

**NUCLEAR REGULATORY COMMISSION
ISSUANCES**

**OPINIONS AND DECISIONS OF THE
NUCLEAR REGULATORY COMMISSION
WITH SELECTED ORDERS**

July 1, 1999 — December 31, 1999

Volume 50
Pages 1 – 417

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

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PREFACE

This is the fiftieth volume of issuances (1 – 417) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from July 1, 1999, to December 31, 1999.

Atomic Safety and Licensing Boards are authorized by Section 191 of the Atomic Energy Act of 1954. These Boards, comprised of three members conduct adjudicatory hearings on applications to construct and operate nuclear power plants and related facilities and issue initial decisions which, subject to internal review and appellate procedures, become the final Commission action with respect to those applications. Boards are drawn from the Atomic Safety and Licensing Board Panel, comprised of lawyers, nuclear physicists and engineers, environmentalists, chemists, and economists. The Atomic Energy Commission first established Licensing Boards in 1962 and the Panel in 1967.

Beginning in 1969, the Atomic Energy Commission authorized Atomic Safety and Licensing Appeal Boards to exercise the authority and perform the review functions which would otherwise have been exercised and performed by the Commission in facility licensing proceedings. In 1972, that Commission created an Appeal Panel, from which are drawn the Appeal Boards assigned to each licensing proceeding. The functions performed by both Appeal Boards and Licensing Boards were transferred to the Nuclear Regulatory Commission by the Energy Reorganization Act of 1974. Appeal Boards represent the final level in the administrative adjudicatory process to which parties may appeal. Parties, however, are permitted to seek discretionary Commission review of certain board rulings. The Commission also may decide to review, on its own motion, various decisions or actions of Appeal Boards.

On June 29, 1990, however, the Commission voted to abolish the Atomic Safety and Licensing Appeal Panel, and the Panel ceased to exist as of June 30, 1991. In the future, the Commission itself will review Licensing Board and other adjudicatory decisions, as a matter of discretion. *See* 56 Fed. 29 & 403 (1991).

The Commission also has Administrative Law Judges appointed pursuant to the Administrative Procedure Act, who preside over proceedings as directed by the Commission.

The hardbound edition of the Nuclear Regulatory Commission Issuances is a final compilation of the monthly issuances. It includes all of the legal precedents for the agency within a six-month period. Any opinions, decisions, denials, memoranda and orders of the Commission inadvertently omitted from the monthly softbounds and any corrections submitted by the NRC legal staff to the printed softbound issuances are contained in the hardbound edition. Cross references in the text and indexes are to the NRCI page numbers which are the same as the page numbers in this publication.

Issuances are referred to as follows: Commission—CLI, Atomic Safety and Licensing Boards—LBP, Administrative Law Judges—ALJ, Directors' Decisions—DD, and 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 to have any independent legal significance.

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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 Commission¹

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 (NAG-PRA), 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

¹In 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 Intervenor has 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.

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 orders⁵ “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

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

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 & 150), 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

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. § 20.2002²⁰ 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

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. Intervenor 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 Intervenor. We are unconvinced by Intervenor's 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

Intervenor 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 Intervenor 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

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 Intervenor's 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 Intervenor 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. Intervenor's Petition for Review of Presiding Officer's Partial Initial Decision (Waste Petition) at 26 (December 16, 1998). Similarly, Intervenor's 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

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 9, 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, Intervenor 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 Intervenor to identify, with some specificity, what the alleged deficiencies are. Based on his review of the arguments made by Intervenor and the responses from HRI and the Staff, the Presiding Officer reasonably found that Intervenor had failed to identify deficiencies with the Staff’s compliance.³⁸

Intervenor 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 Intervenor 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

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, Intervenor’s 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 Intervenor’s 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, Intervenor’s 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

⁴² *Marsh v. Oregon Natural Resources Council*, 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.

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 Intervenor's 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

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 Intervenor 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, Intervenor 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 Intervenor 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, Intervenor 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

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 Regulatory Impact on Uranium Recovery Licensees," Memorandum from James M. Taylor, Executive Director of Operations, 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” at 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

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 Intervenor’s 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?

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 Intervenor’s 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 Intervenor’s 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 Intervenor’s 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 Commission⁵⁹

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).*

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 Commission³

ANNETTE L. VIETTI-COOK
Secretary of the Commission

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

³Commissioner 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

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

¹In 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.

²This 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

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 180-81.

- 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 CP&L-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 CP&L 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 that 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 Assurance⁵

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).

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.

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 the fall 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 BOARD⁷

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 12, 1999

⁷Copies 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*.

¹In 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 BOARD²

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 27, 1999

²Copies 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 board 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. Intervenor's 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 Intervenor, the New England Coalition on Nuclear Pollution (NECNP) and the Citizens Awareness Network (CAN), were opposing termination absent payment by the Licensee to the Intervenor 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 Intervenor's 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, Intervenor 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 Intervenor of such costs.

³ Motion of YAEC for Leave to Respond to Intervenor's “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, Intervenor portray YAEC's termination as an attempt to impose as much monetary cost as possible on the Intervenor. They characterize the withdrawal as "untimely." They assert YAEC had knowledge of the MARSSIM protocols⁸ more than 18 months earlier. Adoption of those protocols at this time caused the LTP to be abandoned, after Intervenor 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 Intervenor's legitimate and serious issues"¹⁰

The Intervenor go on to assert that there has been extensive public interest in this proceeding and, in particular, in the information the Intervenor 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 Intervenor 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 "Intervenor (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 Intervenor 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

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 Intervenor's 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 Intervenor (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 Intervenor 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.

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 Intervenor's 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 Intervenor, producing the result that they explicitly sought.¹⁸

YAEC’s analogies are not entirely appropriate. In the first place, the Intervenor is 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].

¹⁸YAEC 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 Intervenor’s expending more in total than they otherwise would have spent in litigating the adequacy of the current LTP. The opposite may also be true — Intervenor’s 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 Intervenor’s — 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 Intervenor’s 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 Intervenor’s interrogatories and requests for documents that were pending on the date of the termination motion and to provide the results to the Intervenor’s and to the NRC for placement in the local public document room. Further, the Intervenor’s ask us to order YAEC to undertake hydrogeological studies in response to the Intervenor’s 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

¹⁹Motion 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

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 Intervenor's request for hydrogeological studies.

Finally, Intervenor has 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

Intervenor in this proceeding has 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 Intervenor. 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 Intervenor's 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 Intervenor's requests for us to accept for filing their replies dated June 23 and 24, 1999 (CAN reply; NECNP Reply) are hereby *granted*.

3. Intervenor's 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

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

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.

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 willful 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 requirements, the four violations had been classified, in the aggregate, as a Severity Level III violation in accordance with the NRC Enforcement Policy. For the reasons outlined in its letter of May 25, 1999, the Staff exercised enforcement discretion and did not issue a civil penalty for the violations. In its letter, the NRC Staff stated that discretion is appropriate because the Licensee already implemented corrective 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.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Charles Bechhoefer, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of

**Docket Nos. 30-16055-ML
30-16055-ML-REN
(ASLBP Nos. 99-756-01-ML,
95-707-02-ML-REN)
(Renewal of Materials
License No. 34-19089-01)**

**ADVANCED MEDICAL SYSTEMS, INC.
(1020 London Road, Cleveland, Ohio)**

August 4, 1999

In a consolidated proceeding involving (1) the renewal of a byproduct materials license and (2) a contest to the NRC Staff's denial of that renewal, the Presiding Officer, based on advice from the NRC Staff that Ohio would become an agreement state by the end of August 1999, suspends hearing activities pending transfer of jurisdiction to the State of Ohio.

ADMINISTRATIVE TRIBUNALS: JURISDICTION

When the subject matter of a proceeding becomes subject to the authority of an Agreement State, an NRC Presiding Officer loses jurisdiction to continue litigation in a proceeding, absent explicit agreement to the contrary between the Commission and the State.

RULES OF PRACTICE: STAY OF PROCEEDINGS

Where transfer of jurisdiction over a proceeding to a State is imminent, a Presiding Officer may elect to suspend further hearing activities pending such transfer.

MEMORANDUM AND ORDER (Suspension of Hearing Activities Pending Transfer to Ohio, and Termination of Proceedings Upon Transfer)

These consolidated proceedings involve (1) the application of Advanced Medical Systems, Inc. (AMS or Licensee) for renewal of its byproduct materials license (Renewal Proceeding), and (2) AMS's appeal from the denial of that renewal by the NRC Staff (Denial Proceeding). As set forth below, I have determined to suspend further action in these proceedings pending transfer of jurisdiction to the State of Ohio.

I. BACKGROUND

In my Memorandum and Order dated April 28, 1999 (which reflected a telephone conference call held earlier that day), I posed questions concerning the impending transfer of authority over the byproduct material involved in these proceedings to the State of Ohio. That transfer would be attendant upon Ohio's becoming an Agreement State with respect to such byproduct material.¹ My inquiries concerned both the likely date of transfer and the effect thereof on these proceedings. At the time of that inquiry, it did not appear feasible to complete the proceedings, including time for the Commission to review my decision, prior to the effective date of transfer, then projected to be July 22, 1999. There also was pending before me a number of requests by the parties for access to certain documents, together with motions to strike portions of AMS's March 3, 1999 presentation and to extend the time for various parties' presentations (in response to AMS's presentation).

In response to my April 28, 1999 inquiry, the City of Cleveland, an Intervenor, as well as AMS, took the position that NRC should retain jurisdiction over the proceedings.² They reasoned that the proceedings, which had already been pending

¹ See NRC Staff Board Notification 99-01 (March 5, 1999).

² City of Cleveland Comments Regarding Course of This Proceeding To Reflect Potential Agreement State Status for the State of Ohio (May 27, 1999); AMS Response to ASLBP Memorandum and Order (May 27, 1999).

for over 5 years, would be even further delayed by any transfer.³ They could not confirm whether the transfer would otherwise take place by July 22, 1999, inasmuch as the transfer would not take place until Ohio satisfied the NRC Staff that it had adequately trained personnel to carry out its supervisory responsibilities. Cleveland, at least, deemed the projected July 22, 1999 date to be unlikely. Cleveland also suggested that, alternatively, NRC retain jurisdiction over at least the Denial Proceeding, leaving the Renewal Proceeding to the State of Ohio (a proposal strongly opposed by AMS⁴).

For its part, the NRC Staff took the position that the agreement will become effective prior to August 31, 1999, that the Commission will lose jurisdiction over AMS when the agreement becomes effective, and that even with the extended proposed effective date of August 31, 1999, there would not be sufficient time to complete the proceeding (including time for Commission review) prior to the transfer. The Staff favored suspension of the proceeding, and termination when the agreement with Ohio becomes effective.⁵

Because of the strong positions taken by Cleveland and AMS concerning retention of jurisdiction by NRC, I issued another Memorandum and Order on June 9, 1999, inviting replies to parties' responses and, in particular, requesting comments on the feasibility of the transfer by August 31, 1999, as well as the potential mechanisms, if any, for retaining NRC jurisdiction.⁶ I received replies from the Northeast Ohio Regional Sewer District (NEORS), another Intervenor that explicitly noted that it had declined to respond to my first inquiry,⁷ the City of Cleveland,⁸ and the NRC Staff.⁹

NEORS took strong issue with the projected transfer date (no later than August 31, 1999) that was being advanced by the Staff, terming it "at best disingenuous and at worst a deliberate attempt to mislead the Court." NEORS advised that its counsel had personally consulted a representative of the State of Ohio as recently as June 8, and that such representative advised that Ohio still did not have the required radiation safety personnel and that the NRC Staff was fully aware of this situation. NEORS also stated that NRC retention of jurisdiction over this proceeding was fully contemplated by the NRC-Ohio agreement, subject

³The Renewal Proceeding commenced in 1994, but action in the proceeding was deferred pending completion of the Staff's review. The Denial Proceeding commenced as a result of the Staff's September 28, 1998 denial of AMS's renewal application.

⁴AMS Opposition to City of Cleveland Conclusion That NRC Retain Jurisdiction Only Over the Denial Proceeding (June 9, 1999) [AMS Opposition to Bifurcation].

⁵NRC Staff Comments Regarding the Course of This Proceeding Reflecting Potential Agreement State Status for the State of Ohio (May 28, 1999).

⁶Memorandum and Order (Replies to Responses to Questions) (June 9, 1999).

⁷Northeast Ohio Regional Sewer District's Response to June 9, 1999 Memorandum and Order (June 25, 1999).

⁸City of Cleveland Response to June 9, 1999 Memorandum and Order of Presiding Officer (June 25, 1999).

⁹NRC Staff Reply to "City of Cleveland Comments Regarding the Course of this Proceeding To Reflect Potential Agreement State Status for the State of Ohio" and "AMS'[s] Response to ASLBP Memorandum and Order" (June 25, 1999).

only to a determination by the Commission to retain such jurisdiction. NEORSO also concluded that I had sufficient time to complete this proceeding prior to any likely transfer to Ohio.

For its part, Cleveland reiterated that NRC should retain jurisdiction over this proceeding and recommended that I certify to the Commission, for its action, a recommendation to this effect. It also repeated its alternate recommendation that NRC retain jurisdiction at least over the Denial Proceeding. Finally, it urged me not to suspend this proceeding but to continue until the transfer to Ohio took place.

In the interim, the Staff on July 1, 1999, recounted the procedural history and status of this proceeding to a representative of the State of Ohio — the same representative with whom NEORSO counsel stated that he had consulted on June 8.¹⁰ And on July 15, 1999, the Staff filed a Supplemental Status Report advising that, contrary to NEORSO's assertions, the Staff is now satisfied that Ohio's staffing problem has been resolved, that on July 9 it forwarded the proposed Agreement to the Commission for action and that "the Agreement should be signed during August 1999, and should take effect on or before August 31, 1999."

II. DETERMINATION OF PRESIDING OFFICER

Based on the foregoing procedural history, I find that the best course of action here would be for me to suspend these proceedings, pending formal transfer to the State of Ohio, and for the proceedings to be terminated upon such transfer.

I recognize that this course of action may result in additional work for the parties. Upon transfer, AMS's license will remain in effect with the State of Ohio, but AMS will have to seek renewal from the State within a specified time period thereafter. Therefore, it may have to repeat many of the same steps it went through during the past 5 or 6 years before the NRC.

In addition, I do not believe that NRC could retain jurisdiction absent formal agreement between the Commission and the State of Ohio. If the Commission should elect to seek that result, it can do so equally as well in response to appeals of this Order as it could upon my certification of a recommendation to do so.

However, in my opinion, there are reasons why a modification of the agreement in order to retain NRC jurisdiction over these proceedings would not be desirable. Ohio, as the transfer State, would have to live with whatever result I (or the Commission on appeal) determined was appropriate, particularly with respect to the type of decommissioning plan that should be adopted. This seems to me to be a decision most desirable to be made by the supervising authority that would be called upon to enforce it.

¹⁰ Letter, Robert M. Weisman, Esq. (Staff counsel) to Roger L. Suppes, Chief, Bureau of Radiation Protection, Ohio Department of Health, dated July 2, 1999.

Beyond that, there are subsidiary decisions that would have to be made by whatever authority had jurisdiction, such as the release of proprietary data or the enforcement of the terms of a protective order, were I to impose one on the release of information. These matters seem peculiarly appropriate for the State, which will have to live with the result and accommodate the release of information with its own public information policies.

In short, there are factors that weigh in favor of transfer of these proceedings to the State of Ohio. There are also opposing factors such as the potentially wasted efforts of the parties expended in these proceedings over a number of years. Nonetheless, given the apparently imminent transfer, I have decided to allow the agreement to take effect, which means the proceedings will terminate when Agreement State jurisdiction is transferred to Ohio by the Commission.

Finally, I agree with AMS that Cleveland's alternative suggestion — i.e., retention by NRC of the Denial Proceeding and transfer of the Renewal Proceeding — should be rejected. As AMS points out, to adopt that course of action would undo one of the basic reasons for consolidation, the avoidance of undue expense and investment of time by the parties. According to AMS, "the expense and investment of time by the parties will increase as they argue what decisions of the ASLBP are binding on future decisions of the State of Ohio."¹¹

III. ORDER

For the reasons stated, it is, this 4th day of August 1999, *Ordered*:

1. These proceedings are hereby *suspended* pending transfer of jurisdiction to Ohio, and are *terminated* as of the effective date of such transfer.

2. The alternative advanced by the City of Cleveland of NRC's retaining jurisdiction over the Denial Proceeding but not over the Renewal Proceeding is hereby *rejected*.

3. Because under the unique circumstances of these proceedings this Memorandum and Order represents my final determination in these proceedings, thus terminating the parties' right to participate further in these proceedings, it may be *appealed* to the Commission pursuant to 10 C.F.R. §§ 2.1251(a) and 2.786. (*Cf. Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-787, 20 NRC 1097 (1984).) Any party may file a petition for Commission review within fifteen (15) days after service of this Memorandum and Order, on the grounds specified in 10 C.F.R. § 2.786(b)(4). A petition for review must conform to the standards set forth in 10 C.F.R. § 2.786(b)(2). Pursuant to 10 C.F.R. § 2.786(b)(3), any other party may, within ten (10) days after service of a petition for review, file

¹¹ AMS Opposition to Bifurcation at 3.

an answer supporting or opposing Commission review, conforming to the standards set forth therein.

Charles Bechhoefer, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 4, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Richard F. Cole
Dr. Charles N. Kelber

In the Matter of

Docket No. IA 98-006
(ASLBP No. 99-765-02-EA)

GARY ISAKOFF
(Order Prohibiting Involvement
in NRC-Licensed Activities)

August 11, 1999

The Atomic Safety and Licensing Board in an enforcement proceeding approves a settlement agreement between the NRC Staff and the individual faced with enforcement sanctions.

MEMORANDUM AND ORDER
(Approving Settlement Agreement and Dismissing Proceeding)

On August 2, 1999, both parties to this enforcement proceeding — Mr. Gary Isakoff and the NRC Staff — filed a joint motion asking this Atomic Safety and Licensing Board to approve a settlement agreement (a copy of which is attached). The agreement provides that there has been no adjudication of any wrongdoing by Mr. Isakoff; and that, as a compromise of disputed claims, the agreement is not to be construed as an admission by Mr. Isakoff or a concession by the NRC Staff. Each party is to bear its own fees and costs. Also, the agreement provides that the order against Mr. Isakoff is to be withdrawn and that the Staff will not take any future action against Mr. Isakoff for the activities described in the Staff's order.

