

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-23-03

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chair
Dr. Gary S. Arnold
Nicholas G. Trikouros

In the Matter of

CAMMENGA AND ASSOCIATES, LLC

(Denial of License Amendment Requests)

Docket No. 030-38679-LA

ASLBP No. 21-972-01-LA-BD01

February 28, 2023

MEMORANDUM AND ORDER

(Approving Settlement Agreement and Terminating Proceeding)

In a license amendment application submitted in December 2020, Cammenga and Associates, LLC (Cammenga) sought Nuclear Regulatory Commission (NRC) approval to expand its existing authorization under 10 C.F.R. Parts 30 and 32 to distribute various tritium sealed-source self-luminous consumer products (such as compasses and knives) to include new multi-tool devices.¹ The NRC Staff's consideration of Cammenga's request resulted in July 2021 in the Staff's denial of the amendment application and a Cammenga hearing request challenging that Staff action.² Pending before the Licensing Board is a January 26, 2023 joint

¹ See Letter from Christopher (CJ) Karchon, Vice President, Cammenga, to Office of Federal and State Materials and Environmental Management Programs (FSME), NRC (Dec. 30, 2020) (nonpublic) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML21006A199) [hereinafter December 2020 Amend. Application]. This amendment application, along with several other documents cited in this decision, are being treated as nonpublic because they contain information that Cammenga asserts is proprietary. See, e.g., id., unnumbered attach. 1 (Aff. of Christopher J. Karchon (Dec. 30, 2020)).

² See Letter from Kevin Williams, Division Director, Office of Nuclear Materials Safety and Safeguards (NMSS), to Christopher Karchon, Director of Strategic Initiatives, Cammenga,

motion from Cammenga and the NRC Staff asking the Board to (1) approve an attached proposed settlement agreement specifying thirty-seven designs for self-luminous multi-tool devices that Cammenga will be allowed to distribute to members of the general public; and (2) terminate this proceeding.³

For the reasons set forth below, pursuant to 10 C.F.R. § 2.338(i), we grant the parties' joint motion; approve the January 26, 2023 settlement agreement, a copy of which is attached to this issuance as Appendix A; and terminate this proceeding.

I. BACKGROUND

As outlined in 10 C.F.R. §§ 30.19, 32.22, and 32.210, an entity seeking to manufacture self-luminous products that contain tritium or to initially distribute such products for use by persons "exempt" from NRC licensing must apply for an NRC license and a certificate of registration that the NRC may issue after evaluating applicant-provided radiation safety information regarding the product.⁴ In early 2020 when it first began seeking agency permission

encl. (July 1, 2021) ([Cammenga] Denial of Application Dated December 30, 2020, Basis for Denial) (ADAMS Accession No. ML21139A100) [hereinafter Staff Amend. Denial]; Hearing Request (July 20, 2021) [hereinafter Cammenga Hearing Request]. Although the NRC Staff references other Cammenga license amendment applications and associated submissions, see infra notes 6–7 and accompanying text, Cammenga's December 30, 2020 application is the focus of the Staff's July 1, 2021 denial action, see Staff Amend. Denial at 1–2.

³ See Joint Motion to Approve Proposed Settlement Agreement and Terminate Proceeding (Jan. 26, 2023) [hereinafter Joint Settlement Motion]. Included with the parties' joint motion and referenced in this decision are a proposed settlement agreement and a draft consent order. See id. attach. A (Proposed Settlement Agreement) [hereinafter Settlement Agreement]; id. attach. B (Consent Order) [hereinafter Consent Order].

⁴ Section 30.19 exempts from NRC licensing any person who obtains a self-luminous product containing tritium that is manufactured, produced, or initially transferred by an entity holding a specific license issued under section 32.22. See 10 C.F.R. § 30.19(a). That section also requires an entity wishing to manufacture, produce, or initially transfer such a product to obtain both a section 32.22 license and a section 32.210 registration certificate. See id. § 30.19(b).

As the NRC Staff observed in its answer to the Cammenga hearing request, a license under section 32.22 that authorizes the transfer of self-luminous products to an "exempt" person

to distribute additional self-luminous products, Cammenga held both a section 32.22 exempt distribution license and a section 32.210 registration certificate authorizing the distribution of the VERSA series of self-luminous consumer products containing tritium sealed-sources.⁵ With its February 2020 license amendment application, Cammenga requested that it be given authorization for the exempt distribution of multi-tool devices based on twenty new designs.⁶

After conducting its acceptance review and receiving requested information from Cammenga in April 2020 in the form of an application supplement, the NRC Staff advised Cammenga in October 2020 that it was suspending its review because the application did not

is sometimes described as an “exempt distribution” license, but such an exemption from licensing “does not apply to tritium . . . used in products primarily for frivolous purposes or in toys or adornments.” NRC Staff’s Answer to Hearing Request of [Cammenga] (Aug. 16, 2021) at 1 n.1 (quoting 10 C.F.R. § 30.19(c)) [hereinafter Staff Answer]. And as the Staff also noted, the Commission has promulgated a Consumer Product Policy Statement that describes the criteria for evaluating whether consumer products should be approved for distribution and use by the general public without imposing regulatory controls on consumer users. See id. at 2 (citing Commission Product Policy Statement, 79 Fed. Reg. 2907 (Jan. 16, 2014)). In this regard, the Commission’s policy statement indicates that while it applies directly to any potential rulemaking to add or modify licensing exemptions that cover consumer products and usually “does not apply to individual licensing actions involving such products,” it nonetheless can be used for additional direction in licensing actions approving specific products “when there is a need for interpretation or judgment” to ensure consistency with the policy statement. 79 Fed. Reg. at 2908.

