

(1) Intervenors ENDAUM and SRIC shall file their brief within 21 days of the date of this Order. The brief shall not exceed 30 pages.

(2) The NRC Staff and HRI shall file their responsive briefs within 21 days after receipt of Intervenors' briefs. Their briefs shall be no longer than 30 pages.

(3) Intervenors may file a reply brief within 10 days of receiving the briefs of the NRC Staff and HRI. The reply brief shall be no longer than 10 pages.

All briefs shall be filed and served in a manner that ensures their receipt on their due date. Electronic or facsimile submissions are acceptable, but shall be followed by hard copies within a reasonable time. Briefs in excess of 10 pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited. Page limitations on briefs are exclusive of pages containing a table of contents and of any addendum containing statutes, rules, regulations, etc.

IT IS SO ORDERED.

For the Commission[59]

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 23d day of July 1999.

[59] Commissioner Diaz was not available for affirmation of this Memorandum and Order. Had he been present, he would have affirmed the Memorandum and Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Greta Joy Dicus, Chairman
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket Nos. 50-334-LT
50-412-LT
(License Nos. DPR-66
NPF-73)

DUQUESNE LIGHT COMPANY
and
FIRSTENERGY NUCLEAR OPERATING COMPANY and PENNSYLVANIA POWER COMPANY
(Beaver Valley Power Station, Units 1 and 2)

July 23, 1999

On June 3, 1999, Local 29, International Brotherhood of Electrical Workers filed a petition to intervene with regard to the proposed transfer of interests in the Beaver Valley Power Station. Since the Petitioner specifically declined to request a hearing, the Commission considers the petition as a submission of comments on the license transfer application pursuant to 10 C.F.R. § 2.1305.

RULES OF PRACTICE: LICENSE TRANSFER PROCEEDINGS

The Commission's rules for license transfer at 10 C.F.R. Part 2, Subpart M, set out two possible avenues to address issues that may arise from license transfer applications: written comments or hearings.

MEMORANDUM AND ORDER

In this Memorandum and Order, we address a June 3, 1999 petition to intervene filed by Local 29, International Brotherhood of Electrical Workers with regards to a proposed transfer of interests in the Beaver Valley Power Station from Duquesne Light Company (DLC) to FirstEnergy Corporation. In separate answers filed on June 16, 1999, DLC and FirstEnergy opposed Local 29's petition and argued that it did not have standing to intervene and had failed to raise a valid contention.

On June 23, 1999, Local 29 filed a reply in which it stated:

> It bears repeating that Local 29 has not requested a hearing, is not opposing the transfer, and is not seeking to delay Commission action on the application. It is only seeking to ensure that the Commission has full and complete information about the proposed operating conditions at the plant before it takes action on the application.[1]

The Commission's newly promulgated rules for license transfer set out two possible avenues to address issues that may arise from license transfer applications: written comments or hearings.[2] In this instance, Local 29 has filed a "petition to intervene" but has explicitly stated that it has not requested a hearing. In the absence of a hearing request, there is no potential adjudicatory proceeding in which to intervene. Accordingly, we must deny Local 29's "petition to intervene" and treat it as a submission of comments on the license transfer application pursuant to 10 C.F.R. § 2.1305. We note that our denial of the petition here in no way reflects a judgment regarding the merits of the concerns raised by the Petitioner. The Commission will consider and, if appropriate, respond to Local 29's comments in accordance with section 2.1305. We are referring the comment to the NRC Staff for its consideration as it reviews the license transfer application. *See General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 1), CLI-99-2, 49 NRC 23, 24 n.2 (1999).

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[1] Reply of Local 29, International Brotherhood of Electrical Workers (June 23, 1999) at 2-3.

[2] Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed. Reg. 66,721 (Dec. 3, 1998).

For the foregoing reasons, the petition is denied.
IT IS SO ORDERED.

For the Commission[3]

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 23d day of July 1999.

[3]Commissioner Diaz was not available for affirmation of this Memorandum and Order. Had he been present, he would have affirmed the Memorandum and Order.

Atomic Safety and Licensing Boards Issuances

LICENSING BOARDS

ATOMIC SAFETY AND LICENSING BOARD PANEL

G. Paul Bollwerk III,* *Chief Administrative Judge*
Vacant,* *Deputy Chief Administrative Judge (Executive)*
Frederick J. Shon,* *Deputy Chief Administrative Judge (Technical)*

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Lester S. Rubenstein
Dr. David R. Schink
Dr. George F. Tidey

*Permanent panel members

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Frederick J. Shon
Dr. Peter S. Lam

In the Matter of **Docket No. 50-400-LA**
(ASLBP No. 99-762-02-LA)

CAROLINA POWER & LIGHT COMPANY
(Shearon Harris Nuclear Power Plant)

July 12, 1999

In this proceeding concerning Applicant Carolina Power and Light Company's (CP&L) request to increase the spent fuel storage capacity of its Shearon Harris Nuclear Power Plant through a 10 C.F.R. § 50.90 facility operating license amendment, the Licensing Board grants the hearing request of the Board of Commissioners of Orange County, North Carolina (BCOC), concluding BCOC has standing and has proffered two admissible contentions challenging CP&L's proposed fuel storage expansion plan.

RULES OF PRACTICE: STANDING TO INTERVENE

Those who seek party status in NRC adjudicatory proceedings must demonstrate that they fulfill the contemporaneous judicial standards for standing, which require that a participant establish: (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury in fact within the zone of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury is fairly traceable to the

challenged action; and (3) injury is likely to be redressed by a favorable decision. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

RULES OF PRACTICE: STANDING TO INTERVENE (ZONE OF INTERESTS; REDRESSABILITY OF INJURIES)

The safety and environmental concerns alleged by a local governmental organization relative to its citizens and their local habitat fall within the statutory zone of interests implicated in this proceeding and those injuries could be redressed by a favorable decision in this proceeding.

RULES OF PRACTICE: STANDING TO INTERVENE (ORGANIZATIONAL)

As the Commission has recognized in a somewhat different context, the strong interest that a governmental body has in protecting the individuals and territory that fall under its sovereign guardianship establishes an organizational interest for standing purposes. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 33 (1998).

RULES OF PRACTICE: STANDING TO INTERVENE (INJURY IN FACT; FACTUAL REPRESENTATION)

During the threshold standing inquiry, a petitioner need not establish an asserted injury in fact basis for assertions of offsite radiological consequences with "certainty" or provide extensive technical studies. *See Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994). Such an assertion of injury in fact will be accepted if it is at least facially plausible that it is neither remote nor speculative and the opposing party fails to establish a fatal flaw in its analysis.

RULES OF PRACTICE: CONTENTIONS (POSSIBLE FAILURE TO COMPLY WITH REGULATORY REQUIREMENT)

In order to posit a contention that requires the analysis of an action violating a specific technical specification, a petitioner would have to make some particularized demonstration that there is a reasonable basis to believe that the applicant will act contrary to the terms of such a requirement. *See General Public Utilities Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 164 (1996).

RULES OF PRACTICE: HEARING PROCEDURES FOR SPENT FUEL POOL EXPANSION PROCEEDING

A spent fuel capacity expansion proceeding is subject to the hybrid hearing process outlined in 10 C.F.R. Part 2, Subpart K, to the degree that any party wishes to invoke those procedures. Any party that wishes to invoke this process must do so within 10 days of an order granting a hearing request. *See* 10 C.F.R. § 2.1109(a)(1). If invoked, the process would consist of the following: a 90-day discovery period followed by the simultaneous written submission of relevant facts, data, and arguments and an oral argument on the issue whether an evidentiary proceeding is required for any of the contentions; and finally a decision by the presiding officer that both designates disputed issues of fact for an evidentiary hearing and resolves any other issues. *See* 10 C.F.R. §§ 2.1111, 2.1113(a), 2.1115(a)-(b).

MEMORANDUM AND ORDER
(Ruling on Standing and Contentions)

Responding to a January 7, 1999 notice of opportunity for a hearing, 64 Fed. Reg. 2237 (1999), Petitioner Board of Commissioners of Orange County, North Carolina (BCOC), has filed a timely hearing request and intervention petition that is now before the Board. In its February 12, 1999 petition, BCOC challenges the December 23, 1998 request of Applicant Carolina Power & Light Co. (CP&L) for permission to increase the spent fuel storage capacity at its Shearon Harris Nuclear Power Plant (Harris), which is located in Wake and Chatham Counties, North Carolina. If granted, CP&L's 10 C.F.R. § 50.90 facility operating license amendment request would permit it to add rack modules to spent fuel pools C and D and place those pools in operation.

Both the Applicant and the NRC Staff have contested the BCOC request. CP&L asserts that BCOC lacks standing to intervene, while both CP&L and the Staff argue that none of BCOC's eight contentions are admissible. Having concluded that BCOC does have standing and has proffered two admissible contentions, for the reasons set forth below we grant its hearing request.

I. BACKGROUND

In its December 1998 license amendment request, CP&L indicated that the fuel handling building (FHB) at the Harris site was originally designed and constructed with four separate spent fuel pools to accommodate the four reactor units that were planned for the site. Pools A through D were anticipated to serve Units 1 through

4, respectively. Although three of the units were canceled in the early 1980s, the FHB, the four pools (with liners), and the cooling and cleanup system to support pools A and B were completed and turned over to CP&L. Construction on the cooling and cleanup system for pools C and D, however, was not completed. CP&L also declared that because a Department of Energy high-level waste repository is not expected to be available in the foreseeable future, it has been shipping spent fuel from its three other nuclear facilities for storage in the Harris pools in order to maintain full core offload capability for those facilities. According to CP&L, the present amendment request to utilize pools C and D is designed to provide storage capacity for all four CP&L units — Harris, Brunswick Steam Electric Plant, Units 1 and 2, and H.B. Robinson, Unit 2 — through the end of their current operating licenses. *See* CP&L Request for License Amendment (Dec. 23, 1998) Encl. 1, at 1 [hereinafter License Amendment].

Asserting it had standing to intervene on behalf of its citizens, in its February 12, 1999 intervention petition BCOC contested this CP&L request as involving both safety and environmental risks. *See* [BCOC] Request for Hearing and Petition to Intervene (Feb. 12, 1999) at 2-4 [hereinafter BCOC Petition]. CP&L filed a March 1, 1999 answer declaring that the BCOC petition to intervene should be denied because BCOC has failed to establish its standing. *See* [CP&L] Answer to BCOC's Request for Hearing and Petition to Intervene (Mar. 1, 1999) at 7-11 [hereinafter CP&L Petition Response]. The NRC Staff, on the other hand, asserted in its answer that BCOC had established its standing to intervene. *See* NRC Staff's Answer to Orange County's Request for Hearing and Petition to Intervene (Mar. 4, 1999) at 5 [hereinafter Staff Petition Response].