Furthermore, the agreement states that Mr. Isakoff's request for a hearing is withdrawn and, for a period of a year, Mr. Isakoff is not to engage in NRC-licensed activities. For an additional three-year period, Mr. Isakoff is to inform the Staff within 20 days of accepting employment involving NRC-licensed activities. Under the Staff's proposed order, Mr. Isakoff would have been suspended for a year, with a reporting requirement extending for an additional year.

Pursuant to 10 C.F.R. § 2.203, where, as here, a notice of hearing has been issued, we are authorized to entertain a compromise and approve a settlement, according "due weight" to the position of the Staff. By the August 2, 1999 motion, the Staff has indicated that the settlement is "fair and equitable."

According due weight to the position of the Staff, we hereby *approve* the attached settlement agreement and *dismiss* the proceeding.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Dr. Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 11, 1999

ATTACHMENT

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

**Docket No. IA 98-006
(ASLBP No. 99-765-02-EA)**

GARY ISAKOFF

SETTLEMENT AGREEMENT

WHEREAS, on February 24, 1999, the staff (Staff) of the U.S. Nuclear Regulatory Commission (NRC) issued an "Order Prohibiting Involvement in NRC-Licensed Activities" (Order) captioned IA 98-006 to Gary Isakoff (Mr. Isakoff). *See* 64 Fed. Reg. 11954 (March 10, 1999).

WHEREAS, on March 16, 1999, Mr. Isakoff answered the Order, denying all of the staff's allegations against him, and requested a hearing.

WHEREAS, it is in the public interest to terminate this proceeding without further litigation and without reaching the merits of the Order, subject to the approval of the Atomic Safety and Licensing Board (Board).

NOW THEREFORE, IT IS STIPULATED AND AGREED AS FOLLOWS:

1. There has not been any adjudication of any wrongdoing by Mr. Isakoff. This Settlement Agreement shall not for any purpose be construed as an admission by Mr. Isakoff or as a concession by the NRC, and is a compromise of disputed claims. Each party shall bear its own fees and costs.

2. The February 24, 1999, Order issued to Mr. Isakoff shall be withdrawn upon the approval of this Settlement Agreement by the Board. The Staff will not take any future enforcement action against Mr. Isakoff based on Mr. Isakoff's activities as a Temple University Hospital employee as described in the February 24th Order. However, in the event Mr. Isakoff breaches this Settlement Agreement, the February 24th Order shall be reinstated and Mr. Isakoff hereby waives his right to contest such reinstatement.

3. Mr. Isakoff's March 16, 1999, request for a hearing is withdrawn, and he waives his right to a hearing in this matter and his right to contest or otherwise appeal this Settlement Agreement once approved by the Board. Mr. Isakoff's

withdrawal and waiver will become effective only upon approval of this Settlement Agreement by the Board.

4. For a period of one year from the date of approval of this Settlement Agreement by the Board, Mr. Isakoff will not engage in NRC-licensed activities, or seek employment involving such activities. NRC-licensed activities are those activities that are conducted pursuant to a specific or general license issued by the NRC, including, but not limited to, those activities of Agreement State licensees conducted in areas of NRC jurisdiction pursuant to the authority granted by 10 C.F.R. § 150.20.

5. For a period of three years following the expiration of the one-year period described in Paragraph 4, Mr. Isakoff will inform the NRC within 20 days of accepting any employment involving NRC-licensed activities.

6. The Staff and Mr. Isakoff will file a joint motion requesting the Board to approve this Settlement Agreement and terminate the proceeding, pursuant to the Commission's regulations in 10 C.F.R. § 2.203.

IN WITNESS THEREOF, Mr. Isakoff and the Staff have caused this Settlement Agreement to be executed by their parties or their duly authorized representatives on this 28th day of July 1999.

L. Michael Rafky, Esquire
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(Counsel for NRC Staff)

Gary Isakoff

John F. O'Riordan, Esquire
Eckert Seamans Cherin
& Mellot, LLC
1515 Market Street
Ninth Floor
Philadelphia, PA 19102
(Counsel for Gary Isakoff)

Dated at Rockville, Maryland,
this 28th day of July 1999.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Peter B. Bloch, Presiding Officer
Thomas D. Murphy, Special Assistant
Robin Brett, Special Assistant

In the Matter of

Docket No. 40-8968-ML
(ASLBP No. 95-706-01-ML)
(Re: Leach Mining
and Milling License)

HYDRO RESOURCES, INC.
(2929 Coors Road, Suite 101,
Albuquerque, NM 87120)

August 20, 1999

This Partial Initial Decision, which concludes consideration of Phase I of this application for a license to conduct injection mining for uranium, affirms the validity of the license granted to Hydro Resources, Inc. (HRI), to mine its Church Rock Section 8 property. This decision covers the following issues: groundwater, National Environmental Policy Act of 1968 (NEPA), cumulative impacts, and environmental justice.

The groundwater portion of this Decision concluded that the Church Rock Section 8 portion of the Crownpoint Uranium Project meets Nuclear Regulatory Commission (NRC) regulatory criteria for licensing and that the geological model presented by Intervenors is not appropriate for the geology of this region. The Presiding Officer also concluded that the *in situ* leach (ISL) mining project on Church Rock Section 8, with the license conditions imposed on it by the Staff of the Commission, does not pose a credible threat to the environment or to human health and safety. That key determination provided the foundation for the further conclusion that the Final Environmental Impact Statement and the findings made in this proceeding, both in prior decisions and in this one, take the "hard look"

required for NEPA determinations, for consideration of cumulative impacts, and for environmental justice.

URANIUM MINING: ISL MINING; DETECTION OF LEAKS

After careful examination of the literature concerning the local hydrogeology, the Presiding Officer concluded that there were not likely to be underground pipes or pathways for rapid movement of water (“channelways”) that would permit uranium-laden fluid to escape the monitoring wells that were built in order to detect and help to control leaks.

URANIUM MINING: ISL MINING; PRECIPITATION OF URANIUM

As water that is rich in uranium passes through underground formations that are rich in humates, the uranium precipitates out rather than being carried long distances by the water.

URANIUM MINING: ISL MINING; GROUNDWATER RESTORATION

Intervenor’s witness modeled concentrations of uranium and concluded that after about 200 years the concentration would be about 0.17 mg/L. This value is still substantially less than the NRC’s primary goal of a restoration value of a uranium concentration of 0.44 mg/L. Accordingly, water quality is acceptable.

URANIUM MINING: ISL MINING; LOCAL HYDROLOGY

Careful study of available information on local hydrology persuades the Presiding Officer that there is little risk from vertical excursions. In addition, Licensee will gather further data by performing pump tests before commencing ISL mining.

URANIUM MINING: ISL MINING; REINJECTION OF BLEED WATER

Licensee’s plan to reinject a portion of the bleed water into the aquifer will not reduce negative pressure at the production well because the reinjection will occur far enough from the mining field that it will not affect water pressure in the field.

URANIUM MINING: ISL MINING; URANIUM LEVELS NEED NOT BE MONITORED

Licensee will monitor bicarbonate, chloride, and conductivity at its monitoring wells. This will give adequate advance indication of an excursion. It is, therefore, not necessary to model uranium levels. Licensee has agreed to monitor these levels anyway.

URANIUM MINING: ISL MINING; GROUNDWATER RESTORATION DEMONSTRATION

Under its license, Licensee is required to conduct described demonstration projects concerning groundwater restoration. These demonstration projects are adequately described to provide assurance that groundwater restoration will be adequate.

URANIUM MINING: ISL MINING; EXEMPTED AQUIFER

When EPA has exempted a portion of an aquifer under the Safe Drinking Water Act, its determination implies that there is no drinking water in the exempted portion of the aquifer.

URANIUM MINING: ISL MINING; OVERALL SAFETY

Having resolved all pending arguments except those presently before the Commission, the Presiding Officer concluded that there was an adequate assurance of safety for the licensed ISL project in the mining area subject to adjudication in this phase of the case.

NEPA: BENEFITS OF PROPOSED PROJECT; PRICE OF URANIUM

The final environmental statement for the licensed ISL mining project relied primarily on a price of uranium that is substantially above the current market value. Nevertheless, it is an appropriate price for estimating benefits because economic considerations require that Licensee postpone mining unless the market were to reach the price used in the final environmental statement. Accordingly, the price is an appropriate level for calculating benefits.

NEPA: HARD LOOK; ADEQUACY OF FEIS

After examining Intervenor's arguments in light of the record compiled in this case, the Presiding Officer concluded that the agency has taken an appropriate "hard look" at environmental issues and that the FEIS is adequate.

NEPA: HARD LOOK; CUMULATIVE IMPACTS

The Presiding Officer determined that the small impacts on public safety that would result from Licensee activity were not "the straw that breaks the camel's back" and that they do not require further discussion in the FEIS.

NEPA: HARD LOOK; ENVIRONMENTAL JUSTICE IMPACTS

The Presiding Officer determined that there were no substantial adverse impacts on environmental justice in the community and that the analysis in the FEIS on environmental justice was adequate.

TECHNICAL ISSUES

The following technical issues are discussed: groundwater, hydrology, ISL mining for uranium, groundwater restoration, and reinjection of bleed water.

APPEARANCES

Attorneys representing Eastern Navajo Diné Against Uranium Mining and Southwest Research and Information Center: **Lila Bird, Johanna Matanich, Douglas Meiklejohn, and Douglas Wolf**, Santa Fe, New Mexico 87505; **Diane Curran**, Washington, D.C. 20009.

Attorneys representing the Staff of the Nuclear Regulatory Commission: **John T. Hull** and **Mitzi Young**, Rockville, Maryland 20852.

Attorneys for Grace Sam and Marilyn Morris: **Roderick Ventura** and **Samuel D. Gollis**, Window Rock, Arizona 86515.

Attorneys for Hydro Resources, Inc.: **Anthony J. Thompson, Frederick S. Phillips**, and **David C. Lashway**, Washington, D.C. 20037.

PARTIAL INITIAL DECISION CONCLUDING PHASE I (Groundwater, Cumulative Impacts, NEPA, and Environmental Justice)

This is a proceeding in which Hydro Resources, Inc. (HRI), seeks to retain a license to mine for uranium in McKinley County, New Mexico. It proposes to mine by injecting water, fortified with dissolved oxygen and sodium bicarbonate, into the uranium ore-bearing portion of the aquifer to oxidize and dissolve uranium and bring it to the surface for extraction. This process is also known as *in situ* leach (ISL) mining because it uses fluid to extract uranium from the place (*situ*) in which it is found. HRI's license is opposed by a group of Intervenor who have a variety of concerns, including an allegation that this process will adversely affect the quality of water in the aquifer.

This Partial Initial Decision, which concludes consideration of Phase I of this case, affirms the validity of the license granted to HRI to mine its Church Rock Section 8 property. This Decision follows a series of partial initial decisions. It covers the following issues: groundwater, National Environmental Policy Act of 1968 (NEPA), cumulative impacts, and environmental justice.

The groundwater portion of this Decision examines the geological model presented by Intervenor and concludes that it is not appropriate for the geology of this region and that HRI's analyses demonstrate that the Church Rock Section 8 portion of the Crownpoint Uranium Project meets NRC regulatory criteria for licensing. Accordingly, after consideration of all the areas of concern presented to me in this phase of the litigation, I conclude that the ISL mining project on Church Rock Section 8, with the license conditions imposed on it by the Staff of the Commission, does not pose a credible threat to the environment or to human health and safety. That key determination provides the foundation for the further conclusion that the Final Environmental Impact Statement, NUREG-1508, February 1997, "Summary and Conclusions" (FEIS) and the findings made in this proceeding, both in prior decisions and in this one, take the "hard look" required for NEPA determinations, for consideration of cumulative impacts, and for environmental justice.¹

¹ CLI-99-22, 50 NRC 3, was issued by the Commission on July 23, 1999. Pursuant to that decision, the Commission retained jurisdiction over the adequacy of HRI's financial assurance plan. For purposes of my finding concerning the hard look taken under NEPA, I assume that the Commission is taking a hard look at the adequacy of the financial assurance plan.

I. BACKGROUND: DESCRIPTION OF THE HRI PROJECT²

HRI has applied for and received a materials license to conduct ISL mining on Sections 8 and 17 in Church Rock, New Mexico, and on two sites in Crownpoint, New Mexico, “Unit 1” and “Crownpoint.”³ HRI’s application proposes processing the uranium extracted from each site at its Crownpoint central processing facility.⁴

This phase of the proceeding, completed by this Decision, covers concerns that the portion of the project at Church Rock Section 8 should not be licensed. It also covers concerns that might demonstrate that the overall project should not be licensed. Memorandum and Order, Scheduling and Partial Grant of Motion for Bifurcation, September 22, 1998 (unpublished), at 3. Prior partial initial decisions in this phase of the proceeding include LBP-99-1, Waste Disposal Issues, 49 NRC 29 (1999); LBP-99-9, Issues Related to the National Historic Preservation Act (NHPA) and the Native American Graves Protection and Repatriation Act (NAGPRA) and Cultural Resources, 49 NRC 136 (1999); LBP-99-10, Performance-Based Licensing Issues, 49 NRC 145 (1999); LBP-99-13, Financial Assurance for Decommissioning Issues, 49 NRC 233 (1999); LBP-99-18, Technical and Financial Qualifications, 49 NRC 415 (1999); LBP-99-19, Radioactive Air Emissions, 49 NRC 421 (May 13, 1999).

At the Church Rock site, HRI’s mineral rights include 65 hectares (160 acres) of patented mining claims in Section 8, T16N R16W, and 80 hectares (200 acres) of private minerals operating leases in Section 17, T16N R16W. The site involves 512 hectares (1280 acres) of allotted lands requiring mineral operating leases issued and held in trust for the Navajo allottees by the Bureau of Indian Affairs (BIA). The Unit 1 site is located in Sections 15, 16, 21, 22, and 23, T17 R13W. The Crownpoint site, which involves 365 hectares (912 acres) of private leases and claims areas, is located in Sections 19, 24, and 25, T17N R13W, and Section 29, T17N R12W. The Church Rock Section 17, Unit 1, and Crownpoint sites are scheduled to be considered in Phase II of this proceeding.

The proposed project would be designed to extract a total of 19 million kilograms (42 million pounds) of uranium reserves, at a maximum rate of approximately 1.5 million kg/year (3 million lb/year). HRI anticipates that uranium recovery activities at the Church Rock site would last approximately 8 years.

²This introduction gives an overview of the nature of HRI’s proposed project. It is drawn from the FEIS at xix to xxi.

³HRI has been granted a license (SUA-1508, January 5, 1998) to conduct ISL mining. It submitted its initial application on April 13, 1988, and proposed to mine on Section 8 in Church Rock. Hearing Record Accession Number (ACN) 8805200339, Application for Materials License (April 13, 1988). HRI later amended the application to include processing in Crownpoint and mining at Section 17, Unit 1, and Crownpoint. Consolidated Operations Plan (COP), Rev. 2.0, at 2 (Hearing Record ACN 9708210179, August 15, 1997).

⁴COP Rev. 2.0 at 2. *See also* Hearing Record ACN 8811040138 (HRI changes location of the proposed Central Processing Facility) (October 12, 1988).

HRI proposes to construct ISL well fields where it has claims or leases to economic ore reserves. Existing and new surface facilities at each site would be used as processing plants for extracting uranium from aqueous mining solutions. Groundwater in the aquifer known as the Westwater Canyon Member⁵ of the Morrison Formation (Westwater) would be fortified with dissolved oxygen and sodium bicarbonate, then continuously recirculated by wells through the ore-bearing portion of the aquifer to oxidize and dissolve uranium minerals. In the Church Rock area, the top of the Westwater is found at depths ranging from 140 to 230 meters (460 to 760 feet). The proposed mining process would use a pattern of injection and production wells drilled into the ore zone. Each production well would be pumped at about 95 liters per minute (Lpm) (25 gallons per minute (gpm)), and enough patterns would operate in each well-field area to provide a maximum processing plant flow rate of 15,000 Lpm (4000 gpm). Before mining could occur at either the Unit 1 or Crownpoint site, HRI would be required to conduct a groundwater restoration demonstration at the Church Rock site. The demonstration would be conducted at a large enough scale to determine the number of pore volumes that would be required to restore a production-scale well field.

Uranium would be recovered from the mining solution in each processing plant by circulating it through ion exchange columns. The ion exchange columns would be alternately taken off line and the uranium stripped, precipitated, and concentrated. All uranium slurry produced would be dried using a single dryer located in the central processing plant at Crownpoint. Uranium slurry would be transported by truck from the satellite Church Rock facility to Crownpoint for drying. The Crownpoint processing plant would use an existing building constructed for earlier uranium mining. A satellite processing plant would be constructed at Church Rock. Approximately 2.5 hectares (6 acres) of land would be cleared to construct the satellite plant, including buildings, storage and parking areas, and retention ponds.

HRI proposes that groundwater restoration criteria be established on a parameter-by-parameter basis, and that the primary goal of restoration be to return all parameters to average premining baseline conditions. In the event that water quality parameters cannot be returned to average premining baseline levels, the secondary goal would be to return water quality to the maximum concentration limits as specified in United States Environmental Protection Agency (EPA) secondary and primary drinking water regulations (40 C.F.R. Part 141 and § 143.3). For barium and fluoride, the secondary restoration goal would be set to the State of New Mexico primary drinking water standard. For uranium, 300 pCi/L (0.44 mg/L)

⁵ In the literature, the Westwater Canyon Member is referred to also as Westwater Canyon, Westwater Canyon sandstone, Westwater Canyon aquifer, Westwater sandstone, and Westwater aquifer. In this Decision, I will call it simply “Westwater” unless the term is included in a direct quotation, in which case I will accept the author’s terminology.

would be used. This concentration was obtained from 10 C.F.R. Part 20 and is suitable for unrestricted release of natural uranium to water. HRI proposes to employ a two-stage treatment system for all liquid effluents. Treated water that meets groundwater standards would be recirculated in the aquifer during restoration and then either reinjected into the Westwater in a location isolated from mine units or applied to the land using ordinary irrigation equipment. Most solid wastes that would be generated by the mining process are defined as 11e(2) byproduct material in the Atomic Energy Act of 1954, as amended, and would require disposal at an offsite licensed disposal facility.