⁵ Although there is some uncertainty about exactly when Cammenga submitted its initial license application, see infra note 6, as it is pertinent here, the Cammenga licenses that were operative in that time frame all had essentially the same provisions. See NRC Form 374, Materials License, License No. 21-26460-03E, Amend. No. 10, at 1–2 (Aug. 19, 2019) (indicating licensee Cammenga is authorized to distribute to exempt persons compasses and knives manufactured in accordance with NRC sealed-source and device (SS&D) registration certificate No. NR-0210-D-101-E and listing the VERSA series as among series of self-luminous products licensee is authorized to distribute) (ADAMS Accession No. ML19231A175); id., Amend. No. 11, at 1–2 (Feb. 26, 2020) (same) (ADAMS Accession No. ML20056C690); id., Amend. No. 12, at 1–2 (Mar. 3, 2020) (same) (ADAMS Accession No. ML20063L571).

⁶ See Letter from Christopher (CJ) Karchon, Vice President, Cammenga, to FSME, NRC, unnumbered attach. 9 (Feb. 18, 2020) (Model Information/Device List) (nonpublic) (ADAMS Accession No. ML20079D918). We note as well that some attachments to Cammenga’s February 18, 2020 application letter have dates other than February 18, including an affidavit dated March 10, 2020, that was provided in support of Cammenga’s request that its application should not be publicly available. See id., unnumbered attach. 1 (Aff. of Christopher J. Karchon (Mar. 10, 2020)). Nonetheless, for the sake of consistency we refer to Cammenga’s initial amendment request as its February 2020 application.

contain the required information.⁷ The Staff also indicated that Cammenga could resubmit its application with additional information, which Cammenga did in December 2020, requesting authorization for the exempt distribution of multi-tool devices based on more than 3600 new designs.⁸ This triggered a Staff request for additional information (RAI), to which Cammenga responded in April 2021.⁹ Ultimately, however, in a July 1, 2021 letter the Staff denied Cammenga's amendment request, concluding that "[t]he introduction of tritium into the product, and its subsequent distribution, may result in widespread use of radioactive materials and does not have a clear tangible benefit to the public." Staff Amend. Denial, encl. at 2.

In its denial letter, the NRC Staff advised Cammenga that it could seek a hearing to challenge the denial action within twenty days, which Cammenga did by filing a hearing request on July 20, 2021. See id. at 1; Cammenga Hearing Request at unnumbered p. 1. Acting on a referral by the Secretary of the Commission, the Chief Administrative Judge on July 29, 2021, empaneled this Licensing Board to preside over the adjudication of Cammenga's hearing

⁷ See Letter from David Alley, Branch Chief, NMSS, NRC, to Christopher Karchon, Vice President, Cammenga at 1–2 (Apr. 6, 2020) (ADAMS Accession No. ML20085G069); Letter from Christopher J. Karchon, Director of Strategic Initiatives, Cammenga at 1 (Apr. 24, 2020) (referencing twenty-two new designs) (nonpublic) (ADAMS Accession No. ML20126G390); Letter from David Alley, Branch Chief, NMSS, NRC, to Christopher Karchon, Director of Strategic Initiatives, Cammenga at 1 (Oct. 27, 2020) (ADAMS Accession No. ML20296A362) [hereinafter Staff Review Suspension Letter].

⁸ See Staff Review Suspension Letter at 1, encl. at 1–2 ([Cammenga] Amend. Request dated April 24, 2020) (identifying issues that need to be addressed in any future Cammenga amendment application resubmittal); December 2020 Amend. Application, unnumbered attach. 9 (Model Information/Device List). The number of designs reflected the proposed use a variety of materials to construct the multi-tool devices as well as the number and location of the tritium sealed-sources on the devices. See December 2020 Amend. Application, attach. 6 (10 [C.F.R. §] 32.22 Information/Construction and Design (Dec. 30, 2020)).

⁹ See Letter from Lymari Sepulveda, Mechanical Engineer, NMSS, NRC, to Christopher Karchon, Director of Strategic Initiatives, Cammenga, encl. (Apr. 26, 2021) ([Cammenga] Application Dated December 30, 2020, [RAI]) (ADAMS Accession No. ML21111A171); E-Mail from CJ Karchon, Cammenga, to Lymari Sepulveda, NRC, attach. (Apr. 29, 2021 11:54 EDT) (Letter from Christopher J. Karchon, Director of Strategic Initiatives, Cammenga (Apr. 29, 2021)) (nonpublic) (ADAMS Accession No. ML21137A111).

request.¹⁰ In its August 16, 2021 answer to Cammenga's hearing request, the Staff indicated that Cammenga should be granted a hearing, at which the Staff would contest the merits of Cammenga's claims.¹¹ See Staff Answer at 6. In an August 25, 2021 issuance, the Licensing Board granted Cammenga's hearing request but deferred setting a scheduling conference date until Cammenga had retained counsel.¹² Additionally, in response to an August 30, 2021 unopposed Staff motion, the Board on September 1, 2021, deferred discovery pending Cammenga retaining legal representation.¹³