In its initial prehearing order, the Board set an April 5, 1999 deadline for BCOC to submit a supplement to its petition specifying its contentions. *See* Licensing Board Memorandum and Order (Initial Prehearing Order) (Feb. 24, 1999) at 3 (unpublished). BCOC filed a supplemental petition on that date, which set forth three technical and five environmental contentions. *See* [BCOC] Supplemental Petition to Intervene (Apr. 5, 1999) at 4-44 [hereinafter BCOC Contentions]. In responses filed May 5, 1999, both CP&L and the Staff took the position that BCOC had failed to present a contention that would meet the admissibility standards set forth in 10 C.F.R. § 2.714(b) and, as such, its petition should be dismissed. *See* [CP&L] Answer to Petitioner [BCOC] Contentions (May 5, 1999) [hereinafter CP&L Contentions Response]; NRC Staff's Response to [BCOC] Supplemental Petition to Intervene (May 5, 1999) [hereinafter Staff Contentions Response]. Thereafter, at a one-day prehearing conference conducted in Chapel Hill, North Carolina, on May 13, 1999, the Board heard oral arguments from the participants on the issues of BCOC's standing and the admissibility of its eight contentions. *See* Tr. at 11-170.

II. ANALYSIS

A. Standing

Those who seek party status in NRC adjudicatory proceedings must demonstrate that they fulfill the contemporaneous judicial standards for standing, which require that a participant establish (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zone of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury is fairly traceable to the challenged action; and (3) injury is likely to be redressed by a favorable decision. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

In this instance, BCOC asserts in its intervention petition that, as a political subdivision of the State of North Carolina, it is "authorized to protect the citizens of the County through its police powers," and indicates it wishes to intervene because the proposed spent fuel pool expansion amendment "threatens the County's interest in protecting the health and welfare of its citizens and the integrity of the environment in which they live." BCOC Petition at 3; *see also* Tr. at 12. BCOC also declares that "[t]he entire county lies within the 50-mile ingestion exposure emergency planning zone around the Harris facility, and part of the county lies within 15 miles of the plant." BCOC Petition at 3. According to BCOC, in light of the showing in the attachments to its petition regarding the increased risk of, and offsite consequences resulting from, reactor or spent fuel pool accidents that could occur if the CP&L expansion proposal is implemented, it has demonstrated its injury in fact. *See* Tr. at 12-15. The Staff agrees that BCOC has made a showing sufficient to establish BCOC's organizational standing. *See* Staff Petition Response at 5 & n.2. CP&L objects, however, declaring that BCOC — which CP&L maintains is located approximately 17 miles from the Harris facility — has not established its organizational standing. *See* CP&L Petition Response at 7-8; Tr. at 15-21.

It is apparent that the safety and environmental concerns alleged by BCOC fall within the statutory zone of interests implicated in this proceeding and that those injuries could be redressed by a favorable decision in this proceeding. Moreover, as the Commission has recognized in a somewhat different context, the strong interest that a governmental body like BCOC has in protecting the individuals and territory that fall under its sovereign guardianship establishes an organizational interest for standing purposes. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 33 (1998).

Indeed, there seems little doubt that if the Harris facility were located within the boundaries of Orange County, the requisite injury in fact would have been established relative to Petitioner BCOC. *See Private Fuel Storage, L.L.C.*

(Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 169 (finding State of Utah has standing relative to facility located within the State, albeit on Native American reservation), *aff'd on other grounds,* CLI-98-13, 48 NRC 26 (1998). It is not so located, however. Instead, the county's closest boundary is approximately 17 miles from the facility. Previous standing rulings regarding spent fuel pool expansion and reracking indicate that standing has been accorded to interested persons within approximately 10 miles of the reactor facility.[1] *See Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 455, *aff'd,* ALAB-893, 27 NRC 627 (1988); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 842, *aff'd in part and rev'd in part on other grounds,* ALAB-869, 26 NRC 13 (1987); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987). While CP&L declares that the additional 7 miles to the BCOC border negates BCOC's standing claim, we conclude the additional distance is not a bar to Petitioner's standing in this instance.

In an affidavit attached both to BCOC's petition and its contentions supplement, Dr. Gordon Thompson, the executive director of the Institute for Resource and Security Studies, analyzes the hazard posed by the Harris spent fuel pool expansion as it relates to cesium-137.[2] Noting that cesium-137 is an important hazard potential indicator because it emits intense gamma radiation and is released comparatively readily in severe accidents, Dr. Gordon declares that activation of pools C and D will potentially result in an inventory of spent fuel containing cesium-137 in amounts that, if released in a significant fraction to the environment because of a severe accident, would create offsite radiation doses in amounts that would be an order of magnitude larger than the exposure from the Chernobyl accident and as much as two times higher than those from a similar accident involving only pools A and B. He also notes that, as is the case with many facilities, the spent fuel pools at the Harris plant are not within the containment area, so that any released radioisotopes are likely to exit the building in an atmospheric plume. He further postulates what he asserts are the previously unanalyzed consequences of a partial uncovering of the fuel, which he declares could be more severe than the total water loss circumstances previously analyzed in terms of the possibility of creating exothermic reactions that could result in significant atmospheric discharges. Finally, he identifies several events involving the pools

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[1] In addition to the cases cited above, in *Virginia Electric and Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 55-57 (1979), the Appeal Board permitted intervention in a spent fuel pool expansion proceeding for an intervenor group that had identified members who resided 35 and 45 miles from the facility, one of whom also engaged in canoeing on a river "in the general vicinity" of the plant. Although the exact basis for this ruling is not entirely clear, because it appears to rest on the close proximity of the recreational activities to the facility rather than the more remote residences of the individuals, we do not consider it controlling here.

[2] This attachment was originally prepared to support a challenge to the Staff's proposed no significant hazards consideration finding that accompanied the hearing opportunity notice for the CP&L amendment. The validity of that proposed determination is, of course, not a matter before us. *See* 10 C.F.R. § 50.91(a)(4).

or an interaction between the pools and the Harris reactor, that might cause such a partial water loss accident. *See* BCOC Contentions, Exh. 2, at 6-10; *see also* BCOC Contentions at 29-32.

Relative to the standing criterion of injury in fact, what Dr. Thompson's declaration indicates is that the proposed CP&L expansion could create circumstances in which there could be releases that could go beyond the Harris facility boundary and could have health or environmental impacts equal to or in excess of those that now exist for pools A and B. CP&L, however, posits two reasons why this showing is insufficient to establish BCOC's standing. First, citing the Commission's decision in *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994), it argues that Dr. Thompson's analysis relies on beyond-design-basis accident sequences that are too conjectural or hypothetical to provide a basis for standing. *See* CP&L Petition Response at 10. In addition, it points out that the Staff recently has granted a series of exemptions waiving offsite emergency planning requirements for power reactor facilities that have been shut down, but will retain spent fuel inventories in pools during the decommissioning process. *See id.* at 11 & n.8 (citing, as an example, 63 Fed. Reg. 48,768 (1998) (Maine Yankee exemption)); Tr. at 19.

We find neither of these arguments persuasive. The Commission indicated in *Sequoyah Fuels*, CLI-94-12, 40 NRC at 72, that during the threshold standing inquiry, a petitioner need not establish an asserted injury in fact basis with "certainty" or provide extensive technical studies. *Id.* Here, in conformance with that standard, BCOC has produced an explanation of why Dr. Thompson's accident concerns are not remote and speculative that is at least facially plausible. *See* BCOC Contentions at 31-32. At the same time, nothing presented by CP&L, including the referenced emergency planning exemptions, establishes a fatal flaw in his analysis. The exemptions involve facilities in which the power reactors are no longer operating, a crucial distinction given Dr. Thompson's specific references to pool-reactor operation interaction as a supporting basis for his analysis.

Accordingly, we conclude that BCOC has made a showing sufficient to establish that it meets the criteria for standing in this proceeding.

B. Contentions

As was noted earlier, in seeking to gain party status to this proceeding, BCOC has proffered eight contentions, three involving technical issues and five that concern environmental matters. For reasons that will become apparent, we deal with the admissibility of the technical contentions individually, but rule on the environmental contentions as a group.

1. Technical Contentions[3]

TECHNICAL CONTENTION 1 (TC-1) — Inadequate Emergency Core Cooling and Residual Heat Removal

> CONTENTION: In order to cool spent fuel storage pools C and D, CP&L proposes to rely on the Unit 1 Component Cooling Water ("CCW") system, coupled with administrative measures to ensure that the heat load from the pools does not overtax the CCW system. CP&L's reliance on the Unit 1 CCW system and administrative measures for cooling spent fuel storage pools C and D will unduly compromise the effectiveness of the residual heat removal ("RHR") system and the Emergency Core Cooling System ("ECCS") for the Shearon Harris plant, such that the plant will not comply with Criteria 34 and 35 of Appendix A to 10 C.F.R. Part 50.

DISCUSSION: BCOC Contentions at 4-10; CP&L Contentions Response at 12-28; Staff Contentions Response at 4-10; Tr. at 29-87.

RULING: In discussing this contention, we utilize the six-basis construct outlined in the CP&L response to the BCOC contention supplement, which we find both useful and accurate.

> a. Basis 1 — Even without the amendment to add pools C and D, the Harris Final Safety Analysis Report (FSAR) shows that the CCW system is incapable of accommodating the heat load from the recirculation phase of a design-basis loss of coolant accident (LOCA).

Although it questions the adequacy of the existing CCW system, BCOC has failed to provide any factual information or expert opinion that gives us reason to believe the relatively small addition to the heat load during a LOCA would have any effect on the ability of the system to cool the reactor. CP&L presented figures in its contention response and at the prehearing conference indicating that the heat removal capabilities of the system are adequate. *See* CP&L Contentions Response at 16-17; Tr. at 56-57. Petitioner BCOC does not offer any specific calculation showing otherwise, nor did BCOC's expert allege that any specific limit would be violated. *See* Tr. at 34-39. The fact that BCOC's expert used an outdated version of the FSAR casts further doubt on the notion that any limits would be exceeded, and the Petitioner's difficulties in identifying the latest version of the FSAR, while unfortunate, cannot form the basis for a valid contention.

Accordingly, lacking adequate factual and expert opinion support, this basis is insufficient to support the contention. *See Private Fuel Storage*, LBP-98-7, 47 NRC at 180-81. In fact, in its present form, this basis appears to be a challenge to the design of the emergency core cooling system (ECCS), which would place

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[3] Because we prefer to have these first three contentions designated by their subject matter category, i.e., technical, we have renumbered them as technical contentions 1 through 3.

it outside the scope of this proceeding, and so again does not provide support for an admissible contention. *See id.* at 179.