After HRI concludes the mining operation and demonstrates complete aquifer restoration, HRI proposes to plug and abandon the wells, decontaminate or decommission processing facilities, remove all contaminated material to a licensed waste disposal site, survey all disturbed areas, decontaminate to acceptable levels, recontour, revegetate, and release the areas for unrestricted use.

II. GROUNDWATER CONCERN

Intervenors allege that HRI has made serious misrepresentations with respect to the hydrogeology and aqueous geochemistry at the Church Rock site, that necessary water tests were not conducted in a proper manner, and that the geologic unit known as the Westwater is inappropriate for mining activity. They conclude that mining will result in degradation of the quality of the water supply. This allegedly will occur because of inadequate monitoring for excursions, improper criteria for determining excursions, and inadequate groundwater restoration standards, especially for uranium. HRI and Staff both deny these allegations.⁶ I examine each of the arguments, using the order of presentation in the Intervenors' Groundwater Brief.⁷

A. HRI Has Misrepresented the Westwater as a Homogeneous Aquifer

Intervenors argue that ore in the Westwater, in which Church Rock Section 8 is located, was deposited along ancient channelways. Intervenors suggest that the Westwater "consists of thin, stacked, and crisscrossing sand channels bounded by less permeable siltstones and shales." (Intervenors' Groundwater Brief at 17, 18.) They are concerned because they believe that these channels form a pathway for rapid water travel, carrying toxic elements released by mining over large distances

⁶HRI's Response to Intervenors' Brief . . . with Respect to Groundwater Issues, February 19, 1999 (HRI Groundwater Response); NRC Staff's Response . . . on Groundwater Issues, March 12, 1999 (Staff Groundwater Response).

⁷Intervenors' Amended Written Presentation in Opposition to Hydro Resources, Inc.'s Application for a Materials License with Respect to Groundwater Protection, January 18, 1999 (Intervenors' Groundwater Brief).

in a relatively short time, thus poisoning the aquifer and adversely affecting its use for drinking water. *Id.* at 19.

The considerable literature on the Westwater⁸ demonstrates that it consists predominantly of sandstone that contains discontinuous clay horizons formed by fluvial deposition⁹ (Turner-Peterson at 47-75¹⁰). On a local scale it is heterogeneous due to the very local occurrence of clay and conglomerate (e.g., Turner-Peterson and Fishman at 373). On a broad scale, that of the proposed mining operation, the Westwater may be approximated as homogeneous.

Seismic studies at Church Rock indicate that the bulk of the ore zone occurs entirely within a portion of the Westwater consisting of a block down-dropped by ancient faulting (Phelps *et al.* at 145). Thickness of sand and sand content are greater within this block than in the remainder of the Westwater. Therefore, the seismic data strengthen the conclusion that the ore zone of the Westwater behaves in a homogeneous manner. Similar thickening occurs elsewhere in the Westwater where the Westwater contains large sandstone-to-mudstone ratios (Turner-Peterson and Fishman at 373).

The technical literature cited by Intervenors offers similar descriptions of the Westwater to that quoted from the Intervenors' Groundwater Brief above. The Intervenors stress the heterogeneity of the Westwater, whereas HRI and Staff stress the homogeneity.

Intervenors differ from the published literature in their belief that channels will rapidly transport water through the Westwater and that the ore has been deposited in a series of vertically stacked channelways. Such deposition along channelways contradicts conventional uranium deposit models. Uranium deposits at redox fronts, where the circulating fluids encounter a more reducing environment, are commonly caused by the presence of organic material, especially humates (e.g., Turner-Peterson and Fishman at 357-88). The published literature does not suggest in any way that these redox fronts are ancient channelways.

The Intervenors rely on references to channelways in AAPG Studies in Geology #22. In examining the literature, however, there are no references to channelways, although statements are made about "vertically stacked and laterally coalesced sandstone beds interbedded with thin, *laterally discontinuous* mudstone beds" (Kirk and Condon at 111). These are not synonymous with channelways and are typical of fluvial sandstone deposits such as the Westwater.

⁸The source most cited by the parties is *A Basin Analysis Case Study: The Morrison Formation Grants Uranium Region New Mexico* (Christine E. Turner-Peterson *et al.* eds., AAPG Studies in Geology #22, 1986 (AAPG Studies)). This is a collection of articles. In this Partial Initial Decision, I have used scientific citations to articles within this collection, all of which I find relevant and admissible.

⁹A process by which a river lays down deposits. *The Random House College Dictionary* at 509 (1980).

¹⁰Citations in this format, using author names not defined in the text, are citations to *A Basin Analysis Case Study*, cited in note 8, above.

For the Intervenor's concerns about channelways to be relevant to this proceeding, there must be narrow channelways that transport water much faster than surrounding rock, possibly causing water to bypass monitoring wells and to create rapid excursions, much as if there were underground pipes that somehow manage to avoid all the monitoring wells. A channelway must also be long enough to speed up the travel of water for an appreciable fraction of the total distance to be traveled. The principal characteristics of rock that permit water to move within it are its porosity and permeability. For a channelway to flow faster than the surrounding rock, it must have higher porosity (a higher percentage of pore space — which measures its ability to contain water within pores) and higher permeability (ability of water to flow from pore to pore). I conclude, based on a review of the entire record, that the Westwater does not contain channelways.

Intervenor's expert, Wallace (Response Affidavit, May 20, 1999, at 4-11),¹¹ presents a model that he has constructed based on a pump test and some assumptions. However, HRI's license conditions acknowledge that one pump test is by no means definitive either in determining the hydrological properties of the aquifer, including whether or not it is vertically contained. Accordingly, additional pump tests will be conducted. (License Conditions 10.23 to 10.26, 10.30 to 10.31 (SUA-1508 at 8-9).) Furthermore, the conclusions that can be drawn from models depend on their assumptions, and Wallace's model assumes a channelway, which is contrary to the weight of the evidence before me. Wallace states, however, that the model is "nothing more than one of many plausible configurations based on a channel theme." (Wallace Response Affidavit, May 21, 1996, at 10.) Wallace (*id.* at 15) states that

the results represent two solutions among many solutions that could fit the data. While alternative solutions could show lower impacts on the down-gradient well, other alternative solutions could show even greater impacts at any earlier time.

Wallace's model uses postulated conductivities, including the totally unreasonable assumption that the velocity of water through postulated channelways is 10,000 times the velocity of water through surrounding rock.

The model also concludes that restoration will be unsuccessful and that pollution at the nearest private well after 274 years will be about one-fifth the value of maximum contaminant content in the mine area. (*Id.*, Exhibit 2G.) Finally, the model assumes no precipitation of toxic elements along the flow path. However, it is well documented that the Westwater is rich in humates. (AAPG Studies, Fisher at 357-88). Humates are organic compounds that serve as reducing agents,

¹¹ See Intervenor's Joint Response to HRI's and the NRC Staff's Responses to the Presiding Officer's April 21, 1999 Memorandum and Order (Questions), May 25, 1999 (Intervenor's May 25, 1999 Response) at Exhibit 2 (Wallace Response Affidavit).

taking oxygen from groundwater, thus precipitating elements, such as uranium, that depend on the oxygen to remain in solution.

Wallace finds that modeled concentrations of uranium after about 200 years are about 0.17 mg/L. Wallace Response Affidavit, Exhibit 2G. Assuming Wallace's scenario is correct, then this value is still substantially less than the NRC's primary goal of a restoration value of a uranium concentration of 0.44 mg/L. *See, e.g.*, FEIS at 4-60. Accordingly, even if I accept the validity of Wallace's model, I would still find that water quality remained acceptable. Thus, I conclude that Wallace's model, which makes unsupportable assumptions (see the preceding paragraph), has not cast serious doubt on HRI's demonstration that it can adequately restore the mining area.

Intervenors' experts, Abitz¹² and Wallace, are unclear about the three-dimensional structure of the Westwater. The most recent Intervenor position, responding to the informative paper by Cowan (3 *SEPM Concepts in Sedimentology and Paleontology*, at 80-93 (1991) (Cowan Article)), is the position taken by Lucas. Intervenors' expert, Lucas¹³ (Lucas Response Affidavit at 4-7), gives an excellent summary of Cowan's work with respect to the internal structure of the Westwater. He points out that the Westwater is lithologically heterogeneous, but on the large scale each "channel belt" can be "superficially characterized as sandstone, because the majority of the deposit is sandstone." I agree. If one looks at Cowan's photographs and drawings, the Westwater is clearly a fairly pure sandstone, albeit cross-bedded and scoured, and may thus, as noted above, be regarded as generally homogeneous.

Lucas (*id.* ¶ 14, at 6) reports that

Cowan's article can be used to conclude that there must be at least two levels of permeability/porosity in the Westwater Canyon Member: (1) the small scale (averaging 30 meters [100 feet]) of complex conduits; and (2) large scale conduits that correspond to the channel belts.

For reasons stated by Lucas, who is an Intervenor witness, I agree. However, this conclusion does not support Intervenor's position.

Cowan (Cowan Article at 89) states that sheet sandstones act as fluid conduits, but he points out that "in general, it is not possible to trace the base of a sandstone sheet across to adjacent cliff exposures separated by valleys." In addition, the "channelways" are quite discontinuous, and in no sense can be regarded as channelways in a regional sense. Indeed, Cowan points out that these individual sheet sandstone bodies are at least 1 kilometer wide and they "possibly exceed several km." Based on these characteristics, there seems little chance that monitor

¹² Abitz's qualifications are cited in Intervenors' Groundwater Brief at Exhibit 1, Written Testimony of Dr. Richard J. Abitz at 1-3, and Exhibit A. I accept Abitz as an expert.

¹³ Intervenors' May 25, 1999 Response at Exhibit 3 (Lucas Response Affidavit). Lucas's qualifications appear in Lucas Response Affidavit at 1-2 and Exhibits A and B. I accept Lucas as an expert.

wells spaced 400 feet apart would miss an excursion in this environment. I find, contrary to Lucas, that the sheets are 5-10 meters thick, not 30 meters.

The single sheets are discontinuous, possibly because they are overlain and scoured by other sheets. As Lucas points out (Lucas Response Affidavit ¶ 13, at 6), “the Westwater Canyon is a three dimensionally very complex amalgamation of many coalesced channel, bar, and overbank deposits.”

It is important to place the Westwater in context when considering whether it is homogeneous or heterogeneous. If you consider a small area of the Westwater, then it might be heterogeneous even though considering a larger area, as if from a distance, it might be homogeneous.

On a small scale, groundwater flow in the Westwater is complicated, just as water flow through a filter is complicated on a very small scale. But on a larger scale the Westwater may be treated as homogeneous, especially because the coalesced channels are kilometers wide. By homogeneous (isometric medium), what is meant here is that groundwater will flow downgradient at about the same velocity in different parts of the Church Rock area.

I agree with HRI expert Bartels that if lengthy channelways exist at Church Rock, they should occur in other ISL uranium sites that have a very similar fluvial environment. (Bartels Affidavit at 10-14.)¹⁴ Channelways have not been reported elsewhere, so far as I am aware, nor do the Intervenor provide evidence of them.

In light of all the above, I conclude that the ore zone in the Church Rock area is homogeneous (isotropic) with respect to fluid flow, and that the ore zone does not contain significant channelways. Staff (Ford May 24, 1999 Affidavit at 1-3)¹⁵ also persuasively refutes the Channelways hypothesis, as does Bartels (Bartels Affidavit, Feb. 19, 1999, at 12-30, and Wasiolek and Spinks (Affidavit, Feb. 16, 1999,¹⁶ at 4-5). The statement (Intervenor’s Groundwater Brief at 19) that the sand channels in the Westwater function as “pipelines” is without basis. I see no misrepresentation on the part of HRI. Intervenor has an incorrect understanding of the origin of this type of uranium deposit.

¹⁴Bartels’ February 19, 1999 Affidavit is an unnumbered attachment to HRI Groundwater Response (Bartels Affidavit). Bartels’ qualifications are summarized at HRI Groundwater Response, unnumbered exhibit to Bartels Affidavit, February 19, 1999, ¶2. I accept Bartels as an expert.

¹⁵Exhibit 1 to NRC Staff’s Response to HRI’s Answer to Presiding Officer’s Questions, May 25, 1999 (Ford May 24, 1999 Affidavit). Ford’s qualifications are found at Exhibit 9 ¶2 to NRC Staff’s Response to Motion for Stay, Request for Prior Hearing and Request for Temporary Stay, February 20, 1998 (Ford February 20, 1998 Affidavit). I determine that Ford is an expert.

¹⁶Affidavit of Mary Ann Wasiolek and Michael P. Spinks, P.E., February 16, 1999, unnumbered attachment to HRI Groundwater Response (Wasiolek/Spinks Affidavit).

B. Alleged Misrepresentation

1. HRI Misrepresents Groundwater Pathways and Divides as Features That Provided a Lixiviant Barrier

The Intervenor (Intervenor's Groundwater Brief at 19-22) make this allegation by citing the Wallace January 8, 1999 Testimony (attached as Exhibit 3, at 30-37). The Intervenor accuses HRI of misrepresentation on this issue. All arguments are presented for Crownpoint and are therefore not directly relevant for this phase of the hearing, which is limited to Church Rock. However, the method employed by HRI is a commonly used method for evaluating *in situ* mines (HRI Groundwater Response at 8) and does not misrepresent the groundwater pathways.

2. HRI Misrepresents Its Groundwater Travel Times as Conservative

None of the arguments (Intervenor's Groundwater Brief at 22-23) presented involve Church Rock. Further, in discussing Unit 1 and Crownpoint, Intervenor's witness, Wallace (Jan. 8, 1999 Testimony at 42), appears to question the assumption of homogeneity of the Westwater, rather than the method of calculation of flow rates if homogeneity is assumed. As discussed above, homogeneity appears to be the most reasonable characterization. Accordingly, there is no misrepresentation by HRI.

3. HRI Misrepresented That It Evaluated Whether Faulting Exists That Connects the Westwater With Other Aquifers

a. Alleged Connection to Aquifers Below Westwater

The Intervenor states, in their Groundwater Brief at 23-26, that the Recapture Shale (thought to exist under the Westwater, separating it from the underlying Cow Springs aquifer) probably does not exist at Section 8, so it cannot act as a barrier to the Cow Springs aquifer. They state that HRI uses data from a single borehole, although they possess data from 200 such holes. They state that a 5-foot clay layer is the sole barrier between the two aquifers. Intervenor claims that the Cow Springs aquifer "comes into nearly direct contact with the Westwater." (Wallace Jan. 8, 1999 Testimony at 62-63; *see also* Intervenor's Staub Testimony at 27-28, attached as Exhibit 2 to Intervenor's Groundwater Brief. (Staub January 9, 1999 Testimony).¹⁷) Intervenor's Wallace cites Hilpert (Staub Testimony, Exhibit N), whose cross sections indicate that the Recapture is thin or missing in the area of Church Rock. Staff (FEIS at 3-18) and HRI (HRI's Groundwater Response at 9, 10) adequately rebut this allegation, as is discussed below.

¹⁷ Staub's qualifications appear at 1-3 and Exhibit A. I accept Staub as an expert.

The Intervenor further claim (Intervenor's Groundwater Brief at 25-26) that the Recapture Shale may be an aquifer in its own right and may be contaminated by vertical excursions (Intervenor's Groundwater Brief at 25-26; Wallace Jan. 8, 1999 Testimony at 14-17). Many drill holes penetrated the Recapture Shale to varying degrees, and in every case its characteristics are those of an aquatard. The Recapture appears to be present throughout Section 8, as reported by Staff in the FEIS and HRI (HRI Groundwater Response at 10).

HRI's expert, Lichnovsky (Lichnovsky Affidavit, attached to HRI Groundwater Response at 19)¹⁸ states that at the Church Rock area the Recapture Shale is shale (*id.* at 19) and offers evidence (*id.* at 21) that the Cow Springs sandstone does not intertongue with the Recapture Shale at the site. In addition, HRI will conduct tests to determine whether the Cow Springs aquifer is hydrologically confined from the Westwater. Cow Springs will be monitored if confinement does not exist (HRI Groundwater Response at 17-18). I find no misrepresentation by HRI.

Lucas (Lucas Response Affidavit at 3) points out that "the Recapture Shale is not a confining layer in this region because the Recapture is a fluvial deposit in the southern part of the San Juan Basin." Condon and Peterson, at 21, agree with this, but point out that it contains sandstone, claystone, mudstone, and siltstone, in agreement with HRI and Staff. I therefore find that it is an aquatard, separating the Westwater from the Cow Springs aquifer so that there is little reason to believe that there is an appreciable flow of water between them.

Lucas (Lucas Response Affidavit ¶ 6) then states, in disagreement with Intervenor's affidavits, Staff, HRI, and the literature cited by them, that "the rock section immediately below the Westwater is not shale — it is a mixture of sandstone, siltstone, and thin gypsum beds that overlie the gypsum beds of the upper Todilto Formation." He does not state if this mixture is the Recapture Shale, nor does he give any reference to support this statement. In stating this, he did not account for either the considerable thickness of the Cow Springs sandstone, which is a known aquifer in the region, or for the Beclabito Member, both of which overlie the gypsum-bearing Todilto Limestone, which is quite thin in this area (e.g., Condon and Peterson, Fig. 4a, at 11). I reject this uncorroborated statement. Instead, I accept the findings of Condon and Peterson that over 500 feet of Recapture, Cow Springs, and Beclabito lie between the Westwater and the Todilto.

Lucas then states that the gypsum beds to which he refers are easily deformed and dissolved, which "produces numerous fractures at the subsurface and at the surface." (Lucas Response Affidavit ¶ 6, at 3.) This is entirely to be expected for gypsum, and if present could provoke vertical excursions if one accepts Lucas's stratigraphy. However, there is no evidence concerning fractures at the surface in the mine area, which one should see if Lucas's scenario were correct. For the

¹⁸Lichnovsky's qualifications are cited in his affidavit at 1, 2. I accept him as an expert.

reasons stated, I therefore conclude that Lucas's scenario is incorrect and that there is no fracturing caused by gypsum beds, as Lucas alleges.

b. Alleged Connection to Aquifers Above Westwater

Intervenors' Staub (Staub January 9, 1999 Testimony at 26) makes claims about overlying strata. He contends that the Westwater and overlying Dakota aquifer may be in contact at Church Rock because the Brushy Basin member has been scoured away. Staff (FEIS at 3-18) quotes HRI and Hilpert (1969)¹⁹ on the varying thickness of the Brushy Basin at the Church Rock site. Based on the information provided by the Staff, I am persuaded that the minimum thickness of the Brushy Basin Member is 45 feet, and at no place is the sandstone unit in the Brushy Basin separated from the Westwater and Dakota Members by less than 16 feet of mudstone, which is known to be an efficient aquatard (FEIS at 3-35).