¹⁰ See Memorandum from Richard J. Laufer, Acting Secretary, Office of the Secretary (SECY), NRC, to E. Roy Hawken, Chief Administrative Judge, Atomic Safety and Licensing Board Panel, NRC, at 1 (July 27, 2021); In the Matter of [Cammenga]; Establishment of Atomic Safety and Licensing Board, 86 Fed. Reg. 41,997 (Aug. 4, 2021). In the Licensing Board establishment notice, Administrative Judge Ronald M. Spritzer was appointed as Board chair. See id. at 41,998. With Judge Spritzer's retirement from federal service in July 2022, the Board was reconstituted with Administrative Judge Paul Bollwerk appointed as chair. See [Cammenga] (Denial of License Amend. Requests); Notice of Atomic Safety and Licensing Board Reconstitution, 87 Fed. Reg. 45,369 (July 28, 2022).

¹¹ In its answer, the NRC Staff also challenged Cammenga's request that its hearing petition be afforded nonpublic treatment, asserting that Cammenga's request met neither the procedural requirements of 10 C.F.R. § 2.390(b) to provide a supporting affidavit and page markings showing the purported confidential information in the document nor set forth a documented basis for determining what confidential information was in that pleading. See Staff Answer at 6. The Staff also indicated that, out of an abundance of caution, it likewise would submit its answer as a nonpublic document. See id. at 7. In a February 2, 2023 issuance, the Board directed that, in light of the disputed nature of these pleadings, the parties should submit a joint report providing their views on the nonpublic status of the Cammenga hearing petition and the Staff's answer. See Licensing Board Memorandum and Order (Requesting Information on Non-Public Status of Party Pleadings) (Feb. 2, 2023) at 2 (unpublished). In a February 8, 2023 joint response, the parties agreed that both filings could be made publicly available. See Joint Response to Memorandum and Order Requesting Information on Nonpublic Status of Party Filings (Feb. 7, 2023) at 1. As a result, in a February 10, 2023 memorandum, the Board requested that SECY take steps to have both documents classified as publicly available in the agency's Electronic Hearing Docket (EHD). See Licensing Board Memorandum (Requesting Previously Nonpublic Party Filings Be Made Publicly Available) (Feb. 10, 2023) at 1–2 (unpublished). As of the date of this issuance, both documents are publicly available in the EHD.

¹² See Licensing Board Order (Granting Hearing Request; Deferring Scheduling Conference) (Aug. 25, 2021) at 1–2 (unpublished).

¹³ See Unopposed NRC Staff Motion to Defer Initial Discovery Deadlines under 10 C.F.R. §§ 2.336 and 2.1203 (Aug. 30, 2021) at 1; Licensing Board Order (Granting Unopposed NRC Staff Motion to Defer Initial Discovery Deadlines) (Sept. 1, 2021) at 1–2 (unpublished).

Shortly following the September 28, 2021 entry of a notice of appearance by counsel for Cammenga, the Board set an October 12, 2021 conference date to discuss scheduling an evidentiary hearing.¹⁴ On October 8, 2021, Cammenga and the Staff filed a joint motion requesting that the proceeding be held in abeyance and that a settlement judge be appointed in accordance with 10 C.F.R. § 2.338.¹⁵ During the October 12 scheduling conference, the Board indicated that it intended in the near term to grant the motion and refer the parties' settlement judge appointment request to the Chief Administrative Judge for his consideration.¹⁶ The Board issued an order to that effect the same day, which also included a directive that the parties file a joint status report on the progress of their settlement negotiations every thirty days thereafter.¹⁷

The next day, the Chief Administrative Judge named a settlement judge, who in turn issued an October 18, 2021 order requesting that the parties provide him with their dates of availability for an initial settlement conference to be convened during the week of November 1, 2021.¹⁸ The first settlement conference was held on November 3, 2021, followed by additional conferences on November 29, 2021, February 3, 2022, and November 4, 2022. See Joint Settlement Motion at 4. Furthermore, the parties filed a series of sixteen monthly status reports, the last submitted on January 12, 2023, in which they generally reported that "continued

¹⁴ See Notice of Appearance of Madeline Fleisher (Sept. 28, 2021) at 1; Licensing Board Order (Scheduling Conference) (Sept. 30, 2021) at 1 (unpublished). This attorney subsequently withdrew from representing Cammenga but was replaced by another lawyer. See Notice of Withdrawal and Substitution of Party Representative (Dec. 30, 2021); Notice of Appearance of Kevin Desharnais (May 13, 2022).

¹⁵ See Joint Motion Requesting to Postpone Discovery, Hold Proceeding in Abeyance, and Request Appointment of a Settlement Judge (Oct. 8, 2021) at 1.

¹⁶ See Tr. at 4.

¹⁷ See Licensing Board Order (Granting Joint Motion and Referring to Chief Administrative Judge for Appointment of Settlement Judge) (Oct. 12, 2021) at 1 (unpublished).