> b. Basis 2 — The analysis of CCW margin supporting the license amendment application does not address the time dependence of the CCW system heat load during a design-basis LOCA.

Basis 2, questioning the time dependence of the heat load analysis, likewise is without foundation. The short of it is that CP&L did indeed take account of the time variation, as both it and the Staff point out. *See* CP&L Contentions Response at 17-20; Staff Contentions Response at 6-7; Tr. at 63-65. Petitioner's plea that the time dependence is complex, *see* Tr. at 40, raises no litigable issue. No one doubts this issue is complex; however, an allegation of complexity is not a substitute for an adequately supported explanation of the exact nature of the matter in controversy. Nor is the BCOC complaint that some calculation sheets may not have been signed, *see id.*, adequate to call the substance of the calculations into question, as would be necessary for any cognizable challenge to their accuracy. Thus, besides problems with its materiality, this basis lacks sufficient factual and/or expert opinion support to make this a litigable issue. *See Private Fuel Storage*, LBP-98-7, 47 NRC at 179-81.

> c. Basis 3 — The analysis of CCW margin supporting the license amendment application does not address the degradation of CCW and RHR heat exchanger performance due to heat exchanger fouling and plugging.

TC-1, Basis 3, alleging a failure to account for fouling and plugging factors in the calculation of the analysis of the CCW margin, is simply incorrect. CP&L apparently did account for such factors, *see* CP&L Contentions Response at 20-22; Staff Contentions Response at 7, and the fact BCOC generally is dissatisfied with the level of detail in the calculation and is not sure whether the calculation has been finalized, *see* Tr. at 44, cannot form the basis of an admissible contention. *See Private Fuel Storage*, LBP-98-7, 47 NRC at 180-81.

> d. Basis 4 — The license amendment application does not address the potential for failure to comply with the administrative measure limiting the heat load in pools C and D to 1.0 MBTU/hour.

Basis 4, asserting an improper reliance on an administrative limit to keep the heat load in pools C and D within safe bounds, scarcely represents a change introduced by the proposed license amendment, as Petitioner would have us find. The heat load in existing pools A and B, and indeed many other limits, depends ultimately upon administrative controls. And there are many safety parameters like these administrative controls that could, at the discretion of the operating

organization, be pushed beyond their appropriate limits. That, however, is precisely the reason for the adoption of technical specifications.

Among other things, technical specifications are intended to prevent the licensee organization from exceeding a limit in a way that could pose a hazard. In the case of this license amendment, there is a proposed technical specification, Technical Specification 5.6.3.d, *see* License Amendment, Encl. 5, at unnumbered p. 4, that would dictate that the stored fuel heat load for pools C and D not exceed 1.0 MBtu/hr. Given this provision, we agree with CP&L and the Staff, and the Licensing Board's ruling in *General Public Utilities Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 164 (1996), that in order to posit a contention that requires the analysis of an action violating a specific technical specification, a petitioner would have to make some particularized demonstration that there is a reasonable basis to believe that the applicant will act contrary to the terms of such a requirement. Thus, in this instance, BCOC would need to show that circumstances exist that make the proposed technical specification especially prone to violation, which it has not done.

e. Basis 5 — The license amendment application does not address the potential for increased operator error in diverting CCW system flow to meet the cooling needs of pools C and D during a LOCA event.

Basis 5 lacks specificity, as well as failing to raise any issue that is directly related to the change proposed in the present amendment. In this regard, CP&L and the Staff have indicated that the added burden on the operators is vanishingly small; the requirement to restore pool cooling already exists (and, indeed, exists for pools A and B with their substantially greater heat load); and the failure to perform that minor function would not lead to a substantial hazard. *See* CP&L Contentions Response at 23-26; Staff Contentions Response at 8-9; Tr. at 69-71). In the face of this information, Petitioner's speculation that there may be excessive strains on the operators or that there may be critical temperature or humidity limits, *see* Tr. at 49-51, is simply that — speculation. Because BCOC has not identified any specific errors or hazards that may be occasioned or any specific limits that may be violated and has presented no calculations that can form the basis for this contention, it lacks adequate support. *See Private Fuel Storage*, LBP-98-7, 47 NRC at 189-81.

f. Basis 6 — The analysis supporting the license amendment application does not address the ability of Unit 1 electrical systems to meet the needs of pools C and D while also supporting essential safety functions.

Basis 6, a complaint that CP&L has failed to analyze the new demands on the emergency diesel generator system, also lacks adequate support. *See* CP&L Contentions Response at 26-28; Staff Contentions Response at 9. The analysis

supporting the amendment indicates that the diesel generators have capacity to spare. *See* Tr. at 66-67. And Petitioner's additional plea that the time dependency of these loads may somehow show the system to be inadequate, *see* Tr. at 42, is again purely speculative. BCOC has given no reason to assume there is a time-dependent load that exceeds the peak given by CP&L in its analysis. *See Private Fuel Storage*, LBP-98-7, 47 NRC at 180-81.

In sum, we find TC-1 lacks an adequate basis and thus fails to meet the requirements for admissibility specified in 10 C.F.R. § 2.714(b).

TECHNICAL CONTENTION 2 (TC-2) — Inadequate Criticality Prevention

CONTENTION: Storage of pressurized water reactor ("PWR") spent fuel in pools C and D at the Harris plant, in the manner proposed in CP&L's license amendment application, would violate Criterion 62 of the General Design Criteria ("GDC") set forth in Part 50, Appendix A. GDC 62 requires that: "Criticality in the fuel storage and handling system shall be prevented by physical systems or processes, preferably by use of geometrically safe configurations." In violation of GDC 62, CP&L proposes to prevent criticality of PWR fuel in pools C and D by employing administrative measures which limit the combination of burnup and enrichment for PWR fuel assemblies that are placed in those pools. This proposed reliance on administrative measures rather than physical systems or processes is inconsistent with GDC 62.

DISCUSSION: BCOC Contentions at 10-13; CP&L Contentions Response at 29-36; Staff Contentions Response at 10-13, Tr. at 88-118.

RULING: In discussing this contention, we utilize CP&L's two-basis construct, which we again find both useful and accurate.

a. Basis 1 — CP&L's proposed use of credit for burnup to prevent criticality in pools C and D is unlawful because GDC 62 prohibits the use of administrative measures, and the use of credit for burnup is an administrative measure.

The Board has determined that this basis for the contention does indeed raise a genuine material dispute that warrants further inquiry so as to be cognizable in this proceeding. Specifically, the litigable issue essentially is a question of law: Does GDC 62 permit an applicant to take credit in criticality calculations for enrichment and burnup limits in fuel, limits that will ultimately be enforced by administrative controls?

While it is apparent that draft Regulatory Guide 1.13, at 1.13-13 to -15 (proposed rev. 2, Dec. 1981), *see* Staff Contentions Response, Attach. 3, would permit criticality control by such limits, the PFS-referenced Commission admonition that "[i]f there is conformance with regulatory guides, there is likely to be compliance with the GDC," *Petition for Emergency and Remedial Action*, CLI-78-6, 7 NRC 400, 407 (1978), is not a blanket endorsement of the notion that regulatory guides necessarily govern. Further, the instances cited by PFS in which the Staff issued licenses embodying administrative controls based on burnup and enrichment to

prevent criticality are instances that stand, to the extent they stand for anything, for the proposition that the Staff agrees with itself that its interpretation of this GDC is correct. The propriety of that interpretation of GDC 62 has apparently never been tested in the crucible of an adversary adjudication. We will permit such a test here by entertaining legal arguments on whether the use of administrative limits on burnup and enrichment of fuel stored in pools C and D properly conforms to the requirements of GDC 62 for the prevention of criticality.

> b. Basis 2 — The use of credit for burnup is proscribed because Regulatory Guide 1.13 requires the criticality not occur without two independent failures, and one failure, misplacement of a fuel assembly, could cause criticality if credit for burnup is used.

The second basis raises a question of fact. Will a single fuel assembly misplacement, involving a fuel element of the wrong burnup or enrichment, cause criticality in the fuel pool, or would more than one such misplacement or a misplacement coupled with some other error be needed to cause such criticality? While CP&L and the Staff both assure us that, when account is taken for the boron present in the fuel pool water, a single misplacement cannot lead to criticality, the fact that the Staff has sought further information on this point, as evidenced by exhibit 1 proffered by Orange County during the prehearing conference,[4] suggests that further inquiry on the validity of any calculations involved is warranted in determining whether the required single failure criterion is met. Clearly the nature of the amendment, introducing as it does the presence of high density racks on the site, involves a change that may call into question conformance with this aspect of the regulations. Accordingly, we admit contention TC-2 relative to this basis as well.

TECHNICAL CONTENTION 3 (TC-3) — Inadequate Quality Assurance[5]

> CONTENTION: CP&L's proposal to provide cooling of pools C & D by relying upon the use of previously completed portions of the Unit 2 Fuel Pool Cooling and Cleanup System and the Unit 2 Component Cooling Water System fails to satisfy the quality assurance criteria of 10 C.F.R. Part 50, Appendix B, specifically Criterion XIII (failure to show that the piping and equipment have been stored and preserved in a manner that prevents damage or deterioration), Criterion XVI (failure to institute measures to correct any damage or deterioration), and Criterion XVII (failure to maintain necessary records to show that all quality assurance requirements are satisfied).

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[4] While the pendency of a Staff requests for additional information (RAI) such as BCOC exhibit 1 is not a basis for delaying the filing of contentions, such an RAI may provide the basis for a contention. *See Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349-50 (1998), *petitions for review pending*, Nos. 99-1002 & 99-1043 (D.C. Cir. Jan. 4, 1999 & Feb. 8, 1999).

[5] The wording of this contention reflects the uncontested BCOC revision provided to the Board. *see* [BCOC] Response to [PFS] Proposed Rewording of Contention 3, Regarding Quality Assurance (May 27, 1999) at 2, with one Board clarification that is indicated by brackets.

Moreover, the Alternative Plan submitted by Applicant fails to satisfy the requirements of 10 C.F.R. § 50.55a for an exception to the quality assurance criteria because it does not describe any program for maintaining the idle piping in good condition over the intervening years between construction [and] implementation of the proposed license amendment, nor does it describe a program for identifying and remediating potential corrosion and fouling.

The Alternative Plan submitted by Applicant is also deficient because 15 welds for which certain quality assurance records are missing are embedded in concrete and inspection of the welds to demonstrate weld quality cannot be adequately accomplished with a remote camera.