Bartels (Bartels Affidavit at 9, attached to HRI Groundwater Response) discusses the Church Rock Environmental Report (Hearing Record ACN 9304130415 at 110), which points out that the Dakota Sandstone and Poison Canyon units have a positive differential pressure with respect to the underlying Westwater. Bartels correctly concludes that there cannot be appreciable leakage between these units because the leakage would equalize the pressures.

HRI expert Orr (Orr Affidavit ¶ 3, attached to HRI Groundwater Response)²⁰ concludes that because of the lower pressure of the Westwater with respect to the Dakota, "any vertical excursion into the Dakota could be reversed simply by stopping the operation." This would cause the net flow to be into the lower-pressure, underlying Westwater.

Bartels (Bartels May 11, 1999 Affidavit at 5, attached to HRI May 11, 1999 Response) quotes a memo by J. Holonich, NRC, to P. B. Bloch (dated April 20, 1998):

Historically almost all vertical excursions at ISL mining operations [anywhere] have been caused by faulty well completions or unsealed exploration boreholes. The staff is aware of only one ISL site where vertical excursions may have been caused by stratigraphic interconnections.

Based on this memorandum, I conclude that the Brushy Basin Member shows characteristics of an efficient aquatard in the mine area. Thus, HRI has not misrepresented this issue.

I also conclude that there are unlikely to be any serious problems from vertical excursions in the course of mining Church Rock Section 8.

¹⁹ Wallace Testimony, Jan. 8, 1999, at 8.

²⁰ The Orr February 19, 1999 affidavit is an unnumbered attachment to the HRI Groundwater Response. Orr's qualifications are cited in his affidavit, ¶ 1. I accept Orr as an expert.

4. HRI Misrepresented That It Evaluated Whether Faulting Exists That Connects the Westwater With Other Aquifers

Intervenors claim (Intervenors' Groundwater Brief at 26-27, 30) that structural cross sections were not reviewed, so that HRI did not determine whether faults could provide vertical pathways for fluid by bringing one aquifer in contact with another. They point out that vertical faulting is common in the San Juan Basin and that fractures and shear zones could create pathways for vertical excursions (Wallace Jan. 8, 1999 Testimony at 2-24, Exhibit 3).

There is no evidence for any faulting later than the Late Jurassic Period at Church Rock and that faulting appears to have occurred at the time the Westwater was deposited, explaining the greater thickness and sand content in the trough formed by the faulting (Phelps *et al.* at 145). HRI conducted a seismic survey at the Church Rock site and saw no faulting later than the Triassic period (HRI Groundwater Response at 10, 11). Pump testing saw no evidence of vertical excursion indicative of faulting, fracturing, or shearing or of drill holes capable of transporting fluid. HRI will do further hydrologic testing for vertical excursion prior to mining (FEIS at 4-18).

Wallace's (Wallace May 20, 1999 Response Affidavit at 18) view of the scientific literature about Church Rock is that the extent to which the seismic cross section reproduced by Kirk and Condon (at 105-44) "goes through the mining zone cannot be discerned from the relevant figures or text." However, I have examined the text and figures and find that this is wrong. In addition, Phelps *et al.* at 145-60, which Wallace cites in the same footnote, clearly shows the position of faults, ore bodies, and seismic lines.

Wallace states (Wallace May 20, 1999 Response Affidavit at 19) that if most vertical excursions occur due to artificial pathways, then the 174 or more old boreholes in Section 8 may serve as conduits, and that Staff has not assessed this risk. Also, Wallace, on the same page, points out that HRI has data on all these (now "hundreds") of boreholes and has used them to construct stratigraphic cross sections. However, I find that the Staff has assessed the risk that the boreholes might be conduits and has found it to be small. (FEIS at 4-55.) I concur.

Wallace (Wallace May 20, 1999 Response Affidavit at 17-22) complains about lack of structural cross sections, fence diagrams, and structure contour maps. I find that these techniques are useful but not totally reliable when there are changes in the depth of strata not associated with faults. Seismic reflection methods are more direct. They work by passing shock waves through underlying rock and observing the deflection of those waves. This kind of measurement is intrinsically more reliable than by obtaining data on bed depth and thickness from the boreholes and trying to infer how to characterize the strata in the area between the boreholes. To further reduce this element of uncertainty, pump tests have been conducted

and more will be performed. (License Conditions 10.23 to 10.26, 10.30 to 10.31 (SUA-1508 at 8-9).)

Moreover, Staff (Ford May 11, 1999 Affidavit at 15-20, Exhibit 1 to NRC Staff Response to Questions in April 21, 1999 Order) deals adequately with the question of vertical excursion through faults, fractures, shears, joints, etc., and I find that the danger of lasting damage is very small.

5. *HRI Misrepresents Baseline Water Quality in the Westwater*

Intervenors (Intervenors' Groundwater Brief at 28 and 29) allege that HRI lumped chemical data from poor-quality water in the ore zone with data from high-quality water outside the ore zone, thus degrading the baseline for the high-quality water. Intervenors are concerned that that may also be done when setting restoration goals. Furthermore, they claim that there is no role for the NRC in establishing baselines.

As pointed out by HRI (Pelizza February 19 Affidavit at 20 and 21, Exhibit to HRI February 19, 1999 Response) (hereinafter "Pelizza Affidavit"),²¹ baselines have not been set but will be set according to the protocol in COP Rev. 2.0 § 8.6. There is no basis in the record for finding that this protocol is unacceptable. Accordingly, I accept this protocol as adequate, and there has been no misrepresentation. Staff approved the protocol and there is no reason to believe that the protocol is inadequate.

C. *HRI's Aquifer Testing Is Inappropriate for Evaluating Whether a Hydraulic Connection Exists*

1. *HRI Has Not Submitted Structural Cross Sections, Fence Diagrams, or Structure Contour Maps*

I have already addressed all of these concerns. *See* Section II.B.4, pp. 92-93.

2. *HRI Used an Inappropriate Model To Analyze Pump Test Data*

Intervenors claim (Intervenors' Groundwater Brief at 30-31) that the Theis method used by HRI to model drawdown data from pump tests is inappropriate because it assumes that the aquifer being tested is fully confined vertically. Wallace, for the Intervenors, used the Modified Hantush method. Although Intervenors' witness Wallace states that the Modified Hantush Test agrees with the Theis Test at Church Rock, namely that no upward excursion occurred there during

²¹ Mr. Pelizza's qualifications are cited in his Affidavit at 2-6. Based on his qualifications and my review of his testimony, I find that he is an expert.

the pump tests, he alleges that the Modified Hantush Method indicates that the Westwater and Cow Springs aquifers are in hydrologic communication. (Wallace Jan. 8, 1999 Testimony at 48-49.) As the FEIS indicates at 4-18, license conditions require that more pump tests and monitoring be done before mining commences. The hypothesis that there is hydrologic communication will be further tested during the additional pump tests required by the license. (License Conditions 10.23 to 10.26, 10.30 to 10.31 (SUA-1508, at 8-9).) While I find HRI's model to be correct, I take further comfort because additional testing will add to the assurance provided by the model.

3. HRI Did Not Conduct Pump Tests on an Appropriate Scale

Wallace for the Intervenor (Intervenor's Groundwater Brief at 32-33; Wallace Jan. 8, 1999 Testimony at 43-47) points out that pump tests were performed involving pumping 60 gpm for several days, and that HRI plans to pump several thousand gallons per minute for years. He concludes that the stress on the rocks involved is many orders of magnitude more than that imposed by these pump tests. He alleges that such additional pressures may cause excursions.

However, Staff requires additional pump tests before mining (License Condition 10.23). HRI plans well-field pressures considerably below anticipated conservative fracture pressures for the aquifer (FEIS at 4-24). It would be unrealistic to conclude that fracture definitely will not occur, because rock may be heterogeneous in its reaction to stress. By keeping well pressures considerably below anticipated fracture pressures,²² however, the probability of fracture is low. If a vertical excursion occurs, it can be detected and dealt with without threat to the quality of drinking water drawn from the aquifer. (FEIS at 4-55.)

4. NRC Staff Relies on Improper Data To Detect Vertical Movement Between Aquifers

Wallace (Intervenor's Groundwater Brief at 33; Wallace Jan. 8, 1999 Testimony at 57-58) claims that historic water levels should have been used to complement pump test results. He analyzed the pump tests for Unit 1 and Crownpoint and found that they were in error. He then analyzed historic water levels, which confirm his results. As a result, he alleges a vertical connection. He suggests that Crownpoint results "are relevant to the hydrologic conditions at the Church Rock site" (Wallace Jan. 8, 1999 Testimony at 60). However, Wallace did not have any reason to differ with the pump tests at Church Rock and could not consult historic water levels from wells at Church Rock because there are no wells in the vicinity.

²²The anticipated fracture pressure is the pressure at which a fracture is expected to occur.

I find no reason to believe that the Unit 1 and Crownpoint well tests are relevant to Church Rock, especially when Wallace's interpretation of pump test results at Church Rock agreed with that of HRI and suggests no vertical connection. See Section II.C.2, pp. 93 ff, above.

5. *HRI Did Not Model the Amount of Groundwater It Will "Bleed" To Control Lixiviant and Prevent Horizontal Excursions*

The Intervenor claim (Intervenors' Groundwater Brief at 34) that reintroduction into the Westwater of 97.5% of the bleed water that has been removed gives a true bleed rate of 0.025%, not the 1% that is claimed. (Staub Jan. 9, 1999 Testimony at 28-29.) This is potentially significant because the bleed is intended to create a cone of depression that will cause injected water to move toward the production well rather than spreading outward in a horizontal excursion. (FEIS at 2-7.)

Intervenors allege that this reintroduction of bleed water will reduce the negative pressure that is needed to avoid excursions. HRI (Pelizza Affidavit at 53) agrees with Staub that reinjection should not be done upgrade of the mining operation and they state that it will be done outside the influence of production patterns. HRI, or its parent company, has had experience in reinjection and there is no reason to doubt the statement. Since the reintroduction is outside the production pattern, it will not reduce the negative pressure. Consequently, I conclude that HRI has accurately represented its bleed rate.

D. *Licensing of the Crownpoint Project Is Inimical to Health and Safety Because HRI's Groundwater Monitoring Plan Is Inadequate*

1. *The Proposed Spacing of Groundwater Monitoring Wells Is Inadequate To Provide Timely Detection of Horizontal Excursions*

License Condition 10.17 requires monitoring wells in the Westwater to be placed 400 feet apart and at a maximum distance of 400 feet from production/injection wells. Intervenor claim (Intervenors' Groundwater Brief at 37-40) that these parameters are inadequate because the bulk of fluid passes along narrow sand channels (see p. 84 *et seq.*, above). Intervenor claim that sand channels at Church Rock average 158 feet wide (Intervenors' Groundwater Brief at 37) so that monitors should be placed 300 feet apart, and that a greater concentration be placed downgradient in the mine zone.

This complaint about pump placement is part of Intervenor's claim that sand channels may dominate flow direction and that municipal water pumps at Crownpoint will influence flow. I have concluded that there is a lack of evidence for sand channels, *supra* Section II.A, p. 88. Moreover, given the slow speed at which groundwater travels and the distance of Church Rock from Crownpoint,

Crownpoint municipal pumping would have no effect on groundwater flow at Church Rock.

Staff (Ford March 12, 1999 Affidavit ¶ 25; *see also* Ford Feb. 20, 1999 Affidavit ¶ 14) also argues that two rows of monitoring wells — as suggested by Intervenor — have never been required by NRC at any ISL site. Intervenor (Abitz Testimony at 25, 26) point out that no other mines occur in areas with such high water quality. This argument is irrelevant. Given the homogeneous nature of the rock structures in this area, I conclude that one tier of monitors will be adequate for Church Rock Section 8. (*See* p. 84 *et seq.*, which discusses the hydrogeology of this area.) With high water quality, even a minor excursion would be detected because the Upper Control Limits (UCLs) would be lower. (*See* p. 98, below.)

2. *HRI's Groundwater Monitoring Plan Is Inadequate to Detect Vertical Excursions in Overlying and Underlying Aquifers*

Intervenor claim (Intervenor's Groundwater Brief at 41-42) that monitoring is inadequate to detect excursions into the Cow Springs, Brushy Basin (B Sand Layer), and Dakota aquifers. *See* FEIS at 3-19 (describing three layers known as the Brushy Basin).

a. *The HRI License and Application Improperly Failed To Provide for Monitoring of the Cow Springs Aquifer*

Intervenor complain (Intervenor's Groundwater Brief at 41-42) that HRI has no plans to monitor the Cow Springs aquifer. However, HRI will conduct tests to determine if the aquifer is hydrologically confined from the Westwater. The Cow Springs member will be monitored if confinement does not exist. (*See* HRI Groundwater Response at 17, 18.)

b. *The Frequency of Monitor Wells in the Overlying Dakota and Brushy Basin B Aquifers Is Inadequate*

Monitoring of the Dakota aquifer is required at a minimum of one well per 8 acres, and the Brushy Basin at a minimum of one well per 4 acres. (FEIS at 4-56.) Intervenor complain (Intervenor's Groundwater Brief at 42-43) that Staff has not adequately explained or quantified this assessment in terms of the risks involved. However, well densities here are consistent with NRC-approved densities at other ISL operations. The FEIS states (at 4-55)

the risk of a vertical excursion occurring outside the area of former mining activities should be low given the thick aquatards over and under the production zone, the planned well integrity testing program, and the potential for old boreholes to squeeze shut. HRI proposes to monitor

water levels and water quality in the overlying aquifer to detect leaks. Further, in the event of a vertical excursion, HRI proposes to proceed immediately to determine the cause of the leakage and reverse the trend. The potential for an upper aquifer excursion to go undetected should be small, as discussed for the Unit 1 Site in Section 4.3, 1.2.

Intervenors claim (Intervenors' Groundwater Brief at 43) that spacing should be closer at Church Rock because the other sites were "in aquifers where groundwater does not meet drinking water standards." However, HRI reports (HRI Groundwater Response at 19) that a number of these sites are in aquifers whose water is extensively used for drinking.

The purer the water is, the easier it should be to detect an excursion, especially in sandstone sheets that are at least 1 kilometer (3250 feet) wide and cannot therefore be considered as narrow channelways (*see* p. 87 ff, above). The Upper Control Limits would be lower in zones of pure water, thus making the detection of excursions easier. Accordingly, Intervenors' assertion that the frequency of monitor wells is inadequate is without merit.

E. Licensing of the Crownpoint Project Is Adverse to Public Health and Safety Because HRI Has Failed To Provide Adequate Protection Against Excursions

Intervenors claim (Intervenors' Groundwater Brief at 43, 44) that critical excursion indicators are not listed in the license, so that HRI may create scientifically unsound control limits for monitoring excursions.

1. HRI's License Excludes the Use of Necessary Excursion Parameters

License Condition 10.21 establishes bicarbonate, chloride, and conductivity as the parameters for determining whether or not an excursion has occurred. These parameters are expected to increase in an excursion because they are characteristics of the injected lixiviant and are expected to serve as lead indicators that uranium also may be spread in an excursion. FEIS at 4-19 to 4-20. Intervenors state (Intervenors' Groundwater Brief at 44-45) that uranium content should be an additional parameter and that groundwater elevation control limits should also be used. HRI (Pelizza Affidavit at 44) is willing to monitor uranium despite the fact that it and Staff have not found it to be a useful indicator because it comes out of solution outside the oxidizing zone, so that levels may not reach critical limits during an excursion. I am therefore satisfied that there is no need to measure uranium levels and I will not impose a license condition requiring such measurement. Regardless, HRI will monitor water levels. This is an adequate response to Intervenors' objections.

2. *HRI Proposes To Use Scientifically Unsound UCLs (Upper Control Limits)*

Intervenors state (Intervenors' Groundwater Brief at 45) that an excursion will be considered to have occurred when the readings from a monitor well show that any *one* excursion parameter (bicarbonate, chloride, and conductivity) exceeds its UCL by 20% or that *two* excursion parameters exceed their UCL. (License Condition 10.12; FEIS at 4-21.) UCLs are to be determined from baseline mean concentration and then adding 5 standard deviations from the mean to this value (FEIS at 4-20). It is clear from inspecting Church Rock Site Water Quality Data (FEIS, Table 3.19, at 3-36) that UCL plus 20% for all elements listed with EPA standards are purer than EPA standards except for the two elements that do not meet EPA standards in the Church Rock water: uranium and radium. The quality of water impure enough to signal an excursion is usually not harmful unless the original water is harmful. The same conclusions can be made for other water qualities listed in the FEIS.

Intervenors claim (Intervenors' Groundwater Brief at 45, 46) that allowing 5 standard deviations "allow[s] concentrations of excursion parameters to be two to three times greater than under the Groundwater Monitoring [plan] . . . before an excursion can be declared" (Intervenors' Groundwater Brief at 45). This, they claim imposes danger to the aquifer. Abitz (Abitz Testimony at 38-42) claims that by the time chloride reaches its UCL, uranium would be highly concentrated, and that laboratory analyses take 2 weeks to a month to perform. This, Abitz claims, would result in pollution beyond the monitoring area. Uranium is discussed in Section II.E.1, above. Although monitoring is not necessary, it will be monitored.

HRI rebuts by pointing out (Pelizza Affidavit at 45-48) that 5 standard deviations are widely required by NRC of licensees in Wyoming and that such limits would markedly decrease the number of false positives. Numerous false positives could encourage disregard of a true excursion. Pelizza also states that analyses will be done on site within 24 to 48 hours after samples are received.

Pelizza makes a convincing argument on the danger of setting limits that are too close to baseline. One could successfully argue for fewer standard deviations if baselines were constructed for each individual monitoring well. However, the bulk mean is used for a field because baseline values are variable over time and from well to well. Leach water ranges from a factor of 4 to 17 over UCLs in the example given (*id.* at 47); using 3 standard deviations, the factors range from 5 to 26. It seems clear that both the 3-standard-deviation UCL and the 5-standard-deviation UCL would detect excursions and that the latter would do so with fewer false alarms, as discussed below.