¹⁸ See Chief Administrative Judge Order (Appointment of Settlement Judge) (Oct. 13, 2021) at 1–2 (unpublished); Administrative Judge William J. Froehlich (Settlement Judge) Order (Convening Initial Settlement Conference) (Oct. 18, 2021) at 2 (unpublished).

dialogue would be mutually beneficial.”¹⁹ Then, on January 23, 2023, Cammenga and the NRC Staff filed the pending joint motion to approve their proposed settlement agreement and terminate this proceeding. See id. at 1.

II. ANALYSIS

A. Standards Governing the Approval of Settlement Agreements

NRC regulations, specifically section 2.338 of Title 10 of the Code of Federal Regulations, encourage “[t]he fair and reasonable settlement of issues proposed for litigation” in NRC adjudicatory proceedings, with the strictures that govern such settlements set forth in the balance of section 2.338.²⁰ Thus, subsection (g) outlines the form for such settlements:

A settlement must be in the form of a proposed settlement agreement, a consent order, and a motion for its entry that includes the reasons why it should be accepted. It must be signed by the consenting parties or their authorized representatives.

10 C.F.R. § 2.338(g). In addition, subsection (h) states that a proposed settlement agreement must contain the following items:

- (1) An admission of all jurisdictional facts;
- (2) An express waiver of further procedural steps before the presiding officer, of any right to challenge or contest the validity of the order entered into in accordance with the agreement, and of all rights to seek judicial review or otherwise to contest the validity of the consent order;
- (3) A statement that the order has the same force and effect as an order made after full hearing; and
- (4) A statement that matters identified in the agreement, required to be adjudicated have been resolved by the proposed settlement agreement and consent order.

¹⁹ See, e.g., Joint Status Update Following Initial Settlement Conference (Nov. 10, 2021) at 1; Sixteenth Joint Status Update (Jan. 12, 2023) at 1.

²⁰ 10 C.F.R. § 2.338; see Rockwell Int’l Corp. (Rocketdyne Division), CLI-90-5, 31 NRC 337, 340 (1990) (“Commission policy strongly favors settlement of adjudicatory proceedings.”); Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456 (1981) (“Licensing boards are encouraged to hold settlement conferences with the parties.”).

Id. § 2.338(h). Finally, and particularly pertinent to the Board's consideration of the parties' pending joint motion, subsection (i) describes the settlement agreement approval process:

Following issuance of a notice of hearing, a settlement must be approved by the presiding officer . . . to be binding in the proceeding. The presiding officer . . . may order the adjudication of the issues that the presiding officer . . . finds is required in the public interest to dispose of the proceeding. . . . If approved, the terms of the settlement . . . must be embodied in a decision or order. Settlements approved by a presiding officer are subject to the Commission's review in accordance with § 2.341.

Id. § 2.338(i).²¹

The Commission noted in its Sequoyah Fuels Corp. decision that “[i]n any pending proceeding [in which presiding officer approval of a settlement agreement is required], the presiding officer's approval of settlement is a matter that must give due consideration to the public interest.”²² The Commission then went on to explain that this “public interest” inquiry requires the presiding officer to consider:

(1) whether, in view of the agency's original order and the risks and benefits of further litigation, the settlement result appears unreasonable; (2) whether the terms of the settlement appear incapable of effective implementation and enforcement; (3) whether the settlement jeopardizes the public health and safety; and (4) whether the settlement approval process deprives interested parties of meaningful participation.

²¹ By its terms, section 2.338(i) requires Board approval of a settlement agreement “[f]ollowing issuance of a notice of hearing.” Such a notice often is issued in combination with the initial grant of a hearing request. See James Chaisson, LBP-15-21, 82 NRC 1, 5 (2015), Commission review declined, Memorandum from Annette L. Vietti-Cook, Secretary, SECY, NRC, to Board and Parties (Oct. 30, 2015). In this instance, however, the Board did not issue a formal hearing notice in conjunction with its August 2021 order granting Cammenga's hearing request. Nonetheless, in the context of a section 2.103 license application denial proceeding in which an applicant's “demand” for a hearing is sufficient to warrant granting the applicant's hearing request, see Charlissa C. Smith (Denial of Senior Reactor Operator License), LBP-13-3, 77 NRC 82, 89–95 (2013) (ruling applicant's section 2.103(b)(2) hearing “demand” can be granted without section 2.309(f)(1)-compliant contentions), the Board's order granting Cammenga's hearing demand is the functional equivalent of a hearing notice such that section 2.338(i)'s requirement for Board approval of a settlement agreement is applicable in this instance.

²² Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 207 (1997) (quoting Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994)) (footnote omitted).

Sequoyah Fuels Corp., CLI-97-13, 46 NRC at 209 (footnote omitted). Although these factors were adopted by the Commission in an enforcement context, “the Commission derived these factors from an array of federal court settlement approval decisions that dealt with settlements ranging from public school desegregation class actions to antitrust enforcement suits.”²³ Given the diversity of these cases and the fact that we find these factors to be useful in determining whether there is some substantial public interest reason to reject the settlement in a licensing proceeding, the Board adopts the Sequoyah Fuels Corp. factors for the purpose of deciding whether to approve the proposed settlement agreement currently before us.

Accordingly, with these standards in mind, we undertake our section 2.338(g), (h), and (i) review of the January 26, 2023 settlement agreement between the NRC Staff and Cammenga, the terms of which are described in section II.B, below.