Finally, the Alternative Plan submitted by Applicant is deficient because not all other welds embedded in concrete will be inspected by the remote camera, and the weld quality cannot be demonstrated adequately by circumstantial evidence.

DISCUSSION: BCOC Contentions at 13-19; CP&L Contentions Response at 36-48; Staff Contentions Response at 13-16; Tr. at 118-53.

RULING: We also will admit contention TC-3 for litigation. First, it is unclear from the present filings whether the criteria of Appendix B are to be enforced or not. CP&L says they will be complied with. *See* CP&L Contentions Response at 40. The Staff says they need not be. *See* Staff Contentions Response at 15. BCOC clearly believes they must be met. If, indeed, the criteria here applicable are those of 10 C.F.R. § 50.55a(a)(3), they require the Applicant to demonstrate that:

(i) The proposed alternatives would provide an acceptable level of quality and safety, or
(ii) Compliance with the specified requirements of this section would result in hardship or unusual difficulty without a compensating increase in the level of quality and safety.

Such criteria are inherently more nebulous and governed by subjective judgment to a greater degree than those otherwise applicable to quality assurance matters under 10 C.F.R. Part 50, App. B, and the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code. In particular, we have heard nothing about such points as "hardship," "difficulty," or "compensating increase in the level of quality and safety." And, of course, if CP&L's plea is that the proposed alternatives provide an acceptable level of safety, we will need to confront directly the question of whether a failure of quality control could lead to a hazard, a question about which there is clearly a dispute between CP&L and BCOC.

It also is clear from the positions of all the participants that some of the piping and equipment have not been properly stored and proper records regarding its quality during that period have not been maintained. Whether such storage and maintenance are necessary as a matter of law and fact is clearly a subject of dispute among the participants. The argument concerning this point is not a simple one, nor do we have material on which we can rely to determine the matter.

We are presently uncertain as to the exact scope of the failure to meet the requirements of the regulations, and that scope is uncertain concerning both the

equipment involved and the extent to which each piece of equipment may itself be lacking. Although we heard participant presentations on these matters, much of this bordered on testimony submitted without the purifying challenge of cross examination by parties familiar with the details through discovery.

Thus, to recap, contention TC-1 is rejected as inadmissible while contentions TC-2 and TC-3 are accepted for litigation in the form and subject to the interpretations set forth above.

2. *Environmental Contentions*[6]

Petitioner BCOC specified five environmental contentions in its supplement, as follows:

ENVIRONMENTAL CONTENTION 1 (EC-1) — Proposed License Amendment Not Exempt from NEPA

> CONTENTION: CP&L errs in claiming that the proposed license amendment is exempt from NEPA under 10 C.F.R. § 51.22.

ENVIRONMENTAL CONTENTION 2 (EC-2) — Environmental Impact Statement Required

> CONTENTION: The proposed license amendment is not supported by an Environmental Impact Statement ("EIS"), in violation of NEPA and NRC's implementing regulations. An EIS should examine the effects of the proposed license amendment on the probability and consequences of accidents at the Harris plant. As required by NEPA and Commission policy, it should also examine the costs and benefits of the proposed action in comparison to various alternatives, including Severe Accident Design Mitigation Alternatives and the alternative of dry cask storage.

ENVIRONMENTAL CONTENTION 3 (EC-3) — Scope of EIS Should Include Brunswick and Robinson Storage

> CONTENTION: The EIS for the proposed license amendment should include within its scope the storage of spent fuel from the Brunswick and Robinson nuclear power plants.

ENVIRONMENTAL CONTENTION 4 (EC-4) — Even if No EIS Required, Environmental Assessment Required

> CONTENTION: Even if the Licensing Board finds that no EIS is required, it must order the preparation of an EA.

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[6] BCOC numbered these contentions sequentially as contentions 4 through 8. As with the technical contentions, we prefer to see them designated by their subject matter category, i.e., environmental, and so renumber them accordingly.

ENVIRONMENTAL CONTENTION 5 (EC-5) — Discretionary EIS Warranted

CONTENTION: Even if the Licensing Board determines that an EIS is not required under NEPA and 10 C.F.R. § 51.20(a), the Board should nevertheless require an EIS as an exercise of its discretion, as permitted by 10 C.F.R. §§ 51.20(b)(14) and 51.22(b).

DISCUSSION: BCOC Contentions at 19-41; CP&L Contentions Response at 49-65; Staff Contentions Response at 16-20; Tr. at 153-70.

RULING: BCOC essentially agrees with the CP&L and Staff assertions that these contentions have been superseded by a Staff decision pursuant to 10 C.F.R. § 51.30 to issue an environmental assessment (EA) in [illegible] of this year. *See* Tr. at 153. We would agree because, in connection with such an assessment, the Staff will consider whether an EIS is needed relative to the CP&L amendment. *See* 10 C.F.R. § 51.31. CP&L and BCOC nonetheless do seek direction from the Board regarding two of the contentions. In CP&L's case, it seeks a dismissal with prejudice of EC-3, regarding the transfer of spent fuel from the Brunswick and Robinson facilities, asserting that consideration of the environmental impacts of storing fuel from these facilities was incorporated into the operating license proceeding for the Harris facility. *See* CP&L Contentions Response at 54, 57-59; *see also* Staff Contentions Response at 17. And for its part, BCOC seeks guidance on EC-5 regarding the Board's discretionary authority to order the Staff to prepare an EIS. *See* Tr. at 155.

In both instances, we decline the invitation to delve further into these contentions. Whatever validity these arguments may have in the context of further late-filed contentions submitted after the Staff's EA, *see* 10 C.F.R. § 2.714(b)(2)(iii), for now we consider any Board rulings to be premature. Accordingly, we dismiss all BCOC's contentions, but without prejudice to their being raised before the Board at some later juncture, as appropriate.

III. ADMINISTRATIVE MATTERS

As we noted during the prehearing conference, *see* Tr. at 171, this spent fuel capacity expansion proceeding is subject to the hybrid hearing process outlined in 10 C.F.R. Part 2, Subpart K, to the degree that any party wishes to invoke those procedures. Under Subpart K, following a 90-day discovery period, which can be extended upon a showing of exceptional circumstances, the parties simultaneously submit a detailed written summary of all facts, data, and arguments that each party intends to rely upon to support or refute the existence of a genuine and substantial dispute of fact regarding any admitted contentions. *See* 10 C.F.R. §§ 2.1111, 2.1113(a). Then, an oral argument is conducted by the presiding officer in which the parties address the question whether any of the issues require resolution in an adjudicatory proceeding because there are specific facts in genuine and substantial

dispute that can be resolved with sufficient accuracy only by the introduction of evidence. *See id.* § 2.1115(b). Thereafter, the presiding officer issues a decision that designates the disputed issues of fact for an evidentiary hearing and resolves any other issues. *See id.* § 2.1115(a).

Subpart K specifies that within 10 days of an order granting a hearing request in a proceeding such as this one, a party may invoke its procedures by filing a written request for an oral argument. *See id.* § 2.1109(a)(1). Accordingly, if CP&L, the Staff, or BCOC wishes to use the Subpart K procedures, it must file a request within 10 days of the date of this Memorandum and Order, or on or before *Thursday, July 22, 1999.*

IV. CONCLUSION

As a local governmental entity with a sovereign interest in protecting the health and welfare of its citizens and the environment within its boundaries, which come within approximately 17 miles of the Harris facility, Petitioner BCOC has made a showing sufficient to establish its standing to intervene as of right in this spent fuel pool expansion proceeding. Further, we find two of its eight contentions, TC-2 and TC-3, are supported by bases adequate to warrant further inquiry so as to be admitted for litigation in this proceeding. Accordingly, we grant BCOC's intervention petition and admit it as a party to this proceeding.

For the foregoing reasons, it is, this 12th day of July 1999, ORDERED that:

1. Relative to the contentions specified in paragraph two below, BCOC's hearing request/intervention petition is *granted* and BCOC is admitted as a party to this proceeding.

2. The following BCOC contentions are *admitted* for litigation in this proceeding: TC-2 and TC-3.

3. The following BCOC contentions are *rejected* as inadmissible for litigation in this proceeding: TC-1, EC-1, EC-2, EC-3, EC-4, and EC-5.

4. The parties are to file any request for an oral argument under 10 C.F.R. § 2.1109(a)(1) in accordance with the schedule established in Section III above.

5. In accordance with the provisions of 10 C.F.R. § 2.714a(a), as it rules upon an intervention petition, this Memorandum and Order may be appealed to the Commission within 10 days after it is served.

THE ATOMIC SAFETY
AND LICENSING BOARD[7]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 12, 1999

[7] Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant CP&L; (2) Intervenor BCOC; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage Installation)

July 27, 1999

MEMORANDUM AND ORDER
(Dismissing Contention Utah F/Utah P)

By motion filed July 13, 1999, Intervenor State of Utah (State) has requested that the Board dismiss contention Utah F/Utah P, with prejudice. This consolidated issue concerns the adequacy of training and certification of personnel for the proposed Skull Valley, Utah independent spent fuel storage installation (ISFSI) of Applicant Private Fuel Storage, L.L.C. (PFS). In its motion, the State declares that dismissal of this contention is appropriate because it is now moot. According to the State, it has settled its dispute with PFS in connection with this issue, as evidenced by an attached July 13, 1999 letter from PFS counsel outlining the terms of an agreement between the parties regarding contention Utah F/Utah P. The State also indicates that the NRC Staff supports its motion. *See* [State] Motion to Dismiss Utah Contentions F and P (July 13, 1999) at 1 [hereinafter State Motion to Dismiss]. No other party to this proceeding has filed a response objecting to, or otherwise commenting on, the State's request.

Under the terms of the settlement between the State and PFS relative to this issue, PFS has agreed to make language changes that incorporate six items into the Safety Analysis Report (SAR) accompanying its 10 C.F.R. Part 72 ISFSI application. These changes include SAR revisions indicating that PFS will use a training approach for its personnel that includes the five elements of the Systematic Approach to Training (SAT) set forth in 10 C.F.R. § 55.4; that PFS, to the extent it acts as a rail carrier from the existing main rail line to the PFS facility, will comply with applicable United States Department of Transportation (DOT) statutes and regulations and the rail carrier requirements of 49 U.S.C. Subtitles IV (Part A) and V and the associated implementing regulations in Title 49 of the *Code of Federal Regulations*; and that PFS, to the extent it acts as a motor carrier between the main rail line and the PFS facility, will comply with the DOT motor carrier requirements, including 49 U.S.C. Subtitle IV. Several of these items, however, are subject to a disclaimer, requested by the Staff and apparently not objected to by the State, that the PFS SAR commitment does not constitute a license condition or licensing commitment under any 10 C.F.R. Part 72 license issued for the PFS facility; does not render the commitment subject to 10 C.F.R. § 72.48; and does not obligate the Staff to enforce the requirements or undertake enforcement action with respect to a violation of the requirements under any 10 C.F.R. Part 72 license issued to PFS. *See* State Motion to Dismiss, unnumbered attach. at 1-3 (July 13, 1999 Letter from Paul Gaukler, Counsel to PFS, to Diane Curran, State Counsel).