The UCL for chlorine is particularly conservative. The FEIS (at 4-20) states that

in areas of good water quality, NRC has found the mean plus 5 standard deviations to be acceptable. However, in aquifers with good water quality, chloride populations have been found to have such a narrow statistical distribution that the mean plus 5 standard deviations plus a defined concentration has been used.

Intervenors point out that away from the ore zone the Westwater contains good drinking water. *Id.* at 3-35. Therefore, NRC's mean plus 5 standard deviations for determining UCLs would apply. However, an increment is not being added to the chlorine mean plus 5 standard deviations (FEIS at 4-20 to 4-21), thus making this UCL more conservative than those at some other sites. I therefore conclude that the 5-standard-deviation excursion parameters to be applied are reasonable.

F. Licensing of the Crownpoint Project Is Inimical to Health and Safety Because HRI Has Failed To Demonstrate That Groundwater Restoration Can Be Achieved

HRI's License Condition 10.21A requires the operator to restore groundwater to baseline as a primary goal, with a secondary goal of federal primary and secondary drinking water standards except that the secondary standards for barium (Ba) and fluorine (F) should be the New Mexico primary standard for drinking water and that for uranium (U) shall be 0.44 mg/L.

Intervenors allege that the HRI method of determining baseline will "inflate the concentration of contaminants in baseline averages" and that secondary standards for barium, fluoride, and uranium do not allow for safe drinking water (Intervenors' Groundwater Brief at 47). Further, "the track record of the ISL industry demonstrates that restoration to the good water quality of the Westwater is not technologically feasible."

1. HRI's Methods To Determine Baseline Will Inflate the Concentration of Contaminants in Baseline Averages

Abitz states (Intervenors' Groundwater Brief at 47; Abitz Testimony at 43) that averages of water analyses in the mineralized zone, which are higher in harmful elements than those outside the mineralized zone, are lumped together, thus producing an inflated baseline for water quality in the mineralized zone.

It is quite clear that the figures given by HRI do not constitute baseline. HRI (HRI Groundwater Response at 22) states:

As described in C.O.P. Rev. 2.0 §8.6.3, baseline will be determined after the mine units have been installed for groundwater in the ore zone and non-ore zone separately. HRI agrees that baseline should be determined in both the production area and the mine area separately.

As water in the production area would be expected to be naturally higher in radionuclide concentrations, baseline levels may be elevated and they must be measured and accounted for in establishing restoration goals. Conversely, the monitor wells would be expected to have lower concentrations of radionuclides and these levels should be measured and accounted for so that an excursion could be verified and/or corrected properly. Any assertion that Abitz's Table 1 (Abitz Testimony at 12) represents baseline for compliance purposes is therefore incorrect. HRI has taken the statistically sound approach that it will not derive baseline from a small sample but will augment the sample by using actual well-field data. (HRI Groundwater Brief at 22.) I accept the need for more data and adopt this point of view as my conclusion.

2. *The Secondary Standards for Barium and Fluorine Are Not Protective of Health and Safety*

Intervenors claim (Intervenors' Groundwater Brief at 48) that the New Mexico standards for barium and fluoride are groundwater quality standards, but not drinking water standards. Also, these standards are irrelevant because the project lies within the jurisdiction of the Navajo Nation. Therefore, Navajo Nation standards for drinking water, which are the same as federal standards, should serve as the secondary restoration goal.

The Presiding Officer rejects this argument. The New Mexico standard for barium is 1.0 mg/L, the EPA and Navajo Nation Environmental Protection Agency standard (EPA/NNEPA) is 2.0 mg/L. For fluoride, the New Mexico standard is 1.6 mg/L, the EPA/NNEPA standard is 4.0 (FEIS, Table 4.7, at 4-30). Since the New Mexico standard is more rigorous than either the federal or Navajo standard for drinking water, this concern is without merit.

3. *The Secondary Standard for Uranium Is Not Protective of Health and Safety*

Intervenors claim (Intervenors' Groundwater Brief at 49-51) that the secondary standard for uranium (U) at 0.44 mg/L "is not protective of public health, and is contrary to other relevant pollution controls." The EPA standard is 30 pCi/L (0.44 mg/L) as the groundwater restoration standard at inactive uranium processing sites, and the National Research Council proposes a drinking water standard of 0.035 mg/L (*id.* at 49).

At the Church Rock site, uranium in the groundwater varies from 10.9 to 0.002 with a mean of 1.8 mg/L (FEIS, Table 3.19, at 3-36). For Crownpoint, the figures are a range of 0.021 to 0.0 (*sic*) with a mean of 0.005 mg/L (FEIS, Tables 3.13

and 4.5). (It seems clear that EPA standards should be attainable for Crownpoint, but that topic is not part of this phase of the case.)

The uranium content at Church Rock is much higher than at Crownpoint. This suggests that the EPA standard would be difficult or impossible to meet, and even the required secondary standard of 0.44 mg/L might be difficult to meet.

However, as pointed out in the FEIS (*id.* at 4.57, 4.58), dewatering activities caused by the underground mining at Church Rock in Section 17 have created oxidizing conditions in the mine zone. Once the workings filled with water, the oxidized uranium dissolved, causing elevated uranium values downgrade. In addition, as Ford (Ford May 11, 1999 Affidavit at 7) points out, the mining activities may have influenced the natural reducing capacity of the aquifer. This effect is local to the mine area, as is evidenced by the fact that the concentration of uranium in water near the town of Church Rock is a factor of 9 lower than at the proposed mine site. Further, restoration will ameliorate the high uranium content of the mine site, because water high in toxic elements will be removed and replaced with cleaner water.

There is an abandoned surface mine on Church Rock Section 17. Although this area has been beneath the water table for many years and no remediation has occurred, uranium in the water in the vicinity of the Church Rock mine is only a factor of 5 above the EPA standard. Because of the well-known property of uranium ions to precipitate under reducing conditions and because humates are common in the Westwater, uranium values can be expected to decrease rapidly with distance from the mine area (FEIS at 4-57, 4-58; Ford May 11, 1999 Affidavit at 7-8).

4. *HRI May Be Permitted To Modify Restoration Goals to a Level That Degrades Water Quality*

Intervenors state that the HRI's License Condition 10.21A allows it (HRI) to make a case to the NRC to relax the standards for a given parameter beneath the primary and secondary standards — if these standards cannot be met and if such restoration neither degrades water quality nor threatens public health. Intervenors claim that this “gives HRI the latitude to set different restoration goals and creates an impetus to move away from the baseline to contaminant levels that exceed drinking water standards.” (Intervenors' Groundwater Brief at 51-53).

I disagree with Intervenors' assumptions. The intent of the license is to require compliance with the primary and secondary standards. However, the license recognizes that practical experience might dictate relaxing those goals because they may not be achieved. Intervenors have not established that relaxing the goals would create serious problems. Given the distance of Church Rock Section 8 from the nearest water well, it is very unlikely that relaxation of these standards would affect the quality of drinking water taken from the aquifer. In addition, I expect

both the Staff and the Environmental Protection Agency to be ardent protectors of the quality of the water supply in the event these standards are exceeded.

5. *The Track Record of the ISL Industry Demonstrates That Restoration to the Good Water Quality of Westwater Is Not Technologically Feasible*

Intervenors claim that HRI “has not provided a reasonable level of assurance that it will be able to restore the Westwater . . . to a level that meets either baseline conditions or drinking water standards” (Intervenors’ Groundwater Brief at 53.) They allege that “no ISL operation to date has been attempted in an aquifer that meets all EPA primary and secondary drinking water standards, as most of the Westwater does” (Abitz Affidavit at 25). Abitz speculates that this is presumably because the technology does not exist to restore such high-quality aquifers to their original condition. (*Id.* at 26.)

The Intervenors’ Groundwater Brief at 54 concludes the section by stating that

Since restoration to the water quality present in the Westwater has never been achieved, and indeed well fields in Wyoming and Texas, with poor water quality, have failed to achieve restoration, it is easy to deduce that HRI will not be able to achieve either the primary or secondary restoration goals. These goals are technologically beyond the reach of this company.

Pelizza (Pelizza Affidavit at 34-36), rebuts the statement that ISL licenses are not given for mines in aquifers with potable drinking water by giving several examples. One is that the City of Kingville (Pop. 25,000) obtains its water from the Goliad aquifer 4 miles from an ISL mine in the same aquifer.

It should be noted that Church Rock Section 8 is not required to be an area where subsurface water must be potable by EPA standards; it is exempt. (*Id.*, Attachment 22.) The subsurface water in this part of the Westwater is not potable today; it does not meet EPA standards. It also should be recognized that the Westwater is huge, so that it can tolerate relatively small toxic areas like the Section 17’s old mine workings and still provide high-quality drinking water. The water near the old mine workings is undrinkable yet the aquifer as a whole has not suffered because toxic elements that migrate out of this area are affected by both precipitation and dilution. These natural mechanisms help to protect the quality of water in the aquifer as a whole from the toxicity contained in small areas. (FEIS at 4-57 to 4-58; Ford May 11, 1999 Affidavit at 7-8.)

With respect to plans to restore sites after the completion of ISL mining, Pelizza states that:

HRI will conduct a small isolated pattern demonstration at each site at the beginning of mining activities to verify that general leach solution chemistry and restoration responds as expected. After production begins at any mine site of the CUP (Crownpoint Uranium Project), HRI will

immediately begin work on a field restoration demonstration outside of the actual production, yet inside the monitor well ring, and within the target ore zone.

(Pelizza Affidavit at 78.) Key elements of the restoration demonstration are:

An isolated restoration demonstration pattern, completed in the ore zone, constructed to the same basic configuration as the proposed production wellfield pattern and operated under the same conditions as the proposed mining procedures.

Leaching of the pattern will be run for at least three months under commercial activity conditions using leaching agent concentrations equal to, or greater than is expected to be required for production.

After the leaching phase, a complete chemical description of the produced fluid will be obtained, and a demonstration of a restoration will be initiated.

Sample analysis of key parameters, and fluids will be completed at least every week during the restoration demonstration.

Restoration will continue until the groundwater is restored to levels consistent with baseline.

With each progress report, HRI will calculate and submit the volume of groundwater affected, expressed in pore volumes. Factors to be considered include: areal extent, formation, thickness, and porosity. Upon the completion of the restoration demonstration, the data, analysis, and conclusions will be compiled into a final report.

I am persuaded that these demonstration elements are appropriate measures to ensure adequate restoration.

Ford (Ford May 11, 1999 Affidavit at 2-15) further persuades me of the likelihood of successful restoration and discusses the problems associated with restoration at the Church Rock site. In the interest of full disclosure, he reveals that “it is extremely likely that after ISL mining is completed, the groundwater quality will be restored to acceptable levels so that the water use of the aquifer is maintained.” “[I]t is unlikely that groundwater activities at the Church Rock site will achieve baseline concentrations for all groundwater parameters. . . . However, it is likely that most, if not all, of the groundwater parameters will achieve the secondary groundwater restoration goals stated in HRI License Condition 10.21.”

The “if not all” statement by Ford above likely is not satisfactory to the Intervenor, but I find that it is adequate. Ford points out that 26%, a total of six, of the parameters in the Mobil demonstration in the same or similar horizon of the Westwater as the planned Church Rock operation did not meet secondary groundwater restoration goals after 9-10 pore volumes of restoration effort. However, of the six parameters, three (calcium, sodium, and molybdenum) do not have primary or secondary standards because they are not considered hazardous to humans.

Pelizza (Pelizza Affidavit at 26) points out that the Mobil pilot ore is much higher in certain trace elements, especially molybdenum, than the Church Rock ore, so that similar restoration problems would not be anticipated at Church Rock. Total dissolved solids (TDS) at the Mobil restoration after 9.7 pore volumes were close to the EPA standard of 500 ppm. (*Id.* at 77.)

Ford suggests (Ford May 11, 1999 Affidavit at 3) that the TDS secondary goal would be achieved at Church Rock, although calcium and sodium may not meet their baseline concentrations. High calcium is one of the reasons people drink milk. The sodium content of water after the Mobil pilot restoration was 141 ppm (FEIS, Table 4.13, at 4-38), and sodium in water in the Westwater aquifer under Church Rock Section 8 is 130 ppm (FEIS, Table 3.19, at 3-36) and at some distance from the mine site is 125 ppm (FEIS, Table 4.5, at 4-16). There are, as I have said, no primary or secondary standards restricting the amount of these elements in drinking water.

The other three elements in the Mobil pilot restoration that did not achieve baseline after restoration are radium, arsenic, and uranium. Arsenic at 0.079 mg/L came very close to the primary standard at 0.05 mg/L (Ford May 11, 1999 Affidavit at 4). Pelizza (Pelizza Affidavit at 26) states that like molybdenum, arsenic is much more concentrated at the Mobil site than at the Church Rock site. Arsenic removal therefore should not present a problem at Church Rock. Arsenic, molybdenum, radium, and uranium are readily precipitated by redox reactions or adsorption on mineral grains while traveling through the rock, so most of these elements will remain close to the mine site and not create problems at a distance (*see* Ford May 11, 1999 Affidavit ¶¶ 12-14, 24).

So far as I am aware, there are no reports of water with elevated uranium levels in wells away from the Church Rock site, despite the fact that the mean values of water sampled in the vicinity of the site show values for this element well above any drinking water standards (*see* FEIS, Table 3.19, at 3-36). This is persuasive evidence that uranium does not travel readily through the aquifer, even over timescales of thousands of years.

On the other hand, the existing concentration of radium-226 is double the EPA drinking water standard in wells in the vicinity of Church Rock (FEIS, Table 4.5, at 4-16). This occurs because uranium is more easily reduced than radium in its travel through the rock. Abitz (Abitz Affidavit at 3)²³ cautions that there is too much reliance on “natural attenuation through chemical reduction.” Abitz states that this is likely to fail. However, the Intervenor makes a point of emphasizing the outstanding purity of water outside the mine area at Church Rock. Because the old mine workings contain highly toxic water, precipitation must occur, so that

²³ Intervenor’s May 25, 1999 Response, Exhibit 1; Affidavit of Dr. Richard J. Abitz in Response to the Presiding Officer’s Questions in the Memorandum and Order of April 21, 1999 (Abitz Affidavit).

even if the water “courses” along channels through the aquifer, uranium would not reach the wells from which pure water currently is being obtained.

I have concluded, for reasons stated above at p. 84 *et seq.* and in the text immediately above, that the water in the channels does not course, that there are no channels, and that the drill holes at Church Rock that sampled the water did not intersect channels. I also conclude that the rock does act as a significant precipitating agent for uranium and other elements.

I also find, based on the behavior of radon at the Crownpoint site, that radium contamination does not move rapidly in the Westwater. Radium is about six times more concentrated at the Crownpoint site than at Church Rock (FEIS, Table 3.13, at 3-27; Table 3.19, at 3-36). This cannot be ascribed to mining operations in the vicinity. Radium occurs in high concentrations in water in the vicinity of uranium deposits. In contrast to the Crownpoint mine site, the Crownpoint town water, from wells in the Westwater, contains radium at about one-tenth of the EPA drinking water standard (FEIS, Table 3.12, at 3-26), indicating that radium is both diluted and removed from the water by the time it reaches the town wells. As was the case with uranium, water in the vicinity of a uranium deposit may be well above safe standards for radium in the vicinity of the mining area, as at Church Rock, but the water from the same aquifer will be safe to drink away from the mine area because the toxic elements are diluted and precipitated.

Ford states that the results of the Mobil pilot restoration represent the closest parallel to a restoration at Church Rock (Ford May 11, 1999 Affidavit ¶ 17). I note that the simulated restoration using drill core at Church Rock does not closely simulate conditions underground at the Church Rock site. Nevertheless, I will discuss the results (FEIS, Table 4.8, at 4-32; Table 4.9, at 4-33).

The drill core results are affected because conditions of porosity and permeability of the crushed drill core are not the same as those underground; however, the geochemistry of the ore is that of the underground ore. Core leach tests were both slow and fast leaches; the latter clearly represents unrealistic conditions for a restoration. The slow leach test showed that radium, uranium, iron, and manganese do not reach acceptable drinking water standards even after 20 pore volumes have passed through. As discussed above, uranium precipitates in a reducing environment, so it poses no threat to present or reasonably foreseeable water supplies, especially considering the distance to the nearest well.

The radium result is in error. It is improbable that rock containing pregnant lixiviant containing 1010 pCi/L radium in its pores would be flushed with 20 pore volumes of clean water and finish up with a radium content of the final fluid of 1000 pCi/L. The result is quite unlike any other restoration test reported in the FEIS. Another indication that the test is flawed is that iron is 500 times more abundant in the restored fluid than in the leach water, and 1000 times higher than in the pregnant lixiviant. No other restoration tests show such results, which must

be ascribed either to analytical error or the presence of particulates in the dissolved fluid. The Church Rock test does not warrant further discussion.

In addition to the Mobil restoration and the core leach study, the FEIS at 4-31 discussed the Teton test. The results are impressive (FEIS, Table 4.9, at 4-33; Table 4-12, at 4-36) considering that only 1 pore volume was used, but for this and other reasons the FEIS does not place much confidence in this test. Of the three tests, I find that the Mobil test is most applicable, with the limitations discussed above.

Intervenors (e.g., Abitz Affidavit ¶ 18) believe that successful restoration will require more than 9 pore volumes of fluid. If this is correct, HRI will be required to continue to restore; the requirement does not end at 9 pore volumes. FEIS at 4-62. In addition, HRI must demonstrate successful restoration at the Church Rock Section 8 site or it will not be permitted to conduct injection mining elsewhere. (*Id.*)

In light of the above, I agree with Ford (Ford May 11, 1999 Affidavit at 15) that it is very likely that after ISL mining is completed, the water quality will be restored to acceptable levels.

G. Licensing of the Crownpoint Project Is Inimical to Public Health and Safety Because the Westwater Is Not Suitable for ISL Mining

Intervenors allege that “because of the documented problems of site characterization, the high quality of the Westwater, and its use as a drinking water source, the Westwater is not an appropriate location for continued experimentation with ISL mining.” Intervenors’ Groundwater Brief at 55.

Intervenors claim that excursions are so commonplace in ISL mining that operators do not have an adequate control of ISL well fields. (*Id.*) However, excursions do not constitute a spill like an oil spill or a spill of toxic waste. They represent a warning system within the exempt mine zone that alerts the operator that unless something is done, a spill outside the exempt zone may occur. Excursions fill a similar role in ISL mining to an oil pressure light in a car — if something is not done promptly, damage will be done. (*See* Bartels’ May 11, 1999 Affidavit at 8-13.)