B. NRC Staff/Cammenga and Associates, LLC Settlement Agreement

The settlement agreement between the NRC Staff and Cammenga states that the NRC Staff “has determined that Cammenga has resolved the issues raised in the July 1, 2021, denial letter and met the regulatory requirements in 10 C.F.R. § 32.22 and § 32.210 for a subset of the designs in its various applications.”²⁴ Further, the agreement indicates the NRC Staff will approve the designs listed for SS&D registration certificate No. NR-0210-D-101-E, as amended January 19, 2023,²⁵ and will amend Cammenga’s exempt distribution materials license

²³ Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-18, 63 NRC 830, 837 (2006) (footnote omitted).

²⁴ Joint Settlement Motion, attach. A at 2 (Proposed Settlement Agreement Between [NRC] And [Cammenga] (Jan. 26, 2023)) [hereinafter Settlement Agreement].

²⁵ The approved designs are as follows:

GR-S1.1, GR-S2.1, GR-S3.1, GR-S4.1, SP-S1.1, SP-S2.1,
SP-S3.1, SP-S4.1, SP-B1, MJ-S1.1, MJ-S2.1, MJ-S3.1, MJ-S4.1,
GR-S1.2, GR-S2.2, GR-S3.2, GR-S4.2, SP-S1.2, SP-S2.2,
SP-S3.2, SP-S4.2, MJ-S1.2, MJ-S2.2, MJ-S3.2, MJ-S4.2,

No. 21-26460-03E and SS&D registration certificate No. NR-0210-D-101-E to reflect this approval. See Settlement Agreement at 2–3. According to the settlement agreement, the amended license and registration certificate will be issued by the NRC Staff within five days following the Board’s approval of the agreement. See id. at 3.

For its part, Cammenga agrees to withdraw its hearing request for any designs not listed in the settlement agreement, as well as for the CLAM models 2S-6 and 2S-8 that previously had been approved by the NRC Staff separate and apart from the agreement at issue here. See id. The agreement also indicates that Cammenga’s withdrawal of its hearing request is effective upon Board approval of the settlement agreement and termination of this proceeding. See id.

Finally, the settlement agreement states that “[a]ll regulatory requirements and conditions that apply to entities holding licenses under 10 C.F.R. § 32.22 and registration certificates under 10 C.F.R. § 32.210 shall apply to Cammenga just as they would if the approval” of the listed designs in the settlement agreement were “issued through the traditional licensing process.” Id. at 3–4. As such, the settlement agreement declares, “Cammenga is deemed to be a ‘licensee,’ a ‘person licensed under § 32.22,’ a ‘person licensed by the Commission pursuant to regulations’ in 10 C.F.R. Part 32, and a ‘certificate holder’” for the purposes of regulatory applicability. Id. at 4. Additionally, the settlement agreement recognizes that “activities authorized by the approval described in [the settlement agreement] constitute ‘activities authorized by the license issued under § 32.22.’” Id.

GR-S1.3, GR-S2.3, GR-S3.3, GR-S4.3, SP-S1.3, SP-S2.3,
SP-S3.3, SP-S4.3, MJ-S1.3, MJ-S2.3, MJ-S3.3, and MJ-S4.3.

Id. at 3. These designs are approved “with the nominal dimensions, combined with tolerances of +/- 0.1 millimeter as noted in the drawings included in [SS&D registration certificate No.] NR- 0210-D-101E or referenced therein.” Id.

C. Licensing Board Determination

1. 10 C.F.R. § 2.338(g) and (h): Settlement Agreement's Form and Content

In considering whether to approve the proposed settlement agreement between the NRC Staff and Cammenga with the terms described in section II.B above, the Board first must turn to section 2.338(g), which governs the agreement's form, see supra section II.A. Here, the parties' filing contains each of the elements outlined in subsection (g): (1) a proposed settlement agreement; (2) a consent order; and (3) a motion for its entry that includes the reasons why it should be accepted. See Joint Settlement Motion; Settlement Agreement; Consent Order. The settlement is also signed by the consenting parties or their authorized representatives. See Settlement Agreement at 5. We thus conclude that the settlement fulfills the form requirements of section 2.338(g).

We next turn to section 2.338(h), which outlines the specific content of the proposed settlement agreement. See supra section II.A. As required by section 2.338(h)(1)–(4), the proposed agreement includes (1) the “admission of all jurisdictional facts” in section 5(a), see Settlement Agreement at 4; see also id. at 1–2 (“whereas” clauses in the agreement’s introduction reciting factual background of the proceeding); (2) the “express waiver of further procedural steps before the presiding officer, of any right to challenge or contest the validity of the order entered into in accordance with the agreement, and of all rights to seek judicial review or otherwise contest the validity of the consent order” in section 5(b), see id. at 4; (3) the “statement that the order has the same force and effect as an order made after full hearing” in section 5(c), see id.; and (4) the “statement that matters identified in the agreement, required to be adjudicated have been resolved by the proposed settlement agreement and consent order” in section 5(d), see id. We therefore conclude that the above referenced sections of the proposed settlement agreement fulfill the requirements of section 2.338(h).