After reviewing the State's motion and the accompanying attachment, and finding nothing therein that is inconsistent with the public interest,[1] we *grant* the State's July 13, 1999 motion to dismiss. Further, as requested by the State, contention Utah F/Utah P is *dismissed with prejudice*.

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[1] In granting the State's motion to dismiss, we express no opinion on the extent to which the Staff-requested disclaimers regarding the effect of incorporating the PFS commitments into the facility SAR may impact the Board's authority relative to any future attempt to enforce the agreement between PFS and the State.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD[2]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 27, 1999

[2]Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) Intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Thomas S. Elleman
Thomas D. Murphy

In the Matter of

Docket No. 50-029-LA-R
(ASLBP No. 99-754-01-LA-R)
(License Termination Plan)

YANKEE ATOMIC ELECTRIC COMPANY
(Yankee Nuclear Power Station)

July 28, 1999

In a proceeding involving the adequacy of a License Termination Plan (LTP) for the Yankee-Rowe reactor, where the Licensee seeks to withdraw its LTP and to substitute another one (using a modified survey methodology) at a future date, the Licensing Board grants the Licensee's motion and terminates the proceeding (except for matters pending before the Commission itself) without prejudice. The Licensing Board declines to impose termination conditions, such as reimbursement of fees and costs, sought by the Intervenors.

LICENSING BOARDS: DELEGATED AUTHORITY

Given the prior issuance of a Notice of Hearing, a licensing board has authority pursuant to 10 C.F.R. § 2.107(a) to permit a licensee to withdraw its application on "such terms as the [licensing board] may prescribe." Such terms may include, as appropriate, withdrawal with prejudice, the payment by the licensee of fees and costs of the intervenors, or the performance of requested discovery.

LICENSING BOARDS: DELEGATED AUTHORITY

The wording of 10 C.F.R. § 2.107, granting the Commission the authority to terminate a proceeding "with prejudice" prior to issuance of a Notice of Hearing, does not preclude a licensing board under its general termination authority from terminating "with prejudice" after issuance of a Notice of Hearing. *See Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125 (1981); *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 974 (1981).

RULES OF PRACTICE: TERMINATION OF PROCEEDING

Where contentions have been admitted but not yet litigated, dismissal of the proceeding with prejudice would amount to an adjudication on the merits of those contentions.

LICENSING BOARDS: JURISDICTION

Licensing boards lack jurisdiction to terminate a matter pending before the Commission itself. In addition, where rulings on intervenors' standing were those of the Commission, the licensing boa lacks jurisdiction to accord a "with prejudice" termination with respect to such standing rulings.

RULES OF PRACTICE: TERMINATION OF PROCEEDING

A licensee that has submitted an LTP cannot unilaterally withdraw that LTP when it disagrees with conditions imposed after litigation. That practice might subject the licensee to payment of fees and costs to the intervenors.

RULES OF PRACTICE: TERMINATION OF PROCEEDING

A licensing board has authority, in appropriate circumstances, to condition termination on the licensee's payment of fees and costs to the intervenors. But the prospect of a second proceeding, standing alone, is not a legally cognizable harm that would warrant payment of fees and costs. *See Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), LBP-82-81, 16 NRC 1128, 1135, 1140-41 (1982).

RULES OF PRACTICE: TERMINATION OF PROCEEDING

Although the licensing board would have authority to impose, as conditions of termination, the licensee's completion of its responses to discovery previously

submitted by intervenors and pending as of the date of the termination motion, such conditions are not warranted or appropriate in the present factual situation. Intervenors' request for further discovery relating to not-yet-admitted contentions is denied as being beyond the scope of the discovery rules.

MEMORANDUM AND ORDER
(Termination of Proceeding)

This proceeding concerns the adequacy of the License Termination Plan (LTP) submitted by Yankee Atomic Electric Company (YAEC or Licensee) for the Yankee Nuclear Power Station located in Rowe, Massachusetts. YAEC has withdrawn its current LTP, has indicated that it will file another substantially different LTP at a later undetermined date that could be a decade or more in the future, and has moved to terminate the proceeding.[1] For reasons hereafter set forth, we are granting the requested withdrawal and terminating the proceeding.

I. PROCEDURAL BACKGROUND

The procedural background to the Licensee's termination motion is set forth in our June 14, 1999 Memorandum and Order (Requesting Replies to NECNP Response to Termination Motion), LBP-99-22, 49 NRC 481. There, we determined that, pursuant to 10 C.F.R. § 2.107, the Licensing Board rather than the Commission should rule in the first instance on the termination motion, notwithstanding the circumstance that YAEC's motion to terminate was directed to the Commission. We also observed that the Intervenors, the New England Coalition on Nuclear Pollution (NECNP) and the Citizens Awareness Network (CAN), were opposing termination absent payment by the Licensee to the Intervenors of specified costs (including attorneys' fees) and performance by YAEC of certain discovery-related activities.[2] We invited replies to the NECNP/CAN proposals for payment and performance of specified tasks.

YAEC filed two responses to the NECNP/CAN proposals — the first accompanied by a motion for leave to reply (filed before we had issued LBP-99-22) and the second a supplemental response covering additional matters raised by

[1] Board Notification (Withdrawal of Application) and Motion To Terminate Proceeding and Dismiss Appeal, dated May 26, 1999 [Termination Motion].

[2] Intervenors' Opposition to Yankee Atomic Electric Company's [YAEC's] Motion to Terminate and Proposed Form of Order for Expenses, Fees and Responses to Discovery, dated June 7, 1999 [Motion for Conditions].

LBP-99-22.[3] The Franklin Regional Council of Governments (FRCOG) filed a response to LBP-99-22 on June 22, 1999 [FRCOG Reply]. CAN filed a reply on June 23, 1999 [CAN Reply]. NECNP's reply was filed on June 24, 1999 [NECNP Reply]. On June 29, 1999, YAEC filed a Motion for Leave to Reply to NECNP's and CAN's Replies, a motion that we *grant*.[4] Finally, on July 6, 1999, the NRC Staff filed its timely response to LBP-99-22, as well as to the replies or responses filed by various other parties [Staff Response]. Faced with the foregoing plethora of papers, we turn to the substance of the proposals before us.

II. THE NECNP/CAN PROPOSALS

As set forth in their June 7, 1999 proposal [''Motion for Conditions''], as well as their June 23, 1999 and June 24, 1999 replies, Intervenors are seeking, as a condition of termination, YAEC's payment of attorneys' fees and other costs of litigation. In addition, NECNP and CAN seek to have YAEC complete the discovery previously requested by NECNP or CAN and to have those responses and documents placed in the local public document room. Finally, they seek to have any termination be ''with prejudice'' insofar as it would affect the Commission's ruling as to their standing.

In support of this proposal, NECNP/CAN cite the extensive costs of litigating this proceeding that they have incurred. They state (backed by an affidavit specifying particular expenses and fees for which they are seeking reimbursement) that they have invested ''considerable time and money'' for ''over a year.''[5] They list costs and expenses of $15,603 and attorneys' fees of $44,254 (442.54 hours @$100/hour), for a total of $59,857.[6]

They claim that at the future date when a new LTP will likely be filed, their expenditures on this proceeding will have gone for naught: ''Intervenors will not likely be able to use any of the materials or experience they have assembled to date to tackle a new LTP submitted a decade from now.''[7] They assert that, pursuant to 10 C.F.R. § 2.107(a), and in the situation where, as here, the Board has issued a Notice of Hearing, we possess legal authority to condition the termination on YAEC's payment to Intervenors of such costs.

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[3] Motion of YAEC for Leave to Respond to Intervenors' ''Opposition to . . . Motion to Terminate [Etc.],'' dated June 14, 1999 [YAEC Reply-1]; ''Response of YAEC to LBP-99-22,'' dated June 17, 1999 [YAEC Reply-2]. We *grant* YAEC's request for us to accept for filing YAEC Reply-1.

[4] Motion for Leave to Reply (Intervenors' June 23, 1999, and June 24, 1999, Filings), dated June 29, 1999 [YAEC Reply-3].

[5] Motion for Conditions at 1-2.

[6] *Id.* at 2 n.1.

[7] *Id.* at 3.

In support of the requested reimbursement, Intervenors portray YAEC's termination as an attempt to impose as much monetary cost as possible on the Intervenors. They characterize the withdrawal as "untimely." They assert YAEC had knowledge of the MARSSIM protocols[8] more than 18 months earlier. Adoption of those protocols at this time caused the LTP to be abandoned, after Intervenors expended much time and effort on the proceeding.[9] "YAEC's decision to defer filing for an entire decade is plainly an attempt to avoid both this [Board's] jurisdiction of the matter and responding to the Intervenors' legitimate and serious issues . . . ."[10]

The Intervenors go on to assert that there has been extensive public interest in this proceeding and, in particular, in the information the Intervenors requested by way of discovery. (That information had not, as of the date of the termination motion, and has not as a result of such motion, yet been provided). The Intervenors also reference the hydrogeological information provided by them as one of the bases for their proposed environmental contentions,[11] to which (as a result of the termination) no parties have responded and on which we have not acted. (The Environmental Assessment giving rise to those contentions is based on the current LTP, leading us here to *dismiss* those proposed contentions as moot.) NECNP/CAN assert that "Intervenors (and the public) have not obtained any reassurances about the actual levels of contamination" at the site.[12] And they call upon YAEC to perform proper hydrogeological studies to fill this information gap. The discovery responses, studies, and documents may, in their view, be imposed as a condition pursuant to 10 C.F.R. § 2.107(a), and would be both provided to the Intervenors and filed in the Local Public Document Room.

III. RESPONSES TO NECNP/CAN PROPOSALS

Of the various other parties or participants, only FRCOG supports the termination conditions sought by NECNP/CAN. It characterizes the sought discovery responses as "particularly important" to FRCOG.[13]

YAEC strongly opposes the proposed termination conditions and seeks our termination of this proceeding "without prejudice." It questions whether we have authority to award costs as a termination condition. Even assuming such authority, it questions whether the costs and fees should properly be assessed in

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[8] NUREG-1575/EPA 402-R-97-106, Multiagency Radiation Survey and Site Investigation Manual (MARSSIM), dated December, 1997.