Intervenors report that “restoration efforts at other ISL mines have taken longer than anticipated.”²⁴ (Intervenors’ Groundwater Brief at 55.) What they have not shown, however, is that long restoration time results in harm to the aquifer.

Intervenors claim that “few mines have been restored to baseline and none have been restored to baseline water quality equivalent to that of the Westwater

²⁴ Intervenors exaggerate the length of the restoration time taken by a mining company because regulatory approval time is included in the time for restoration. Pelizza (Pelizza Affidavit at 73) points out that the time taken for regulatory agencies to approve restoration is of the same order as the time taken for actual restoration.

or drinking water standards.” This is true because: (a) the water quality did not match that of the Westwater to begin with, as the Intervenors have acknowledged; and (b) in the mine areas the original water in the vicinity of the uranium deposits probably never met drinking water standards, just like the water quality in the vicinity of the Church Rock, Crownpoint, and Unit 1 deposits at present.

Most ISL mining has been done in fluvial aquifers like the Westwater, and no public or environmental harm has occurred (Bartels’ May 11, 1999 Affidavit at 8-13; Lichnovsky Feb. 19, 1999 Affidavit at 25, 27). The Intervenors cite no instances of permanent environmental harm. Consequently, I do not draw any adverse inferences from the history of ISL mining that would affect my conclusions about the adequacy of the portion of the Crownpoint Uranium Project that is planned for Church Rock Section 8.

H. Licensing of the Crownpoint Project Is Inimical to Public Health and Safety Because Conditions Are Inadequate To Remedy Defects in the Project

Intervenors reintroduce (Intervenors’ Groundwater Brief at 57) a number of perceived problems again in this complaint: “unsuitability of the confining units to prevent vertical . . . movement of lixiviant out of the ore zone,” “undetected high permeability,” “geologic faults,” and “hydrofracturing of the ore zone of an underlying and overlying strata.” All of these alleged problems are a repetition of complaints that are discussed above, *passim*.

I. HRI’s Planned Use of Church Rock Section 8 as a Restoration Demonstration Is Hydrogeologically Unsound

Intervenors claim that “because of the hydrogeologic connection between Section 8 and Section 17, Section 17 must be mined first to avoid additional complications with restoration.” (Intervenors’ Groundwater Brief at 58.)

Intervenors contend that

Section 17 with its old mine workings is up-gradient from Section 8. Therefore, if Section 17 were mined last, an excursion in a Section 17 well-field would flow down gradient and contaminate a previously restored well-field, or a well-field undergoing restoration in Section 8.

(*Id.* at 59.) They therefore claim that it would be more sensible to mine Section 17 before Section 8. Pelizza (Pelizza Affidavit at 52-53) discusses the consequences of mining Section 8 before Section 17 and he argues that there will not be a problem of competing bleeds because of the distance apart of the restoration wells in Section 8 and production wells in Section 17.

However, I need not decide this issue now. In Phase II of this proceeding, intervenors may argue that it is improper to mine Section 17 because Section 8 will have been mined first.

J. Licensing of the Crownpoint Project Is Inimical to Public Health and Safety Because HRI's Operation Poses an Undue Threat to the Quality and Safety of the Public Water Supply

Intervenors claim (Intervenors' Groundwater Brief at 59, 60) that underground injection violates the Safe Drinking Water Act (SDWA). Contrary to this assertion, the Environmental Protection Agency has granted an aquifer exemption for the Church Rock Section 8 site. (Pelizza Affidavit at Exhibit 22.) This exemption means that EPA has determined, pursuant to its authority, that there is no drinking water to be protected at this site. Thus, the allegation is groundless. (See also the discussion in the next section of the Decision, § K.)

K. The SDWA Applies To Protect the Westwater at Church Rock and Crownpoint

Intervenors (Intervenors' Groundwater Brief at 61) state that the Crownpoint Uranium Project (CUP) will violate EPA's program to protect drinking water, as set forth in 40 C.F.R. § 144.12, which prohibits injection activity "that allows the movement of fluid containing any contaminant into underground sources of drinking water." The intervenors paint a ghastly scenario of pregnant lixiviant escaping undetected along a channel, oxidizing more and more radium and uranium in its path until the contaminants have invaded NTUA Well No. 1. In these channels, the water "courses" through the aquifer, perhaps reminiscent of a mountain stream during the spring melt-off.

This argument is a dramatic repetition of the earlier argument that there will be undetected excursions. I reject that argument. *See* p. 84. First, the concept of channelways contradicts both the published literature on the Westwater (some cited earlier, and in intervenors', Staff's, and HRI's exhibits) and the literature on all similar sandstone aquifers containing uranium deposits (e.g., Lichnovsky Affidavit, Bartels February 19, 1999 Affidavit). For these reasons, I agree with the arguments against the channel theory made in the Bartels February 19, 1999 Affidavit and the Wasiolek and Spinks Affidavit.)

Second, although the lixiviant oxidizes only a limited amount of the toxic elements listed because it contains only a limited amount of oxygen, humates in the rock will cause reduction, thus further depleting the lixiviant and ultimately causing precipitation of some toxic elements from solution. *See* pp. 86-87, above. Finally, the closest well downgrade to the mining operation is 14,200 feet from the

northeast corner of Section 8. At reasonable flow velocities not involving water coursing along channelways, it would take 1632 years at 8.7 ft/year and would be diluted and much of the toxic elements reprecipitated before it reached the site (*see* HRI May 11, 1999 Reply).

In general, as discussed above, the underground geology of this area and the monitoring program that HRI will implement carefully attend to the protection of drinking water. There is no reason to believe that the Church Rock Section 8 project will contaminate sources of drinking water.

For these reasons, I conclude that HRI's project does not violate the SDWA at Church Rock Section 8, nor has there been a showing that the license should be invalidated because of a serious problem under the SDWA at Crownpoint.

In reaching this conclusion, I note again that *the portion of the aquifer* in which the Church Rock ore is found has been exempted. It is not necessary that the whole aquifer qualify for an exemption. It is enough that the ore-bearing portion of the aquifer qualifies. 40 C.F.R. § 146.4. EPA has granted an exemption for this section. (Intervenors' Groundwater Brief at 14; Pelizza Affidavit at Exhibit 22.)

L. The FEIS Fails To Adequately Describe Impacts of the Crownpoint Uranium Project on Groundwater

Intervenors' claim (Intervenors' Groundwater Brief at 65) that the FEIS failed to adequately consider the environmental impacts of the Crownpoint project. This is a recapitulation of themes already stated by Intervenors and addressed by me. They do not state separate grounds for this argument. Accordingly, my discussion of Intervenors' arguments, above, is an adequate response to Intervenors' overall assertion. I find that there is no reason to question the Staff's conclusions in the FEIS with respect to groundwater. The FEIS is therefore adequate because it is both thorough and correct.

M. Groundwater Conclusions

In sum, I conclude that the risks of ISL mining at Church Rock are minimal and that they do not call the validity of the HRI license into question. I also conclude that Intervenors' allegations that HRI and its experts are guilty of misrepresentation are without merit.

III. CONCLUSIONS CONCERNING SAFETY AND THE EFFECT ON THE ENVIRONMENT

In this proceeding, I have issued partial initial decisions considering Intervenors' arguments concerning the environmental, safety and cultural impacts of liquid

wastes, air emissions, effects on cultural resources, performance-based regulation, groundwater, and financial assurance for decommissioning. In the course of these decisions, I have considered each of Intervenor's significant arguments. Nevertheless, I have been convinced by HRI and the Staff, by a preponderance of the evidence, that the Church Rock Section 8 portion of the Crownpoint Uranium Project — conducted pursuant to the license granted by the Staff — will have no substantial inimical impact. Reasonable conditions have been imposed to ensure that any risks have been minimized so that they do not constitute a public health and safety concern.²⁵

IV. ALLEGED FAILURE TO COMPLY WITH NEPA, TO CONSIDER CUMULATIVE EFFECTS, AND TO CONSIDER ENVIRONMENTAL JUSTICE ISSUES

A. Failure to Comply with NEPA

1. The Law

As the Nuclear Regulatory Commission said in *In the Matter of Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998):

NEPA establishes a "broad national commitment to protecting and promoting environmental quality." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989), citing 42 U.S.C. § 4331. To ensure that this commitment is "infused into" the actions of the federal government, NEPA mandates particular "action-forcing" procedures. *Id.*, quoting 115 Cong. Rec. 40,416 (1970) (remarks of Sen. Jackson). Chief among these procedures is the environmental impact statement (EIS), which NEPA requires federal agencies to prepare for all proposals that would "significantly affect . . . the quality of the human environment." 42 U.S.C. § 4332(2)(C). The EIS must describe the potential environmental impact of a proposed action and discuss any reasonable alternatives. *See* 42 U.S.C. § 4332.

The principal goals of an FEIS are twofold: to force agencies to take a "hard look" at the environmental consequences of a proposed project, and, by making relevant analyses openly available, to permit the public a role in the agency's decision-making process. *See Robertson*, 490 U.S. at 349-50; *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996). This latter information disclosure function of the EIS "gives the public the assurance that the agency has indeed considered environmental concerns . . . and perhaps more significantly, provides a springboard for public comment." *Robertson*, 490 U.S. at 349 (citation omitted). The EIS, then, should provide "sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a 'hard look' at environmental

²⁵ CLI-99-22 was issued by the Commission on July 23, 1999. Pursuant to that decision, the Commission retained jurisdiction over the adequacy of HRI's financial assurance plan. For the purpose of making my finding concerning compliance with NEPA, I assume that the Commission will take a hard look at the issue concerning the financial assurance plan and that they will modify the license, if necessary, to ensure that risks are minimal based on their consideration of the evidence and the law.

factors and to make a reasoned decision.” *Tongass Conservation Society v. Cheney*, 924 F.2d 1137, 1140 (D.C. Cir. 1991) (quoting *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988)). It is intended to “foster both informed decision-making and informed public participation,” [footnote omitted] and thus ensure that the agency does not act upon “incomplete information, only to regret its decision after it is too late to correct.” *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

As the Licensing Board emphasized repeatedly in LBP-96-25, NEPA does not require agencies to select the most environmentally benign option. *See, e.g.*, 44 NRC at 341-42. “If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.” *Robertson*, 490 U.S. at 350.

Although the statute itself does not mandate a cost-benefit analysis, NEPA is generally regarded as calling for some sort of a weighing of the environmental costs against the economic, technical, or other public benefits of a proposal. *See, e.g., Idaho By and Through Idaho Public Utilities Commission v. ICC*, 35 F.3d 585, 595 (D.C. Cir. 1994); *Calvert Cliffs’ Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971). The EIS need not, however, always contain a formal or mathematical cost-benefit analysis. *See, e.g., Sierra Club v. Lynn*, 502 F.2d 43, 61 (5th Cir. 1974) (“NEPA does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula”), *cert. denied*, 422 U.S. 1049 (1975). *See also* Council on Environmental Quality (CEQ) Regulations, 40 C.F.R. § 1502.23. NRC regulations direct the Staff to consider and weigh the environmental, technical, and other costs and benefits of a proposed action and alternatives, and, “to the fullest extent practicable, quantify the various factors considered.” 10 C.F.R. § 51.71(d). If important factors cannot be quantified, they may be discussed qualitatively. *Id.*

The core of the Commission’s principled statement about NEPA is that the EIS should provide “sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a ‘hard look’ at environmental factors and to make a reasoned decision.” The test is one of judgment that requires an analysis of the particular decision that is being examined. Look hard. Look reasonably.

2. *Is an FEIS Required?*

HRI has argued, without reference to specific regulations, that an EIS is not required by law. (HRI NEPA Response at 6-7.²⁶) It cites a mining engineering text for the proposition that the risks from *in situ* uranium mining are minimal. (*Id.* at 6-7 and Exhibit 1.) However, HRI also acknowledges that the Bureau of Indian Affairs requires an EIS in connection with any lease of Navajo territory. (*Id.* at 7.)

For its part, the Staff of the Nuclear Regulatory Commission found that the EIS “is based on the requirements” of law. Moreover, in preparing the EIS,

²⁶ HRI’s Response to ENDAUM and SRIC’S Brief With Respect to NEPA Issues Concerning Project Purpose and Need, Cost/Benefit Analysis, Action Alternatives, No Action Alternative, Necessity to Supplement EIS, Mitigation and Cumulative Impacts, March 25, 1999 (HRI NEPA Response).

the Staff found that the proposal had potential significant impacts that “can be mitigated” through conditions the Staff chose to apply.²⁷ “Final Environmental Impact Statement: To Construct and Operate the Crownpoint Uranium Solution Mining Project,” NUREG-1508 (February 1997) (FEIS) at xxi, §§ 1.3, 1.4 (at 1-3). The Staff’s decision to prepare an EIS was consistent with its responsibility under 10 C.F.R. § 51.20.

3. *Intervenors’ Arguments*

Intervenors have made a variety of arguments concerning the inadequacy of the NEPA analysis.²⁸

a. *Inadequate Statement of Purpose and Need*

SRIC and ENDAUM allege that the FEIS provides an inaccurate and simplistic statement of purpose and need that unreasonably distorts the entire FEIS. (Intervenors’ NEPA Brief at 20-23.) They cite the FEIS at 1-3 as saying:

The purpose of the proposed action is to license and regulate HRI’s proposal to construct and operate facilities for ISL uranium mining and processing. The NRC’s need for action is to fulfill its statutory responsibility to protect public health and safety and the environment in matters related to source nuclear material (Atomic Energy Act of 1954 as amended). The BLM and BIA’s need for action is to fulfill their statutory responsibilities to regulate mining activities on Federal and Indian lands (Mining Law of 1872, Allotted Lands Mineral Leasing Act of 1921, National Historic Preservation Act of 1966, Endangered Species Act of 1973, Federal Land Policy and Management Act of 1976).

b. *The FEIS Fails to Perform an Adequate Cost/Benefit Analysis*

The principal argument advanced by Intervenors is that the FEIS overstates economic advantages to local communities because it assumes a uranium price of \$15.70 per pound,²⁹ which is far above the current market price of under \$11 per pound and because it overstates the need for domestic uranium. (Intervenors’ NEPA Brief at 32-46.) Given Intervenors’ assumptions, they are correct. Present market conditions do not indicate support for additional uranium supplies. HRI states that its fixed cost to bring the Church Rock Section 8 property into production

²⁷ For example, the FEIS that was prepared concluded, among other things, that before doing lixiviant injection at the Crownpoint site, HRI should relocate the town’s drinking wells. FEIS at 4-59.

²⁸ ENDAUM’s and SRIC’s “NEPA Issues Concerning Project Purpose and Need, Cost/Benefit Analysis, Action Alternatives, No Action Alternative, Failure to Supplement EIS, and Lack of Mitigation,” February 19, 1999 (Intervenors’ NEPA Brief); Grace Sam and Marilyn Morris, “Final Written Presentation,” February 19, 1999. Staff “Response to Intervenor Presentations on NEPA Issues, April 1, 1999; HRI “Response to ENDAUM and SRIC’s Brief with Respect to NEPA Issues,” March 25, 1999 (SAM Final Presentation).

²⁹ FEIS, Table 5.4, at 5-5.

is approximately \$14.50 per pound, as discussed in FEIS Chapter 5.³⁰ HRI also states that its break-even production cost is \$15.70 per pound; and Intervenor do not challenge this statement.³¹ I therefore conclude that the FEIS was correct in using a \$15.70 price per pound for uranium. It is highly unlikely that the project will proceed unless the price reaches that level. Furthermore, an increase in price to that level would indicate an improvement in the demand/supply ratio, validating the Staff's assumption of demand for uranium production.

It does not concern me that at present market prices this project will not go forward. That is the very result Intervenor seek. It is the no-action alternative. If that happens, there will be none of the adverse effects discussed in the FEIS. It is only when the market price crosses HRI's break-even point that the validity of the FEIS is in question. And, assuming that the market price has climbed to that level, it is clear that there would be an active market for uranium and that the additional supply would be useful. Intervenor have not succeeded in casting any doubt on the assumptions made in the FEIS *at the price level of \$15.70 per pound* for uranium.³² (FEIS at 4-97, 5-2 to 5-3.)

There may be small differences in the local benefits if the actual price of uranium is slightly different from \$15.70. In the overall scheme of things, these differences are not important. The risks to the environment have been thoroughly analyzed and license conditions imposed to mitigate the risks.

I thus find no basis for disturbing the Staff's FEIS conclusion that it is desirable to initiate a project that creates minimum risks³³ to public health and safety and to the environment and that increases local economic activity.

c. *Groundwater*

In the portion of this opinion concerning groundwater, I have determined that Intervenor's arguments on groundwater are invalid. *See* p. 84 *et seq.* Accordingly, I find that failure to address these erroneous arguments (Intervenor's NEPA Brief at 46-50) in the FEIS was not an error.

³⁰HRI Reply to April 21, 1999 Questions, May 11, 1999, at 19. I note that Intervenor object that HRI's brief represents attorney testimony and should not be admitted. However, this objection is not well taken. Each statement made in HRI's brief is properly documented by reference to a part of the record. Most of the brief is merely explaining what the FEIS has said.

³¹*See* Intervenor's Joint Response to HRI and Staff Responses, May 25, 1999, at 26-29, challenging whether the breakeven point will be reached but not challenging the validity of the break-even point.

³²Although Intervenor argue that production costs may be higher than anticipated by HRI or that the price of uranium may fall subsequent to startup, making HRI's operation uneconomical, they do not address why the surety bond required of HRI would not provide adequate protection to permit effective cleanup if further production was uneconomical.