2. 10 C.F.R. § 2.338(i): Settlement Agreement and the Public Interest

In deciding whether to approve the proposed settlement agreement between the NRC Staff and Cammenga, the Board must give “due consideration to the public interest.” Sequoyah Fuels Corp., CLI-97-13, 46 NRC at 207 (quoting Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994)). As was noted in section II.A above, the public interest inquiry outlined in the Commission’s Sequoyah Fuels Corp. decision is divided into four parts. See id. at 209. In analyzing these factors below, the Board concludes that the public interest does not require any issues to be adjudicated before terminating this proceeding, thereby allowing the settlement agreement to be approved.

a. Risks and Benefits

In reviewing a settlement, the first “public interest” factor the Board examines “is the risks and benefits of settling as compared to litigating the proceeding.” Id. More specifically, as is appropriate here, the Board considers “(1) the likelihood (or uncertainty) of success at trial, (2) the range of possible recovery . . . , and (3) the complexity, length, and expense of continued litigation.” Id.

Importantly, we first note that we need not reject a settlement merely because one of the parties might have received a more favorable result had the case been fully litigated or because the settlement is not the best that could be obtained. See id. at 215. Instead, it is the Board’s obligation to determine whether the agreement “is within the reaches of the public interest.” Id. (quoting United States v. Microsoft, 56 F.3d 1498, 1462 (D.C. Cir. 1995)).

Here, considering the risks of future litigation in light of the agency’s original application denial finding, the settlement appears to be a reasonable compromise between parties that are each ably represented by counsel.

In the context of the settlement, Cammenga provided the NRC Staff with sufficient information to make the requisite regulatory findings and to approve a subset of the designs in Cammenga’s various applications. See Joint Settlement Motion at 5. Additionally, Cammenga

agrees to withdraw its hearing request for any designs not listed in the settlement agreement as well as the CLAM models 2S-6 and 2S-8 that were approved by the Staff separately from the proposed settlement agreement. See id. The parties therefore agree that in this proceeding “there are no disputed issues to litigate.” Id.

Were the Board to adjudicate Cammenga’s hearing request challenging the denial of its application without the settlement-related revisions to its self-illuminated device design approval requests, it is not clear that Cammenga would prevail on the merits of its original claims. On the other hand, Cammenga argued that the NRC Staff denied its application even though that amendment request included versions of its products that were “all but the same to the previously [agency-]approved model numbers,” thereby raising the question whether the Staff’s determination was inconsistent and arbitrary. Cammenga Hearing Request at unnumbered p. 2. Consequently, both sides faced litigation risks, as well as the possibility of extended litigation with not inconsiderable costs, making settlement a reasonable choice for both.

As noted above, see supra section II.B, while the parties’ settlement agreement contains provisions that approve several of Cammenga’s VERSA series designs, it also incorporates some clarifying strictures — i.e., Cammenga’s withdrawal of any VERSA series designs not listed in the agreement as well as the CLAM models 2S-6 and 2S-8. Relative to the Sequoyah Fuels Corp.-identified concern with the “range of possible recovery,” this suggests that the settlement agreement involved negotiation by both sides to reach a mutually agreeable result that provided a reasonable outcome for both parties.

Under these circumstances, we see no basis for questioning the “risk and benefits” judgments made by the NRC Staff and Cammenga and conclude that the settlement agreement achieves a reasonable result on this score.

b. Implementation and Enforcement

The second “public interest” factor looks to “whether the terms of the settlement appear incapable of effective implementation and enforcement.” Sequoyah Fuels Corp., CLI-97-13, 46 NRC at 209.

Here, the settlement agreement contemplates a series of well-defined events — i.e., the NRC Staff will approve the listed designs and issue the amended license and registration certificate within five days of the Board’s approval of the settlement while Cammenga will withdraw its hearing request both with respect to otherwise-contested designs not listed in the settlement agreement and to the separately approved CLAM models 2S-6 and 2S-8 — that appear capable of being effectively implemented and enforced. Certainly, nothing presented by the parties suggests otherwise. See Settlement Agreement at 3.

These considerations likewise support approval of the settlement agreement between the NRC Staff and Cammenga.

c. Public Health and Safety

The third “public interest” factor looks to “whether the settlement jeopardizes the public health and safety.” Sequoyah Fuels Corp., CLI-97-13, 46 NRC at 209.

This resolution of Cammenga’s license amendment request in no way jeopardizes the public health and safety. The NRC Staff’s agreement to approve the listed designs was contingent on Cammenga’s meeting the regulatory requirements in 10 C.F.R. §§ 32.22 and 32.210 for these designs in accordance with the Staff’s review of Cammenga’s application and related submissions provided during settlement negotiations. See Settlement Agreement at 2–3. According to the parties, the settlement agreement is not inconsistent with the public interest because “the Staff has made reasonable assurance findings with respect to the devices subject to the settlement agreement.” Id. at 2.

Our review of the terms of the settlement agreement thus leads us to conclude that the agreement is fully consistent with the agency's mission of protecting the public health and safety and so supports approval of the settlement between the NRC Staff and Cammenga.

d. Meaningful Participation

Last, we look to “whether the settlement approval process deprives interested parties of meaningful participation.” Sequoyah Fuels Corp., CLI-97-13, 46 NRC at 209.