[9] Proposed Findings and Conclusions, attached to Intervenors' Motion for Conditions, ¶1.

[10] *Id.* ¶3.

[11] [NECNP's] Request for Permission to File Contentions and Contentions on the Inadequacy of NRC Staff's April 12, 1999 Environmental Assessment and Finding of No Significant Impact of Approval of the Yankee Nuclear Power Company's [LTP], dated May 17, 1999.

[12] Motion for Conditions at 4.

[13] FRCOG Reply at 4.

this proceeding. YAEC characterizes the expenses incurred by NECNP/CAN as the normal type of litigation expenses for which a party would not normally be reimbursed. And it opposes the sought discovery as inconsistent with the Rules of Practice, which limit the scope of discovery to admitted contentions. With respect to applicability to a new LTP, YAEC asserts that the admitted contentions based on the withdrawn LTP would not have any relevance. Finally, it asserts that standing must be tied to each proceeding; whether NECNP or CAN would organizationally qualify for standing regarding a new LTP, submitted many years into the future, would depend in part on the makeup and membership of the organizations at that time and whether any member would be affected by a new LTP.

The Staff for the most part takes a similar approach, favoring termination "without prejudice." The Staff agrees that standing is related to a particular proceeding. But it points out that no one has moved for the Commission to vacate its standing determination (CLI-98-21) and, accordingly, that decision remains on the books.

IV. LICENSING BOARD ANALYSIS

It is clear that the Licensing Board has authority, given its prior issuance of a Notice of Hearing, to permit YAEC to withdraw its application on "such terms as the [Licensing Board] may prescribe." 10 C.F.R. § 2.107(a). That Rule itself does not define the conditions that may be imposed, but it manifestly does not preclude either withdrawal with prejudice, or the payment of costs and fees, or the performance of the requested discovery activities as requirements of withdrawal.

A. Termination with Prejudice

YAEC first takes the position that we have no authority to terminate the proceedings "with prejudice." It cites the rule itself (10 C.F.R. § 2.107(a)) as permitting this result only when the Commission itself grants termination and then only prior to the issuance of a Notice of Hearing.

In our opinion, YAEC's reading of the rule is tenuous at best, as well as contrary to earlier decisions. Merely because the rule explicitly permits the Commission at an early stage of the proceeding ("prior to the issuance of a notice of hearing") to terminate "with prejudice" does not necessarily or even logically mean that the more general grant of authority to licensing boards acting after issuance of a Notice of Hearing does not include similar authority. At that stage of the proceeding, the licensing board has a more detailed knowledge of the scope of a proceeding than does the Commission and thus would be in a more appropriate position to evaluate whether a termination should be with prejudice (thus barring future relitigation of similar issues). In any event, the Appeal Board previously has sanctioned

a Licensing Board's exploration of the possibility of dismissal of a proceeding with prejudice. *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125 (1981). Further, the Appeal Board has explicitly confirmed a Licensing Board's authority under 10 C.F.R. § 2.107(a) to dismiss with prejudice where appropriate. *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 974 (1981).

But we need not here reach the legal scope of the rule, inasmuch as we find no value to the Intervenors (to the extent they seek a "with prejudice" dismissal) of such a dismissal, except perhaps with respect to the Commission's ruling on standing. Dismissal with prejudice would amount to an adjudication on the merits of the admitted contentions. *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), LBP-82-81, 16 NRC 1128, 1135 (1982). The contentions that we admitted were focused on the current LTP and alleged deficiencies and inadequacies therein; almost *per force* they could have no relevance to a future LTP based on a differing survey methodology.[14]

As for standing, the Commission's ruling in CLI-98-21 could be of utility to the Intervenors if they were to challenge a future LTP. As both the Staff and YAEC point out, however, standing is unique to every proceeding, depending in part on injury caused by a specific activity (such as an LTP), the identity of the person or group claiming to be affected thereby, and current judicial and administrative rulings on standing.[15] We also believe that a "with prejudice" termination with respect to standing would ignore the essential usefulness of standing to determine whether persons may have an actual interest in a particular proceeding.[16] Although the Commission could treat the termination as "with prejudice" with respect to its standing rulings, we lack authority to grant such a dismissal because CLI-98-21 was a ruling of the Commission itself.

However, we note that, as both the Staff and NECNP point out, there has thus far been no motion to vacate the standing rulings in CLI-98-21.[17] We believe that those rulings represent a useful discussion of the basic elements of standing and can serve as guidance to the boards and litigants generally as to the proper scope of requirements for standing. For that reason, we believe that the best course here would be for the Commission to let stand its decision in CLI-98-21 and for the Board to refrain from imposing a "with prejudice" termination with respect to standing.

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[14] We express no opinion with respect to YAEC's termination motion insofar as it seeks dismissal of YAEC's appeal to the Commission without prejudice. We lack jurisdiction to consider that motion, or the Intervenors' attempt to have the appeal dismissed with prejudice. That motion is currently before the Commission.

[15] YAEC Reply-2 at 2-3; Staff Response at 6-7 & n.8. The Staff points out instances where the Commission has not required a full demonstration of standing by parties seeking to intervene in proceedings related to one in which they have been admitted. Staff Response at 6.

[16] Even though the scope of a proceeding on a future LTP is likely to be similar to the scope of this proceeding, the makeup of the intervening organizations may well change.

[17] NECNP Reply at 3; Staff Response at 5-6.

B. Reimbursement of Fees and Costs

The heart of the NECNP/CAN proposals is their request that termination be conditioned on reimbursement to them of their costs and fees of participation. YAEC asserts that it is doubtful that the Commission has authority to condition withdrawal on the payment of fees and expenses. It states that we could not order YAEC to pay fees and expenses and there is "grave doubt" whether we could condition withdrawal on such payment, citing an early decision in *Pacific Gas and Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 54 (1983). It adds that the Commission has never awarded such fees and costs. It goes on to demonstrate why, even if we had the authority, imposing costs and fees as a condition of withdrawal would be inappropriate.

According to YAEC, the payment of litigation expenses as a condition of termination without prejudice is limited to cases in which the intervenor has already prevailed on specific aspects of the application (which has not happened here). YAEC distinguishes the cases cited by NECNP/CAN as based on the Federal Rules of Civil Procedure, which are not applicable here, and as premised on civil litigation, where different factors are involved, particularly a lack of the public interest function that governs NRC proceedings. Finally, YAEC characterizes the result of withdrawal as a victory for the Intervenors, producing the result that they explicitly sought.[18]

YAEC's analogies are not entirely appropriate. In the first place, the Intervenors are seeking not to defeat the LTP (as YAEC claims) but rather to ensure that whatever LTP might be adopted includes provisions that would protect its interests. To assert, as does YAEC, that it could withdraw any LTP with which it does not entirely agree and thereafter replace it with another is essentially to claim that the hearing process can and should be ignored. The Commission has emphatically ruled to the contrary:

> The Commission [finds] it "appropriate" . . . "to use the [license] amendment process for approval of termination plans, including the associated opportunity for a hearing, *to allow public participation on the specific order required for license termination*"
>
> . . . .
>
> . . . If the LTP were approved despite a failure to satisfy the requirements of 10 C.F.R. § 50.82(a)(9)(ii), then the subsequent implementation of the LTP and termination of the POL could result in the inappropriate release of a site that still poses a threat to public health and safety . . . a decision [denying YAEC's request for approval of the LTP] would necessarily conclude that the LTP did not comply with 10 C.F.R. § 50.82(a)(9)(ii) and/or (10), and would require Yankee Atomic to draft the LTP in a way that would satisfy the requirements of those regulations . . . [emphasis supplied].

[18] YAEC Reply-1 at 4.

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 196, 209-10 (1998).

Moreover, another Licensing Board determination appears to find authority for payment of fees and costs in appropriate circumstances, based in part on an Appeal Board observation in *North Coast*, ALAB-662, *supra*, 14 NRC at 1135 n.11. *See Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), LBP-82-81, 16 NRC 1128, 1140-41 (1982) (finding payment of attorneys' fees to be authorized although unwarranted in the particular circumstance). As that Board remarked, "[i]s there something about money that takes reimbursement of litigation expenses out of the bank of possible conditions available to avoid legal harm to an adversary?" *Id.* at 1140. The Board ruled that "[t]he absence of specific statutory authority does not prevent boards from exercising reasonable authority necessary to carry out its responsibilities and a money condition is not necessarily barred from consideration." *Id.* We find that authority to be persuasive and will treat reimbursement of costs and expenses as a condition that, if warranted, we could impose under 10 C.F.R. § 2.107(a).

To determine whether litigation fees and expenses should be reimbursed, we would have to find that there has been legal harm to the Intervenors caused by some activity or action of the Licensee. The prospect of a second proceeding, standing alone, is not a legally cognizable harm. *Perkins*, LBP-82-81, *supra*, 16 NRC at 1135.

The Intervenors, however, seemingly perceive that YAEC's withdrawal at this time was designed both to cause NECNP/CAN added expenses by requiring duplicative expenses for them to protect their interests at some future date and to permit YAEC in the future to confront a different Licensing Board more inclined than are we to accept their presentations on various issues. In short, they portray YAEC's withdrawal at this time as a type of forum shopping.

In our view, the inferences drawn by NECNP/CAN are unwarranted. YAEC appears to have valid, if not compelling, reasons for not withdrawing its current LTP until this time. The major expressed reason for the withdrawal — the planned substitution of site survey methodologies — was based on the release of the MARSSIM methodology in December 1997. This methodology had been jointly developed by numerous federal agencies called upon to conduct site surveys — the Environmental Protection Agency, Department of Energy, Department of Defense, as well as NRC — and thus would avoid some of the multiagency criticism to which the earlier methodology in NUREG/CR-5849 [5849] had been subject. According to YAEC, the Commonwealth of Massachusetts also concurs in the use of the MARSSIM technology. According to YAEC, "MARSSIM is considered to be more rigorous than the 5849 methodology, and it enjoys a universality of approval that the 5849 Methodology never apparently achieved." YAEC Reply-1 at 2.

The MARSSIM methodology is both lengthy and complex — its text is more than an inch of double-sided pages. It is not surprising to us that it took YAEC almost 18 months to determine that it would incorporate it into its LTP and would require a new LTP based on the complexities involved. Moreover, under NRC regulations, YAEC is permitted to withhold filing of any LTP until 2 years prior to license termination, which is not predicted to take place for many years — "at least a decade," according to YAEC (Termination Motion at n.1). *See also* 10 C.F.R. § 50.82(a)(9)(i).