³³Risks to the public are, of course, a public concern. Costs borne by HRI are internal to HRI, affecting its costs and its business decision about whether to commence this project. *See* FEIS at 5-1.

d. Relocating Individuals

Intervenors argue that proposed mitigation for relocating residents is inadequate. (Intervenors' NEPA Brief at 50-51.) People who graze livestock on HRI's Unit 1 property are either mineral lease holders or are beneficiaries of leases held by others. Some of these people may be displaced because HRI is exercising mineral rights to which it has valid title. Under applicable law, these people do not have the right to continue to graze their livestock upon land on which they do not have continuing grazing rights. Nevertheless, the FEIS considers this impact to be an environmental justice impact and grazing rights permittees and others who would be required to relocate will be compensated. (FEIS at 4-118, § 4.12.6.) I conclude that the FEIS has given adequate consideration to the relocation of individuals. The loss of the small plot of land in Church Rock Section 8, set as it is in the midst of a vast desert, will not materially affect the ability of people to graze their cattle.

e. Environmental Costs of Air Emissions

Intervenors argue that radiological emissions will exceed NRC standards. (Intervenors' NEPA Brief at 51.) The FEIS discusses the effect of Alternative 3 (the NRC Staff-recommended action) on radioactive air emissions. It concludes that there would be only minor impacts on air quality. These issues have been considered in detail in LBP-99-19, Radioactive Air Emissions, 49 NRC 421 (1999), and I am satisfied that the FEIS has given adequate consideration to possible radioactive air emissions. The conditions imposed by the Staff (FEIS 4-5, § 4.1.3 (SUA-1508 § 10.9, at 5; § 10.30, at 9)) provide additional protection against air emissions. These conditions, in my opinion, represent an abundance of caution.

f. Environmental Costs of Liquid Waste Disposal and Cultural Impacts

Intervenors complain that there is inadequate treatment in the FEIS of liquid waste disposal and cultural resources. (Intervenors' NEPA Brief at 51-52.) The FEIS discusses the effect of Alternative 3 (the NRC Staff-recommended action) on waste disposal issues. In my prior decision on this issue, I concluded that the FEIS was adequate. (LBP 99-1, 49 NRC 29 (1999).) For reasons stated in that opinion, I consider the FEIS to be more than adequate with respect to waste disposal issues; and I also find that HRI's methods of waste disposal provide adequate protection for the environment. Intervenors had failed to provide any reason to believe that the waste disposal methods will have substantial adverse environmental impacts. For reasons stated in the partial initial decision on cultural resource impacts, I also find no reason to believe that there will be substantial adverse impacts on cultural resources. (LBP-99-19, 49 NRC 421 (1999).)

g. Environmental Costs of Health Impacts

In this argument, Intervenor again reiterates their groundwater allegations. (Intervenor's NEPA Brief at 52-53.) There is no reason to find that these arguments are any more valid in this context than they have been found to be in the discussion in Section II, beginning at p. 84, above. To the extent that Intervenor challenges the validity of the NRC standard of 0.44 mg/L for the concentration of uranium, they are impermissibly challenging the validity of an NRC regulation. Since EPA also will have to be satisfied with the effect of this project on the quality of drinking water, this attempt to challenge the NRC regulation overlooks an important additional safeguard for water quality. To the extent that Intervenor raises questions of cumulative impacts, those questions are addressed below at pp. 119-21.

h. The Costs Listed in Section 5 of the FEIS Are Unreasonably Undervalued

The FEIS, at 5-6 and 5-7, § 5.2, lists a variety of costs of the proposed project. The earlier partial initial decisions and the discussion of groundwater in Section II, above, beginning at p. 84, appear to be the "hard look" at costs required by NEPA. (Intervenor's NEPA Brief at 53-54.) Intervenor does not present evidence to challenge the adequacy of this list.

i. The FEIS Does Not Perform an Ultimate Cost-Benefit Analysis Among Alternatives and Does Not Adequately Evaluate the Action Alternatives and the No-Action Alternatives

Intervenor argues that the FEIS does not provide a suitable summary of the costs and benefits of alternative courses of action. To the contrary, I find that the FEIS, as explained by the cost/benefit determination filed by Mr. Robert Carlson of the NRC Staff as an attachment to NRC Staff Response to Questions Posed in April 21 Order, May 11, 1999 (Carlson May 11, 1999 Affidavit),³⁴ takes a suitable, hard look at the costs and benefits of this project and is adequate to fulfill the requirements of NEPA.

j. HRI's Environmental Reports Do Not Calculate the Costs and Benefits of the Project

Intervenor argues that the Environmental Reports do not contain a cost/benefit analysis. (Intervenor's NEPA Brief at 55-56.) Section 51.45(b) of 10 C.F.R. states

³⁴ A relevant excerpt of Carlson's May 11, 1999 Affidavit is provided as Attachment A to this decision. I find that Carlson's explanation of information already contained in the FEIS clarifies the Staff's analysis of the costs and benefits of this project. I include it as a way of notifying the public of this explanation.

that the “environmental report shall contain a description of the proposed action, a statement of its purposes, a description of the environment affected” However, it is clear that this requirement is designed to facilitate the Staff’s preparation of the FEIS, which is the focus of any NEPA concerns. Providing that the Staff prepares an adequate FEIS, the purpose of NEPA is fully met. Therefore, I find that Intervenor’s criticism of the ER is without merit.

k. The NRC Staff Violated NEPA by Failing to Supplement the DEIS and FEIS and Recirculate Them for Public Comment

Intervenor’s argue that the use of “performance-based licensing” by the Staff required supplementation of the FEIS.³⁵ (Intervenor’s NEPA Brief at 60-72.) I disagree. This license, which contains many conditions, is not a dramatic departure from previous licensing practices. (See LBP-99-10, 49 NRC 145 (1999).) Moreover, Intervenor’s have provided no reason to believe that performance-based licensing, as applied to this license, will result in any increased risks to public safety or to the environment.

Next, Intervenor’s argue that the FEIS developed and evaluated two new alternatives. These did not, however, involve any substantial change in the description of the project. What the Staff did was to pursue further analysis of the proposed project, including the evaluation of some fresh alternatives and the evaluation of some license conditions that helped to improve safety and reduce risk to the environment. Consistent with 10 C.F.R. § 51.72(a), I conclude that this further Staff analysis did not require a further circulation of the FEIS for comment. Nor was it necessary to develop further alternatives for evaluation.

Finally, Intervenor’s argue that the Staff permitted a substantial change in the sequence of mining, thus requiring EIS supplementation. (Intervenor’s NEPA Brief at 69-70.)

This portion of the case is restricted to an examination of Church Rock Section 8 and of issues that are so important that they call into question the validity of the entire license. Intervenor’s have, however, challenged whether the change in the order of mining Section 8 and Section 17 requires supplementation of the FEIS. Whether or not to require a supplement requires consideration of whether or not it will be appropriate subsequently to permit the mining of Section 17 after Section 8 has been mined. That question need not be answered in this phase of the case. If it is inappropriate to mine Section 17 after Section 8 or if subsequent mining of Section 17 raises important questions requiring supplementation may be reserved for a subsequent portion of this case. In that portion of the case, Intervenor’s will need to raise some question concerning how the change in the order of mining

³⁵The argument about performance-based monitoring also is reiterated in Intervenor’s NEPA Brief at 74.

will *affect drinking water*. Accordingly, I do reserve the question concerning the impact of the change in the order of mining.³⁶

l. Impact of Mitigative Measures

Intervenors argue that the FEIS fails to explore the impact of measures to mitigate or reduce environmental effects, such as the requirement that Crownpoint drinking water wells should be moved. (Intervenors' NEPA Brief at 73-75.) In their brief, Intervenors distort the purpose and effect of requiring that the Crownpoint Water Supply be moved. (*Id.* at 73.) The purpose of having the wells moved is to avoid having the wells cause a cone of depression that would cause an excursion of lixiviant. Hence, once the wells are moved, there is no reason to believe that an excursion would occur that would affect the quality of the water in the area of the closed wells. With the wells closed, there will be nothing to draw lixiviant in that direction.

Furthermore, the required moving of the wells will occur only if the Crownpoint water authority agrees to close down the affected wells and to open new ones. At that point, the Staff would examine the new plan to ensure that it would protect water quality. The EPA likewise would examine that question. So it will take the concurrence of HRI, the municipal water authority, the NRC, and the EPA before this plan is effectuated. If there is no appropriate way to move the wells, then they will not be moved and the no-action alternative for Crownpoint will be implemented.

There is no reason to determine now whether this plan is adequate. There is nothing in Intervenors' Groundwater Brief that persuades me to rule that the entire license is invalid because of this license condition. Accordingly, the question of whether Crownpoint's municipal water supply is adequately protected is reserved for a subsequent phase of this case.

m. Livestock and Displacement

Intervenors object that it is impermissible for HRI to displace individuals from this area, even if it compensates them. They also object that the loss of grazing rights will prevent Larry J. King and Mitchell Capitan from being "complete or 'free.'" (*Id.* at 75.) However, I have been to the site of these projects and I am at a loss to understand the harm of which Intervenors complain. There are no people living on Church Rock Section 8, so there will be no displacement. Furthermore,

³⁶The phased consideration of this case does not create an improper segmentation for NEPA purposes. Intervenors have not provided any evidence that a project-by-project NEPA balance is improper because of an alleged additive effect when the projects are considered together. Hence, there are no NEPA issues being neglected because of phased consideration.

the land being removed from grazing is very small in comparison to the size of the vast desert in which it is located. I do not understand how anyone could possibly be prevented from raising livestock because ISL mining will take place on Section 8. Furthermore, there is no indication in the record that *any* family will be required to relocate. Accordingly, I find Intervenor's allegations about relocation and about grazing rights to be without merit.

n. Inadequate Discussion of Secondary Effects

Grace Sam and Marilyn Morris (the Sams) argue that the FEIS gave inadequate attention to "socioeconomic or 'secondary' benefits." Sams' Final Written Presentation at 24 *et seq.* They argue that the benefits are too speculative. However, the gist of the argument is that the specific benefits to be derived from the project may be somewhat different than the FEIS estimates, particularly in the area of benefits from employment, royalty income, and benefits from tax revenues. In some of these arguments, the Sams appear to be at least partially correct. For example, legal disputes may cause the Navajo Nation to lose the right to a Business Activity Tax and it may also cause some of the benefit for local communities to be wasted in litigation expenses. There is also a mention of the possibility that revenue might be derived by a hotel or motel from visitors to the project or to its employees. As the Sams state, no dollar figure is put on this speculative item. Likewise, the FEIS anticipates that workers at the project would spend some of their earnings locally, generating secondary benefits to the local economy. The Sams are concerned that there is no more detailed analysis than this. The FEIS also says that only about ten to fifteen employees would likely come from outside these communities. The Sams criticize this discussion on the ground that Navajo law requires equal treatment of all Navajos, so that benefits might flow to Navajo's who do not live locally. Likewise, the FEIS discusses a possible tax benefit to McKinley County but does not analyze the extent to which the County would keep these funds local or would benefit local residents outside the area.

The Sams are correct that the calculation of secondary benefits is approximate. However, I find the FEIS to be adequate in this respect. None of the items suggested by the Sams would have a significant impact relative to the overall cost/benefit discussion. Basically, this project represents local economic activity in an area affected by poverty. The increase in economic activity associated with the CUP will produce direct and indirect economic benefits, thus having a small favorable impact on local poverty. Since there are no serious risks attendant to this project, as I have found in this Decision and in prior partial initial decisions, there is a net benefit to the local community if the project goes forward. There is, of course, some uncertainty about the extent to which these benefits will remain strictly local or will benefit others in the County, the State, and the Navajo Nation.

B. Cumulative Effects and Segmentation Issues

This portion of the Final Initial Decision denies relief requested by Intervenor ENDAUM and SRIC concerning “Cumulative Impacts and Segmentation of Consideration of Impacts (Intervenor’s Segmentation Brief).³⁷ In addressing these issues, it is important to note that the issuance of a license to HRI does not condone past practices by other companies with respect to mining or mill tailings. When there are substantial impacts imposed by the HRI project, then Intervenor is correct in pointing out that those impacts must be considered cumulatively with existing impacts in order to assess their importance. However, when the impacts imposed by this project are very small, as they uniformly appear to be for this project, the harm does not flow from this project but from the already existing problems and the small incremental increases caused by HRI are acceptable, absent some showing that they are the “straw that breaks the camel’s back.”

1. Intervenor’s Arguments

Intervenor argues that Council on Environmental Quality regulations require that an EIS consider cumulative effects of proposed federal actions. (Intervenor’s Segmentation Brief at 8-11; 40 C.F.R. §§ 1508.7, 1508.8, 1508.25.) They cite *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 106-07 (1983), for the proposition that “NEPA requires an EIS to disclose the *significant* health, socioeconomic and cumulative consequences of the environmental impact of a proposed action.” (Intervenor’s Cumulative Impact Brief at 9 (emphasis added).)

Intervenor further provides a catalog of alleged specific deficiencies regarding cumulative effects including radiological and health effects (*id.* at 15-25); groundwater effects (*id.* at 25-30); effects on cultural resources (*id.* at 30-33); cumulative impacts from disposal of liquid waste (*id.* at 33-34); and socioeconomic and infrastructure cumulative impacts (*id.* at 35-36). In addition, Intervenor argues that the cumulative impacts of health and environmental effects, along with environmental justice impacts on the communities of Crownpoint and Church Rock, cause psychological stress (“stressors”) that is not evaluated. (*Id.* at 36-43.)

HRI responds that the Staff adequately analyzed all of the cumulative impacts Intervenor claims as deficient in section 4.13 of the FEIS. (HRI NEPA Brief at 30-35.) The Staff responds that the FEIS adequately addresses the cumulative impact concerns argued by Intervenor. (Staff Segmentation Brief at 4-7.)

³⁷ HRI responded with a Brief With Respect to NEPA Issues Concerning Project Purpose and Need, Cost/Benefit Analysis, Action Alternative, No Action Alternative, Necessity to Supplement EIS, Mitigation and Cumulative Impacts, March 25, 1998 (HRI NEPA Brief) and the Staff responded with a Presentation on Cumulative Impact and Segmentation Issues, April 1, 1999 (Staff Segmentation Brief).

2. Analysis and Conclusion

In LBP-98-9, 47 NRC 261, 283 (1998), I ruled that concerns regarding *existing* radiological conditions in and around HRI's Church Rock site are not germane to this proceeding. The intervenors argue that the FEIS inaccurately represents existing and continuing sources of radioactivity in the Church Rock area. My reading of the FEIS at 4-72, 4-73, and 4-124 confirms that the FEIS acknowledges the existence of elevated levels of radioactivity from previous mining and milling activities near Church Rock. In addition, there is a thorough discussion of the background radiological characteristics of the Church Rock, including levels from a previous mining and milling activities site, in DEIS § 3.7. This information was inadvertently omitted from the FEIS but had been made available in the DEIS and was available so that the public might have information about radiation. McKenney April 7, 1999 Affidavit at 9 [attached to Staff's April 7, 1999 Response to LBP-99-15, March 18, 1999 Order].

The FEIS, NUREG-1508 (February 1997), reviews cumulative impacts at pp. 4-120 to 4-127. The key section on health physics effects states:

The total annual population dose was estimated for the period in time of greatest releases from all three project sites. Two population dose estimates were calculated: one for the Crownpoint/Unit 1 sites and one for the Church Rock site. As the area of impact is similar for both calculations, the results were combined with a total population dose less than 0.01 man-Sv/year (1 man-rem/year). The population within the 80 km (50 mi) radius of the entire project is approximately 76,500 persons. Population dose commitments resulting from facility operations represent less than 1 percent of the dose from natural background sources. The population dose from natural background would be approximately 170 man Sv/year (17,000 man-rem/year). FEIS at 4-124.

Additionally, the FEIS at 4-124 to 4-125 adequately discusses the negligible impact on the population in the 50-mile radius from the expected releases from *in situ* leach mining activities HRI proposes.

As I pointed out in LBP-99-15, March 18, 1999 (Questions Concerning Radioactive Air Emissions), the expected impact of radiation from the HRI project will be a small fraction of 1 millirem to an individual in the area. There is no reason to anticipate health effects from such a minimal dose. Accordingly, the FEIS and DEIS have adequately addressed issues concerning radioactive air emissions and no more detailed discussion is required. Likewise, the FEIS § 4.6 at 4-80 to 4-88 adequately treats liquid waste issues. In my Partial Initial Decision, LBP-99-1 (Waste Disposal Issues), 49 NRC 29, I analyzed the intervenors' waste disposal concerns and ruled that the Staff has adequately conditioned the license to handle waste disposal issues. (*Id.* at 32-35.)

With respect to groundwater cumulative impacts, claims that groundwater will not be restored properly are addressed above. (Section II.E at p. 99.) The FEIS satisfactorily evaluates potential excursions at 4-54 and 4-55. Finally, in my Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation)

dated September 22, 1998, I narrowed the scope of this phase of the proceeding to the Church Rock area. Accordingly, Intervenor's argument at this time raising concerns about relocation of wells in Crownpoint is not ripe for this phase of the proceeding, which is focused on Church Rock Section 8. (Intervenor Segmentation Brief at 25-26.)

FEIS Section 13.3 analyzes cultural resources and states that no significant effects are likely to occur. In my Partial Initial Decision (Issues Related to the National Historic Preservation Act (NHPA) and the Native American Graves Protection and Repatriation Act (NAGPRA), and Cultural Resources (LBP-99-9, 49 NRC 137) I found that Intervenor failed to make a case that the Staff did not comply with NHPA, that NAGPRA was not applicable, and that the Staff adequately conditioned the license to handle cultural resource concerns. 49 NRC at 143.

FEIS § 4.13.9 adequately considers socioeconomic and infrastructure impacts. In fact, it considers many of the impacts such as long-term employment, wages, and tax revenues to be a positive impact. I find the treatment in the FEIS adequate.

I have analyzed below Intervenor's health and environmental stress and environmental justice concerns. Intervenor has made no additional arguments with respect to the cumulative impacts of these issues that have not been addressed below. Intervenor's segmentation concerns are addressed in my analysis of their NEPA concerns.

After a careful review of the FEIS and Intervenor arguments concerning cumulative impacts and segmentation issues, I conclude that Intervenor has not provided any analysis or testimony that leads me to conclude that the Staff has not adequately analyzed and weighted the past and future cumulative impacts and segmentation issues associated with licensing HRI to conduct ISL operations at Section 8.

C. Environmental Justice Concerns

1. Legal Background

Executive Order 12898 (EO), "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," 3 C.F.R. § 859 (1995), provides that "each Federal agency³⁸ shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." EO 12898,

³⁸For the purposes of the EO, "Federal agency" is defined as any agency on the Working Group, and such other agencies as are designated by the President of the United States, that conducts any federal program or activity that substantially affects human health or the environment. Independent agencies, like NRC, are requested to comply with the order pursuant to the EO. See EO at 6-604.