In contrast to the Sequoyah Fuels Corp. proceeding, no intervenors or other interested participants have come forward to assert that they might be impacted by the terms of the settlement agreement. See id. at 222–23. This proceeding has involved only the NRC Staff and Cammenga, and both participants fully support the Board’s approval of the settlement agreement.

Accordingly, our approval of the settlement agreement does not deprive any interested party of meaningful participation in this proceeding,²⁶ and such a determination supports approval of the settlement agreement.

In sum, in analyzing the Commission’s Sequoyah Fuels Corp. four-factor inquiry we conclude that the public interest does not require any issues to be adjudicated to reach a proper disposition of this proceeding.

²⁶ The agency’s regulation governing license application denial proceedings states that a notice of proposed denial or denial of a license application is to be issued to “the applicant in writing” and is to inform the applicant of its “right . . . to demand a hearing,” 10 C.F.R. § 2.103(b), and such notice was provided in this instance, see supra p. 4. While intervention by other interested persons in a proceeding regarding the proposed denial or denial of a license application is not without precedent, see Advanced Med. Sys., Inc. (1020 London Road, Cleveland, Ohio), LBP-98-32, 48 NRC 374, 376–77 (1998) (granting intervention requests in license renewal application denial proceeding), the absence here of a hearing opportunity notice for other interested persons is not an impediment to our approval of this settlement agreement because participation by such persons has not been foreclosed. See 10 C.F.R. § 2.309(b)(4)(ii) (providing for filing timely intervention petition when notice of agency action regarding an application is not published in the Federal Register).

III. CONCLUSION

Finding that (1) the settlement agreement's form and content complies with the requirements of section 2.338(g)–(h); and (2) pursuant to section 2.339(i), the public interest does not require any issues to be adjudicated for an appropriate disposition of this proceeding, the Board determines that the settlement agreement between the NRC Staff and Cammenga should be approved and that this proceeding should be terminated.

For the foregoing reasons, it is this twenty-eighth day of February 2023, ORDERED, that

1. The January 26, 2023 joint motion of Cammenga and Associates, LLC, and the NRC Staff is granted, and we approve the parties' January 26, 2023 settlement agreement and terminate this proceeding.

2. In accordance with 10 C.F.R. §§ 2.338(i), 2.341(a)(2), this issuance will constitute a final decision of the Commission 120 days from the date of issuance, i.e., on Wednesday, June 28, 2023, unless the Commission directs otherwise.²⁷

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

G. Paul Bollwerk, III, Chair
ADMINISTRATIVE JUDGE

/RA/

Gary S. Arnold
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland

February 28, 2023

²⁷ Section 2.338(i) indicates that “[s]ettlements approved by a presiding officer are subject to the Commission’s review in accordance with § 2.341.” 10 C.F.R. § 2.338(i). By its terms, section 2.341(b)(1) generally affords the parties the opportunity to proffer any challenges to a licensing board ruling resolving a proceeding by submitting a petition seeking Commission review of that decision. Nonetheless, given that (1) our authority under section 2.338(i) is to approve or reject a settlement agreement, see E. Testing & Inspection, Inc., LBP-96-11, 43 NRC 279, 282 n.1 (1996) (indicating that, as is the case with the federal courts, a presiding officer cannot amend a settlement agreement without the consent of the parties); and (2) in accord with section 2.338(h)(2), the settlement agreement under consideration states that “[t]he Parties expressly waive . . . any right to challenge or contest the validity of the order entered into in accordance with this proposed settlement agreement,” Settlement Agreement at 4, a petition for review challenging this issuance seems both unlikely and inappropriate. Thus, absent some wholly unanticipated development, see Asberry v. U.S. Postal Serv., 692 F.2d 1378, 1380 (Fed. Cir. 1982) (indicating settlement agreement is not open to appellate challenge absent fraud or mutual mistake), additional Commission consideration of our settlement approval determination will occur under its section 2.341(a)(2) sua sponte review authority.

APPENDIX A

**Proposed Settlement Agreement Between
U.S. Nuclear Regulatory Commission
And
Cammenga and Associates, LLC**

This agreement is made by and between the Staff of the U.S. Nuclear Regulatory Commission (NRC Staff or Staff) and Cammenga and Associates, LLC (Cammenga), to wit:

Whereas, Cammenga is the holder of NRC License No. 21-26460-03E and Sealed Source and Device Registration Certificate NR-0210-D-101-E;

Whereas, Cammenga submitted an application requesting amendments to its exempt distribution license and registration certificate to permit the distribution of more than twenty new VERSA series devices;

Whereas, the Staff reviewed Cammenga's application, as supplemented and resubmitted, and issued a July 1, 2021, letter denying Cammenga's amendment requests to allow distribution of certain VERSA models;

Whereas, on July 21, 2021, Cammenga transmitted its hearing request challenging the denial of its application;

Whereas, on July 29, 2021, an Atomic Safety and Licensing Board (Board) was established to preside over the proceeding;

Whereas, on August 16, 2021, the Staff answered Cammenga's hearing request. The Staff agreed that the hearing request should be granted but noted that it would contest the merits of Cammenga's claims;

Whereas, on August 25, 2021, the Board granted Cammenga's hearing request but deferred setting a date for a scheduling conference until Cammenga had retained counsel;