It may be true that YAEC's withdrawal of its current LTP at this time may result in the Intervenors' expending more in total than they otherwise would have spent in litigating the adequacy of the current LTP. The opposite may also be true — Intervenors may find less fault with a new LTP than they do with the current one. Further, although YAEC may not have agreed with all the rulings of this Board, we find no evidence at all to indicate that their withdrawal of the current LTP was motivated by forum shopping.

In any event, the litigation fees and costs for which NECNP/CAN seek reimbursement seem to be no more than the legitimate expenses of litigating a complex proceeding, for which a party would not normally be reimbursed. We believe that YAEC did not take steps that would have reduced costs to Intervenors — such as awaiting the outcome of its motion for reconsideration of Contention 4 prior to its filing of an appeal of all contentions to the Commission. (We would have postponed the effective date of our decision on contentions to permit YAEC to seek reconsideration of one of them and nonetheless preserve its appellate rights.) But YAEC complied with all regulatory requirements in this regard. Given our view that there has been no substantial evidence brought to our attention that YAEC intentionally caused the Intervenors to suffer unwarranted or unusual litigation costs, we are hereby denying as unwarranted the NECNP/CAN request for us to condition termination on reimbursement of fees and costs.

C. Continuation of Discovery

As a condition of termination, NECNP/CAN would have us require YAEC to complete its responses to the Intervenors' interrogatories and requests for documents that were pending on the date of the termination motion and to provide the results to the Intervenors and to the NRC for placement in the local public document room. Further, the Intervenors ask us to order YAEC to undertake hydrogeological studies in response to the Intervenors' conclusions set forth as a basis for their proposed contentions on the environmental assessment (which, earlier in this Order, we have dismissed as moot).[19]

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[19] Motion for Conditions at 12, 13.

As summarized earlier, FRCOG strongly supports the discovery-related conditions for termination. YAEC and the Staff each oppose their adoption. We conclude that, although we would have the authority under 10 C.F.R. § 2.107 to condition termination on YAEC's performance of the requested discovery-related conditions, the proposed conditions are not warranted or appropriate in the present factual situation.

Discovery, of course, is peculiarly related to particular proceedings and particular contentions. In a proceeding of this type, discovery is not available absent a Licensing Board's approval of particular contentions. 10 C.F.R. § 2.740(b). The scope of discovery is confined to the contentions that have been admitted.

In the context of this proceeding, the Licensee would have been required to respond to such discovery requests as are "relevant to the subject matter involved in the proceeding" — i.e., admitted contentions with respect to the Licensee's LTP under review.[20] Information and documents that may be relevant to a new LTP to be submitted some time in the future are manifestly not relevant to the subject matter of *this* proceeding. (To the same effect, the information and documents requested here could not under present rules be relevant to a new LTP that is not under consideration at this time.)

We note that, in one proceeding, a Licensing Board conditioned the termination of a proceeding on the preservation by the applicant (for a construction permit) of discovery documents. *See Pacific Gas and Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 53 (1983). In that case, the parties had undertaken extensive discovery involving production of in excess of a million and a half documents. The applicant itself had proposed the preservation of discovery documents for a reasonable period of time.

The facts in *Stanislaus* are distinguishable from those now before us. Documents already produced were involved, rather than documents for which a request has been filed. Given the likelihood of the same construction-permit application being refiled in the foreseeable future, and given the concurrence of the applicant and Staff in the proposal, the condition was believed by the Licensing Board to serve a legitimate and useful purpose.

In contrast, requiring the not-yet-undertaken discovery responses requested by the Intervenors here as a condition of termination would not appear to serve any useful purpose in this proceeding and would not be authorized with respect to a future proceeding. We are thus denying the request.

Intervenors' request for hydrogeological studies is, in the context of NRC's discovery rules, even less warranted than the other discovery requests. The studies being sought would be in response to scientific opinions expressed as a basis for proposed contentions on which we have never ruled, and which we are dismissing

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[20] 10 C.F.R. § 2.740(b)(1). We express no opinion as to the propriety of any of the particular discovery requests for which NECNP/CAN as well as FRCOG seek responses.

as moot by this Order. The studies would be outside the scope of the discovery rules because they would not even bear on an admitted contention. We are accordingly denying the Intervenors' request for hydrogeological studies.

Finally, Intervenors have set forth public-interest reasons why the discovery they seek and the studies they wish to have performed should be included as a termination condition. We, however, can find no justification for granting a discovery request that is essentially outside the scope of the discovery rules governing this proceeding.

V. CONCLUSION

Intervenors in this proceeding have played a useful role in pointing out possible deficiencies in the LTP before us. We commend their efforts in doing so. However, the proceeding has not yet progressed to the stage at which we could ascertain the legitimacy of their claims. YAEC has now withdrawn the LTP, for an expressed rationale that we find reasonable if not compelling and possibly premised in part on the criticisms raised by the Intervenors. We are accordingly granting YAEC's termination motion without prejudice and without imposing any conditions.[21]

VI. ORDER

For the reasons set forth above, it is, this 28th day of July 1999, ORDERED:

1. The Intervenors proposed late-filed contentions, dated May 17, 1999, are hereby *dismissed* as moot.

2. The Licensee's motions for us to accept for filing its replies dated June 14, 1999 (YAEC Reply-1) and June 29, 1999 (YAEC Reply-3), and the Intervenors' requests for us to accept for filing their replies dated June 23 and 24, 1999 (CAN reply; NECNP Reply) are hereby *granted.*

3. Intervenors' Motion for Conditions, dated June 7, 1999, is hereby *denied.*

4. The motion of YAEC to terminate this proceeding without prejudice is hereby *granted.* (To the extent YAEC's termination motion seeks dismissal of its appeal to the Commission, that matter is still pending before the Commission and is subject to Commission action.)

5. This Memorandum and Order is effective immediately and will become the final order of the Commission in this matter forty (40) days after its issuance date

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[21] In submitting an LTP in the future (which it is required by regulation to do), the Licensee may wish to preclude or limit further litigation of the type involved here by consulting interested persons (including representatives of NECNP, CAN, and FRCOG) prior to such submission. Consultation among the parties in the case of the LTP being reviewed here might have been preferable to litigation as a means of resolving the questions raised by the contentions. In that regard, certain of the contentions appear to us to have focused on the clarity of the LTP rather than upon its substance and thus might have been resolved through minor negotiation.

unless any party petitions for Commission review in accordance with 10 C.F.R. § 2.786, or unless the Commission takes review sua sponte. Any party may file a petition for review within fifteen (15) days of service of this Memorandum and Order, conforming to the requirements set forth in 10 C.F.R. § 2.786(b).

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dr. Thomas S. Elleman (by CB)
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 28, 1999

Directors' Decisions Under 10 CFR 2.206

DIRECTORS' DECISIONS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of **Docket No. 50-245**
(License No. DPR-21)

NORTHEAST NUCLEAR ENERGY COMPANY
(Millstone Nuclear Power Station, Unit 1)

July 27, 1999

In an August 21, 1995 petition request, as supplemented August 28, 1995, Mr. George Galatis and We the People, Inc. (the Petitioners) asserted that (1) the Northeast Nuclear Energy Company (NNECO or Licensee) had knowingly, willingly, and flagrantly operated Millstone Unit 1 in violation of its licensing basis; (2) two license amendments for Millstone Unit 1 were based on material false statements made by NNECO in documents submitted to the NRC; and (3) the Petitioners asserted that the license amendment proposed in a letter dated July 28, 1995, should be denied and the Licensee should be required to operate in full conformance with License Amendment No. 40.

On the basis of these assertions, the Petitioners requested that the NRC (1) institute a proceeding under 10 C.F.R. § 2.202 to suspend the license for Millstone Unit 1 for a period of 60 days after the unit is brought into compliance with the licensing and design bases; (2) revoke the operating license until the facility is in full compliance with the terms and conditions of its license; (3) perform a detailed independent analysis of the offsite dose consequences of the total loss of spent fuel pool water; and (4) take enforcement action pursuant to 10 C.F.R. §§ 50.5 and 50.9.

In the supplement, the Petitioners made additional assertions that (1) Millstone Units 2 and 3 and Seabrook Unit 1 were operated in violation of their licenses by offloading fuel to the respective spent fuel pools contrary to applicable license requirements; (2) at Millstone Unit 3, there is a material false statement in a

previous license amendment submittal and there is an unanalyzed condition in the licensing basis regarding system piping; and (3) at Seabrook Unit 1, there is a license violation regarding the spent fuel pool criticality analysis.

In this Director's Decision it was noted that because the Licensee had decided to decommission Millstone Unit 1, the Petitioners' request to suspend the operating license of Millstone Unit 1 was in effect partially granted. The NRC had documented its technical review of full core offload issues at Millstone Units 1, 2, and 3 and Seabrook Unit 1 in its December 26, 1996 Partial Director's Decision (DD-96-23, 44 NRC 419) to the Petitioners. This review showed that Millstone Units 1 and 3 and Seabrook Unit 1 could safely offload all the fuel in each of the reactors, and that Millstone Unit 2 was not routinely performing full core offloads. Further, the NRC took enforcement action against the Licensee for providing inaccurate information in a license amendment submittal, in effect partially granting the Petitioners' request for enforcement action.

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

I. INTRODUCTION

On August 21, 1995, George Galatis and We the People, Inc. (Petitioners), filed a petition with the Executive Director for Operations of the U.S. Nuclear Regulatory Commission (NRC) pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206). A supplement to the petition was submitted on August 28, 1995. These two submittals will hereinafter be referred to as the "Petition."

The petition raised three issues regarding the Millstone Nuclear Power Station, Unit 1 (Millstone Unit 1), operated by Northeast Nuclear Energy Company (NNECO or the Licensee). First, the Petitioners asserted that the Licensee has knowingly, willingly, and flagrantly operated Millstone Unit 1 in violation of License Amendment Nos. 39 and 40. Specifically, Petitioners asserted that NNECO had offloaded more fuel assemblies into the Millstone Unit 1 spent fuel pool (SFP) during refueling outages than permitted under these license amendments. Second, Petitioners asserted that License Amendments Nos. 39 and 40 for Millstone Unit 1 are based on material false statements made by the Licensee in documents submitted to the NRC. Third, Petitioners asserted that the license amendment proposed by the Licensee under cover of a letter dated July 28, 1995, regarding offloading of the entire core of spent fuel assemblies at Millstone Unit 1, should be denied and the Licensee should be required to operate in full conformance with License Amendment No. 40.

On the basis of these assertions, the Petitioners requested that the NRC (1) institute a proceeding under 10 C.F.R. § 2.202 to suspend the license for the Millstone Unit 1 facility for a period of 60 days after the unit is brought into compliance with the licensing basis and the design basis, (2) revoke the operating license for the Millstone Unit 1 facility until it is in full compliance with the terms and conditions of its license, (3) perform a detailed independent analysis of the offsite dose consequences of the total loss of SFP water, before reinstatement of the license, and (4) take enforcement action against NNECO pursuant to 10 C.F.R. §§ 50.5 and 50.9. Finally, Petitioners requested that the proposed license amendment sought by NNECO be denied.

In the supplement to the petition dated August 28, 1995, the Petitioners made additional assertions in support of their first and third issues. Specifically, in support of Issue 1, the Petitioners asserted that the Licensees for Millstone Units 2 and 3 and Seabrook Unit 1 also performed full core offloads in violation of their licenses. In support of Issue 3, the Petitioners asserted that there is a material false statement in a submission used to support a previous Millstone Unit 3 license amendment request, and that there is an unanalyzed condition in the Millstone Unit 3 Updated Final Safety Analysis Report in that system piping had not been analyzed for the full core offload normal end-of-cycle event. Also, with regard to Seabrook Station Unit 1, the Petitioners asserted that there are Technical Specification violations related to criticality analysis and gaps in Boraflex material.

By letter dated October 26, 1995, the NRC informed the Petitioners that the petition had been referred to the Office of Nuclear Reactor Regulation pursuant to 10 C.F.R. § 2.206 of the Commission's regulations for preparation of a response. The NRC also informed the Petitioners that the NRC Staff would take appropriate action within a reasonable time regarding the specific concerns raised in the petition. Additionally, the NRC Staff informed the Petitioners that their request with regard to issues associated with the requested license amendment (i.e., Petitioners' third issue) was not within the scope of section 2.206 and thus was not appropriate for consideration under section 2.206.

In a Partial Director's Decision (DD-96-23, 44 NRC 419) dated December 26, 1996, the Staff documented its technical review of the full core offload issue at Millstone Units 1, 2, and 3 and Seabrook Unit 1. The Staff concluded that Millstone Units 1 and 3 and Seabrook Unit 1 could safely offload full cores. Additionally, the Staff found that Millstone Unit 2 was not routinely performing full core offloads as asserted by the Petitioners. However, the Staff's followup of SFP issues raised by the Petitioners led, in part, to the identification of a broad spectrum of configuration management concerns that had to be corrected before the Commission allowed restart of any Millstone unit.

On August 14, 1996, the NRC Staff issued a Confirmatory Order establishing an Independent Corrective Action Verification Program (ICAVP) for each Millstone unit to ensure that the plant's physical and functional characteristics were in

conformance with its licensing and design basis. The ICAVP was performed and completed for Millstone Units 2 and 3 to the satisfaction of the NRC before the Commission allowed the plants to restart.[1] To the extent that Millstone Unit 1 permanently ceased operation, as stated in the Partial Director's Decision, the Staff determined that the Petitioners' requests for suspension and revocation of the Millstone Unit 1 operating license was partially granted. The Staff further stated that it had evaluated spent fuel accidents beyond the design bases and, to this extent, the Petitioners' request to perform analyses of such accidents was also partially granted.

In the Partial Director's Decision, the Staff stated that since the Petitioners' letter of August 28, 1995, contained assertions relating to the third issue (that the license amendment proposed by the Licensee under cover of a letter dated July 28, 1995, should be denied) and that the issue was not appropriate for consideration under section 2.206, the Staff would forward its findings to the Petitioners by separate correspondence. In a letter to the Petitioners dated July 1, 1999, the Staff addressed these assertions.

In the Partial Director's Decision, the Staff stated that it was still considering the Petitioners' assertions that the Licensee knowingly, willingly, and flagrantly operated Millstone Unit 1 in violation of License Amendment Nos. 39 and 40 and submitted material false statements to obtain License Amendment Nos. 39 and 40 (as they support the Petitioners' fourth request). As explained below, the NRC Staff has taken actions that, in part, grant the Petitioners' request.

II. DISCUSSION

B. Request for Enforcement Action Against NNECO Pursuant to 10 C.F.R. §§ 50.5 and 50.9

The Petitioners based their requests on their assertion that the Licensee has knowingly, willingly, and flagrantly operated Millstone Unit 1 in violation of License Amendments Nos. 39 and 40 and that License Amendment Nos. 39 and 40 for Millstone Unit 1 are based on material false statements. Specifically, the Petitioners stated that the Licensee conducted full core offloads as a routine practice when its licensing basis analyses assumed one-third core offloads as the normal refueling practice. In their supplemental letter of August 28, 1995, the Petitioners asserted that the Licensees for Millstone Units 2 and 3 and Seabrook Unit 1 also performed full core offloads in violation of their licenses. The Petitioners further contend that the Licensee's actions subjected the public to an unacceptable risk.

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[1] The Staff notes that by letter dated July 21, 1998, the Licensee informed the NRC of its decision to permanently shut down Millstone Unit 1. Upon the permanent shutdown of Millstone Unit 1, the Staff determined that the requirement to perform an ICAVP at Millstone Unit 1 was no longer necessary.

As explained in the Partial Director's Decision, the Staff concluded that Millstone Units 1 and 3 and Seabrook Unit 1 could safely offload full cores. Additionally, the Staff found that Millstone Unit 2 was not routinely performing full core offloads as asserted by the Petitioners.

In a letter to the Licensee dated May 25, 1999, regarding a Notice of Violation and Exercise of Enforcement Discretion, the Staff stated that it had completed the investigations concerning the performance of fuel offloads at Millstone Unit 1. Regarding the Petitioners' assertion concerning the Millstone Unit 1 full core offload practice, the NRC has drawn a distinction between routinely conducting full core offloads and conducting any offloads before the delay times assumed in the Final Safety Analysis Report (FSAR). The NRC has concluded that enforcement action is not warranted at Millstone Unit 1 and other nuclear facilities for conducting full core offloads on a routine basis. The NRC determined that the use of the terms "abnormal" and "emergency" in describing the full core offload scenario in the FSAR did not appear to be presented by the Licensee or understood by the Staff as a commitment to limit the frequency with which full core offloads were conducted at Millstone Unit 1. In this regard, the Licensee informed the NRC Staff of its practice of offloading the full core at Millstone Unit 1 in a meeting on June 16, 1988, associated with the License Amendment No. 40 request pertaining to SFP reracking. Further, although the analytical constraints and assumptions for the full core offload were generally less restrictive than those for a partial core offload, in licensing actions (typically rerack amendments) for nuclear plants, including Millstone Unit 1, the NRC found the plant design for removing the full core acceptable. Finally, as a way of addressing shutdown risk, the NRC encouraged, and still does, the practice of full core offloads. Thus, consistent with the conclusions drawn for all other plants that routinely performed full core offloads, enforcement is not being proposed for the Millstone Unit 1 full core offloading practices.

The Staff's followup of spent fuel pool issues raised by the Petitioners, however, led, in part, to the identification of a broad spectrum of configuration management concerns that had to be corrected before the Commission allowed restart of any Millstone unit. On the basis of information developed during the investigation by the NRC's Office of Investigations, the NRC cited the Licensee for four violations of NRC requirements. Specifically, the NRC determined that, in careless disregard of NRC requirements, the Licensee (1) performed both partial and full core offloads before the delay times assumed in the FSAR without the appropriate engineering analysis, (2) utilized unapproved and unanalyzed system configurations to augment SFP cooling during refueling outages, without procedures to govern those activities, and (3) in two instances, submitted incomplete and inaccurate information to the NRC (violations of 10 C.F.R. § 50.9(a)) related to the performance of fuel offloads that were actually commenced before the delay times assumed in the analysis submitted to the NRC.

In its May 25, 1999 letter transmitting the Notice of Violation, the NRC also stated that these violations, which existed for a long time, appeared to be the result of the deficient safety culture, which contributed to the shutdown of all three Millstone units for an extended period and resulted in a number of other violations for which the NRC issued a $2,100,000 civil penalty to the Licensee on December 10, 1997. That penalty was based, in part, on (1) the Licensee's failure to ensure that the plant was maintained in the configuration as designed and specified in the licensing basis and (2) the Licensee's failure to promptly correct nonconforming conditions. The NRC concluded that the failure of Licensee management to establish standards to ensure that the plant was maintained and operated as designed, and to ensure that nonconforming conditions were promptly identified and corrected, constituted careless disregard of requirements. As such, the violations that resulted from that deficient safety culture, which fostered such disregard, were considered wilful in accordance with the ''General Statement of Policy and Procedures for NRC Enforcement Actions NUREG-1600'' (Enforcement Policy).

In its May 25, 1999 letter, the NRC further stated that in consideration of (1) the undesirable consequences of performance of unanalyzed core offloads and the Licensee's failure to ensure that SFP heat removal was conducted in accordance with approved procedures, (2) the significance of the Licensee's providing incomplete and inaccurate information to the NRC, and (3) the significance that the NRC places on careless disregard of its requ[illegible] the four violations had been classified, in the aggregate, as a Severe[illegible]ation in accordance with the NRC Enforcement Policy. For the [illegible] its letter of May 25, 1999, the Staff exercised enforcement d[illegible] not issue a civil penalty for the violations. In its letter, the [illegible]at discretion is appropriate because the Licensee already implemented [illegible]ve actions to address the underlying performance problems at Millstone and further enforcement action is not necessary to achieve additional remedial actions.

In their petition, the Petitioners requested that the NRC take enforcement action against the Licensee pursuant to sections 50.5 and 50.9. Although not specifically for the reasons cited by the Petitioners (the Petitioners based their requests on their assertion that the Licensee has knowingly, willingly, and flagrantly operated Millstone Unit 1 in violation of License Amendment Nos. 39 and 40 and that License Amendment Nos. 39 and 40 for Millstone Unit 1 are based on material false statements), the NRC did find that in two instances the Licensee submitted incomplete and inaccurate information to the NRC related to the performance of fuel offloads that were actually being commenced before the delay times assumed in the analysis submitted to the NRC. Therefore, for the reasons previously given, the NRC's actions constitute a partial granting of the Petitioners' request regarding enforcement action pursuant to sections 50.5 and 50.9.

III. CONCLUSION

The Staff has completed the investigations concerning the performance of fuel offloads at Millstone and has taken enforcement action as outlined in its letter and Notice of Violation to the Licensee dated May 25, 1999. Therefore, to this extent, Petitioners' request for enforcement action against NNECO pursuant to sections 50.5 and 50.9 is partially granted.

As provided in 10 C.F.R. § 2.206(c), a copy of this Final Director's Decision will be filed with the Secretary of the Commission for the Commission's review. This Final Director's Decision will constitute the final action of the Commission (for Petitioners' Request 4) 25 days after its issuance, unless the Commission, on its own motion, institutes review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Samuel J. Collins, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 27th day of July 1999.