Whereas, on October 12, 2021, the Board granted the Staff and Cammenga's (hereinafter, the Parties) joint motion requesting that the Board postpone discovery, hold the proceeding in abeyance, and that the Board request that the Chief Administrative Judge appoint a Settlement Judge to oversee settlement negotiations;

Whereas, on October 13, 2021, the Chief Administrative Judge appointed Administrative Judge William J. Froehlich to serve as a Settlement Judge in this proceeding;

Whereas, the Parties held settlement conferences with the Settlement Judge on November 3, 2021, November 29, 2021, February 3, 2022, and November 4, 2022. The Parties also continued to engage in productive settlement negotiations between settlement conferences;

Whereas, the Parties agree that the public interest does not require the adjudication of the issues resolved by the settlement agreement because the Staff has made reasonable assurance findings with respect to the devices subject to the settlement agreement, and there are no disputed issues to litigate. The settlement agreement also is consistent with the Commission's policy encouraging the "fair and reasonable settlement and resolution of issues;"¹ and

Whereas, the PARTIES AGREE TO THE FOLLOWING IN SETTLEMENT:

1. Based on application materials and information provided during settlement negotiations, the Staff has determined that Cammenga has resolved the issues raised in the July 1, 2021, denial letter and met the regulatory requirements in 10 C.F.R. § 32.22 and § 32.210 for a subset of the designs in its various applications. The Staff agrees to

¹ 10 C.F.R. § 2.338 (2022).

approve the following designs as described in registration certificate NR-0210-D-101-E, as amended January 19, 2023:

GR-S1.1, GR-S2.1, GR-S3.1, GR-S4.1, SP-S1.1, SP-S2.1, SP-S3.1, SP-S4.1, SP-B1, MJ-S1.1, MJ-S2.1, MJ-S3.1, MJ-S4.1, GR-S1.2, GR-S2.2, GR-S3.2, GR-S4.2, SP-S1.2, SP-S2.2, SP-S3.2, SP-S4.2, MJ-S1.2, MJ-S2.2, MJ-S3.2, MJ-S4.2, GR-S1.3, GR-S2.3, GR-S3.3, GR-S4.3, SP-S1.3, SP-S2.3, SP-S3.3, SP-S4.3, MJ-S1.3, MJ-S2.3, MJ-S3.3, and MJ-S4.3.

The Staff is approving these designs with the nominal dimensions, combined with tolerances of +/- 0.1 millimeter as noted in the drawings included in NR- 0210-D-101E or referenced therein. The Staff will amend Cammenga's exempt distribution license, License No. 21-26460-03E, and Sealed Source and Device Registration Certificate NR-0210-D-101-E, consistent with this approval.

2. The Staff will issue the amended license and registration certificate described in Paragraph (1) to Cammenga within 5 days of the Board approving this settlement agreement.²
3. Cammenga agrees to withdraw its hearing request with respect to designs that are not covered by the description in Paragraph (1) and the CLAM models 2S-6 and 2S-8 that were previously approved by the Staff outside of this settlement agreement. The hearing request withdrawal shall be effective upon the Board's approval of this settlement agreement and termination of this proceeding.
4. All regulatory requirements and conditions that apply to entities holding licenses under 10 C.F.R. § 32.22 and registration certificates under 10 C.F.R. § 32.210 shall apply to

² See 10 C.F.R. § 2.306 (2022) (providing procedures for counting of days).

Cammenga just as they would if the approval in Paragraph (1) had been issued through the traditional licensing process, regardless of whether the relevant requirement or condition uses the example language mentioned in this paragraph or similar but different language. Accordingly, for the purposes of regulatory applicability, Cammenga is deemed to be a “licensee,” a “person licensed under § 32.22,” a “person licensed by the Commission pursuant to regulations” in 10 C.F.R. Part 32, and a “certificate holder.” Similarly, activities authorized by the approval described in Paragraph (1) constitute “activities authorized by the license issued under § 32.22.”

5. Consistent with 10 C.F.R. § 2.338(h), the Parties agree that:
 - a. This proposed settlement agreement admits all jurisdictional facts;
 - b. The Parties expressly waive further procedural steps before the presiding officer, any right to challenge or contest the validity of the order entered into in accordance with this proposed settlement agreement, and all rights to seek judicial review or otherwise contest the validity of the consent order;
 - c. The order implementing this proposed settlement agreement has the same force and effect as an order made after full hearing; and
 - d. The matters identified in this proposed settlement agreement that were required to be adjudicated have been resolved by the proposed settlement agreement and consent order.
6. This settlement agreement shall be effective upon the Board’s approval. Should the Board disapprove this settlement agreement, it shall be null and void.

WHEREOF, the Parties have executed this agreement as of the last date written below.

/Signed (electronically) by/

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Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, DC
this 26th day of January 2023

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
CAMMENGA AND ASSOCIATES, LLC) Docket No. 030-38679-LA
)
(Denial of License Amendment Requests)) ASLBP No. 21-972-01-LA-BD01
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the **MEMORANDUM and ORDER (Approving Settlement Agreement and Terminating Proceeding) (LBP-23-03)** have been served upon the following persons by Electronic Information Exchange.

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Cammenga and Associates, LLC
Docket No. 030-38679-LA
MEMORANDUM and ORDER (Approving Settlement Agreement and Terminating
Proceeding) (LBP-23-03)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 28th day of February 2023.