59 Fed. Reg. 7629 (Feb. 16, 1994), *codified at* 3 C.F.R. § 859 (1995). The President’s memorandum accompanying the EO states that “each Federal agency shall analyze the environmental effects, including human health, economic, and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by the National Environmental Policy Act of 1969 (‘NEPA’), 42 U.S.C. section 321 *et seq.*” Memorandum for the Heads of All Departments and Agencies (accompanying EO) (Feb. 11, 1994), 30 Weekly Comp. Pres. Doc. 279 (Feb. 14, 1994). The EO goes on to state that:

Each Federal agency shall conduct its programs, policies, and activities that *substantially affect* the human health or the environment, in a manner that ensures that such programs, policies and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discriminate under, such programs, policies, and activities, because of their race, color, or national origin.

(EO at 2-2 (emphasis added).)

In interpreting and applying the EO and CEQ guidance, NRC has determined that the executive order “by its own terms, establishe[s] no new rights or remedies.” (*Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113 n.2 (1998) (hereinafter “LES”); citing EO 6-609; LES at 102.) “Its purpose was merely to “underscore certain provision[s] of existing law that can help ensure that all communities and persons across this nation live in a safe and healthful environment.” (*Id.*, citing LES at 102.)

The NRC has decided that it will not examine a company’s motive in order to assess whether or not it has been responsible for racial or economic discrimination. This view is fortified by the position taken by the agency with the greatest expertise in interpreting NEPA, the Council on Environmental Quality (CEQ). In recently issued draft “Guidance for Considering Environmental Justice under NEPA,” CEQ calls for a close NEPA examination of a proposed project’s impacts on minority and disadvantaged communities, but neither states nor implies that if adverse impacts are found, an investigation into possible racial bias is the appropriate next step.

Instead of focusing on racial bias, the Commission chose in the LES case (CLI-98-3, 47 NRC 77, 109-10 (1998)) to focus on measures that might mitigate adverse effects on minority communities. It said:

The Board directed the NRC Staff to consider whether actions can be taken to mitigate the impacts of relocating Parish Road 39. *See* 45 NRC at 406. We concur in that direction, and also direct the NRC Staff to consider whether actions can be taken to mitigate the impacts on property values. Dr. Bullard describes roads in Forest Grove and Center Springs as generally “either unpaved or poorly maintained.” *See* Bullard Prefiled Testimony, dated Feb. 24, 1995, at 18. There may well be simple and relatively inexpensive measures that could be taken to improve existing driving and walking conditions (e.g., improving current roads and footpaths).

This in turn could mitigate property devaluation in these communities by improving overall living conditions.

2. *The Facts*

In this case, Intervenor has attempted to show that serious environmental costs will be imposed on the communities of Church Rock and Crownpoint, where the alleged environmental justice population lives. These communities are more than 4 miles from HRI's Church Rock Section 8 project.³⁹ FEIS at 3-79, 3-55. In previous partial initial decisions and my discussion of groundwater, I have already determined that Intervenor's principal arguments concerning environmental effects are without merit. Accordingly, I have no basis for finding that injection mining at the Church Rock Section 8 site will have any serious impact on an environmental justice population.

Indeed, my visit to this site permitted me to observe the vastness of the desert and raises serious questions about how this project at Church Rock Section 8 could possibly have any serious adverse impact on the people of the area. The project is industrial in nature, but it creates no serious risk of pollution. Since I have found the project at Church Rock Section 8 to be safe, there is no serious adverse impact on an environmental justice population and, unlike the LES situation, there is no basis for taking measures to mitigate or reduce that effect. Nor is there any reason to consider, in the context of a new project, the highly regrettable negative impacts of prior projects that involved uranium milling and mining. *See* Intervenor's Environmental Justice Brief at 21.

The only "adverse" impacts are those that any new economic activity would have, like road traffic; and, as the entirely adequate discussion of transportation risks in the FEIS makes clear, there is no reason to mitigate that kind of effect. *See* FEIS at 4-116.⁴⁰

³⁹ ENDAUM and SRIC filed a Brief in Opposition to the HRI Application, with Respect to: Environmental Justice Issues, February 19, 1999 (Intervenor's Environmental Justice Brief); Grace Sam and Marilyn Morris filed a Final Written Presentation, February 19, 1999 (Sam Final Presentation); HRI Filed a Response to Intervenor's Brief Regarding Environmental Justice, March 25, 1999; and the Staff filed a Response to Intervenor's Presentations on Environmental Justice, April 1, 1999.

⁴⁰ Although Grace Sam and Marilyn Morris are correct in mentioning that there also is a risk to pedestrians walking along the roads and to cattle grazing near to roads (Sam Final Presentation at 8), there is no evidence that any roads will be closed or that the risk to pedestrians or livestock will be of such importance that the failure to analyze this risk means that the FEIS took an inadequate look at the costs and benefits of this project. In particular, during my site visit I did not see any livestock roaming free and I have not seen any evidence concerning the frequency of this alleged problem.

The argument that roadways might also be used at night is not significant (FEIS at 4-69 to 4-70 and 4-116). In particular, the Sams have not shown an increase in the probability of release of materials from a nighttime accident. Furthermore, HRI will not be transporting licensed material to or from its sites at night. HRI's Response to the Final Written Presentation of Grace Sam and Marilyn Morris at 2.

I find that the consideration of environmental justice in the FEIS is wholly adequate with respect to Church Rock Section 8. FEIS at 3-78 to 4-5 and 4-112 to 4-120. The Staff has taken a hard look at a project that does not raise serious risks for the surrounding community.

V. OVERALL CONCLUSIONS

All areas of concern with respect to Church Rock Section 8 have been considered. *See* pages 82 and 109, above. None of the Intervenor's concerns have been found to require relief. Accordingly, the HRI license for Section 8 stands as issued.

VI. ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 20th day of August 1999, ORDERED that:

1. The relief requested by Eastern Navajo Diné Against Uranium Mining (ENDAUM) and the Southwest Research and Information Center (SRIC) and Grace Sam and Marilyn Morris relative to the revocation or revision Hydro Resources Inc.'s license (SUA-1508, January 5, 1998) to conduct *in situ* leach mining in Church Rock Section 8 is *denied*.

2. There is no reason either for further Phase I filings or for oral argument before the Presiding Officer.

3. Pursuant to the Commission's Order of May 3, within 14 days after the Presiding Officer issues this Decision, each party may file a single petition for review by the Commission, not to exceed 30 pages, addressing all remaining challenges to decisions rendered by the Presiding Officer. Responses to such petitions for review shall be filed within 14 days after the petition is filed, and shall not exceed 30 pages.

4. Hydro Resources, Inc., may file a brief before the Presiding Officer concerning the schedule and procedures for the remainder of this case. Its brief must be received by the Service List on or before September 14, 1999. Intervenor's (ENDAUM, SRIC, Grace Sam, and Marilyn Morris) may file a brief concerning the schedule and procedures for the remainder of the case. The Intervenor's brief must be received by the Service List on or before September 28, 1999. The Staff of the Nuclear Regulatory Commission may file a responsive brief concerning

the schedule and procedures for the remainder of the case. Their brief must be received by the Service List on or before October 5, 1999.

Peter B. Bloch, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland

ATTACHMENT A

Carlson Affidavit (See note 34 at p. 115, *supra*.)

3. “[Question] 4. What are the adjusted benefits of the CUP, as stated in the FEIS, for one or two prices of yellowcake that are at or above the minimum price at which HRI would commence work on this project? (This is important because the price of uranium fluctuates and a reasonable cost/benefit picture requires an assessment of benefits at more than one arbitrary price.)”

The Staff does not know the minimum price that HRI would commence work on Section 8 or the rest of the mining project. The FEIS cost/benefit analysis assumes a price of \$15.70 per pound of U_3O_8 (FEIS Section 5.1). The “adjusted benefits” of the proposed project, using a similar cost/benefit analysis using two realistic U_3O_8 prices (*e.g.*, minimum prices) based on the current spot market value of uranium can be examined as follows.

4. The first step in the analysis is to determine the “minimum” prices. The FEIS, at page 5-3, states:

The important point relevant to assessing the project’s potential benefits to the local community is that the benefits depend on HRI’s costs being lower than the future price of U_3O_8 , which has been quite volatile. If the price of U_3O_8 is less than the costs of operation, then operations may be discontinued. If this happens, there would be no economic benefits to the local community.

FEIS Table 5.1 (reprinted here as Table 1) indicates that HRI’s production costs would vary from \$9.38 to \$11.83 per pound, depending on where the U_3O_8 is mined, processed, and dried. Thus, a conservative estimate of benefits would be to assume prices of \$9 and \$12 per pound. These prices are conservative because they “bound” HRI’s production costs as well as the current spot market price (\$10.85 per pound) as of May 3, 1999. www.uxc.com/review/ux_prices.shtml (Ux Consulting Company LLC website).

5. The second step is to examine the project’s benefits using these two alternative U_3O_8 prices. As discussed in the FEIS, both the employment generated

by the project and the taxes paid by HRI would depend on the production of U_3O_8 . In turn, the amount of U_3O_8 produced would depend on the market price and the cost of production. Table 1 (FEIS Table 5.1), below, shows HRI's projected costs of producing U_3O_8 for the alternative operations.

Table 1. Average Production Costs per Pound of U_3O_8 Under Alternative Project Designs

Alternative configurations	Church Rock	Unit 1	Crownpoint
Haul loaded resin to other site for processing and drying	\$11.36	\$10.46	\$9.46
Ship yellowcake slurry to dryer at other site for drying	\$11.32	\$10.48	\$9.40
Ship yellowcake slurry to Texas for drying	\$11.83	\$11.05	\$9.87
Stand alone — all processing done at each site	\$11.30	\$10.51	\$9.38

Source: HRI, Response to Request for Additional Information, Issue 92: Cost/Benefit Analysis.

6. The most important local benefit would be opportunities for employment and earnings. The FEIS assumes that the project would create about 100 long-term jobs with an average annual salary of around \$24,000. FEIS at 5-3, Section 5.1.2. The number of jobs and average salary might be lower with U_3O_8 prices of \$9 and \$12 per pound (as compared to \$15.70 per pound), if HRI decides to hire less workers and pay less salary. The Staff has no information from HRI to make revised assumptions regarding these matters.

7. There could be between \$630,000 (see Table 2, pp. 127-28, which is a modified version of FEIS Table 5.4) and \$840,000 (see Table 3, pp. 129-30, which is a modified version of FEIS Table 5.4) in annual royalty income going to holders of leases, depending on production from Unit 1. (There would be no individual lease holders receiving royalties from production of the Church Rock site. However, HRI would have to pay royalties to private companies holding lease rights at the Church Rock site, *e.g.*, United Nuclear Corporation.) As indicated in the FEIS, at page 5-4, Section 5.1.2, this income would be concentrated (in the hands of about 9 lease holders), and would probably not have a widespread effect.

8. As discussed in FEIS Section 5.1.3 and indicated in Tables 2 and 3 below, significant tax revenues would be collected by McKinley County and possibly the Navajo Nation regardless of the price of U_3O_8 .

Table 2. Annual Project Benefits (assuming U₃O₈ at \$9 per pound)

	Navajo Nation	Local Navajo Communities	McKinley County/ Non-Navajo
Employment	NA	Of 100 long-term jobs that would not require highly specialized skills, local communities could get up to 100 depending on how well HRI executes its intention to hire local Navajo.	Total estimated long-term jobs less those going to Navajo (about 40 if Navajo get 100).
Earnings	NA	Average annual earnings for local employees would be about \$24,000.	Average annual earnings for management/technical positions would be about \$36,000.
Royalties	None	\$630,000 annually (assuming 1 million pounds of yellowcake produced annually from allotment leases at \$9/lb). This would be distributed among 9 lessors of Unit 1 properties.	None.
Taxes	\$540,000 annually for Business Activities Tax (assuming 2 million pounds of yellowcake at \$9/lb and contingent on legal jurisdiction to tax). \$15,000 for construction tax (assuming \$500,000 in drill rig contracts).	Cannot tax. Cannot tax.	\$270,000 annually for real property tax (assuming 2 million pounds of yellowcake at \$9/lb). \$55,000 for personal property (based on value of assets at Unit 1 and Crownpoint).

(Continued)

Table 2. Continued

	Navajo Nation	Local Navajo Communities	McKinley County/ Non-Navajo
Other benefits	NA	Several jobs related to income expenditure in local community or incidental services required by project.	Several jobs related to expenditures in the local community or incidental services required by project.

9. The potential costs of the proposed project to the local communities would not change from those discussed in the FEIS (Section 5.2), regardless of the price of U₃O₈.

10. “[Question] 5. Because of financial and market uncertainties, it is foreseeable that Church Rock Section 8 will be the only section developed. What are the governmental needs that arise because of the CUP? Would local governments need to make any capital expenditures that might not be recouped if the CUP suspended or terminated mining operations without going beyond Section 8? In light of the financial situation of local governments, would environmental justice considerations require indemnification or assurances to local governments for possible losses [footnote: *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 100 (1998).]”

The demand for public infrastructure and services (*i.e.*, “governmental needs”) associated with the proposed project would decrease if Church Rock Section 8 were the only section of the project developed. Typically, increases in the demand for public infrastructure and services are related to increases in population.

11. As discussed in FEIS Section 4.9.2, HRI’s proposed project may cause increases in population of about 25-40 people (less than 0.1 percent of the 1990 McKinley County population of 60,686) and such increases would not be significant. FEIS at 4-99. Therefore, the FEIS concludes that no significant or detrimental effects on housing, schools, utilities, or other public services would occur as a result of project-related population growth in Crownpoint or other communities in the project vicinity. This conclusion, which also relates to environmental justice considerations, would remain valid if Church Rock Section 8 were the only section developed by HRI since mining there is only projected to last six years, *see* FEIS at 4-97 to 4-98, and the resulting population increase would be less than that mentioned above.

12. With respect to HRI’s proposed project, the most significant risk in terms of “governmental needs” would be the need to replace the town of Crownpoint’s

Table 3. Annual Project Benefits (assuming U₃O₈ at \$12 per pound)

	Navajo Nation	Local Navajo Communities	McKinley County Non-Navajo
Employment	NA	Of 100 long-term jobs that would not require highly specialized skills, local communities could get up to 100 depending on how well HRI executes its intention to hire local Navajo.	Total estimated long-term jobs less those going to Navajo (about 40 if Navajo get 100).
Earnings	NA	Average annual earnings for local employees would be about \$24,000.	Average annual earnings for management/technical positions would be about \$36,000.
Royalties	None	\$840,000 annually (assuming 1 million pounds of yellowcake produced annually from allotment leases at \$12/lb). This would be distributed among 9 lessors of Unit 1 properties.	None.
Taxes	\$720,000 annually for Business Activities Tax (assuming 2 million pounds of yellowcake at \$12/lb and contingent on legal jurisdiction to tax). \$15,000 for construction tax (assuming \$500,000 in drill rig contracts).	Cannot tax. Cannot tax.	\$360,000 annually for real property tax (assuming 2 million pounds of yellowcake at \$12/lb). \$55,000 for personal property (based on value of assets at Unit 1 and Crownpoint).

(Continued)

Table 3. Continued

Navajo Nation		Local Navajo Communities	McKinley County Non-Navajo
Other benefits	NA	Several jobs related to income expenditure in local community or incidental services required by project.	Several jobs related to expenditures in the local community or incidental services required by project.

water supply wells. *See* FEIS Section 4.3.1.1. If the entire project were developed, HRI would be required to pay for water supply well replacement and to reimburse the town of Crownpoint for operating costs that would occur because of the drawdown of the water table. *See* FEIS Section 4.3.3; Source Material License SUA-1508, License Conditions (LCs) 10.16 and 10.27. The FEIS concludes that little or no adverse effect would occur to the community because these required mitigation measures would provide a process to assure that replacement wells are acceptable. The need to replace the wells would *only* stem from project development at the Crownpoint site, and *not* from development at Church Rock Section 8. Therefore, the conclusion that the need to replace Crownpoint water supply well is the most significant governmental needs risk remains valid if Church Rock Section 8 were the only section of the project developed.

13. Because project-related population increases would be less than predicted in the FEIS if Church Rock Section 8 were the only section of the project developed or due to lower uranium prices, there would be only slight changes in demand for emergency, fire, and police services. FEIS Section 4.9.4, at page 4-100, notes that “although the probability of accidents related to the project’s operation is very low,” responding to radiological hazards associated with the processed material “would result in the need for additional standby emergency services that currently are not required or available in the Church Rock area.” As discussed in FEIS, HRI has made several commitments to address these issues which include providing “the local hospital with the proper equipment, on-going training for hospital staff, and a separate room equipped for decontamination (Pelizza 1996a).” FEIS at 4-100. HRI’s proposed mitigation measures have been found adequate for the entire project, and therefore would suffice if Church Rock Section 8 were the only section of the project developed.

14. Traffic on New Mexico Highway 566 would increase as project employees commute to Church Rock Section 8 during the work week. Because existing traffic on this road is very light, *see* FEIS at 4-100, the additional traffic associated with the project would not cause congestion or traffic problems. Average Annual Daily

Traffic on Highway 566 (which extends north from I-40 through the town of Church Rock, then bypasses the Church Rock mining site and continues north into the Navajo Indian Reservation property) from 1990 to 1994 was 3,490 vehicles. FEIS at 4-101. This volume of traffic is consistent with the Transportation Research Board's "peak hour Level of Service (LOS) rating of 'C,' which is characterized by stable traffic flows." See FEIS at 4-101. "Using the methodology in *Highway Capacity Manual* (Transportation Research Board 1985) for evaluating traffic flow on rural two-lane highways, at peak project [*i.e.*, the entire Crownpoint project] employment (assuming the addition of up to 100 vehicles at rush hour) the additional traffic would not degrade the existing LOS." FEIS at 4-101. Therefore, there would be even less traffic impacts associated with mining at Church Rock Section 8 only based on the reduced number of people/employees discussed in paragraph 11, above.

15. For the reasons discussed above and in FEIS Section 4.9, it is not likely that local governments would need to make any capital expenditures that might not be recouped if HRI suspended or terminated mining operations without going beyond Church Rock Section 8. Any "losses" to local governments could be addressed as part of socioeconomic mitigation measures required by the license. FEIS Section 4.9.6 discusses the mitigation of socioeconomic impacts provided for in the Staff-recommended action (Alternative 3). Such measures are addressed in LC 9.13 (HRI required to have applicable Memoranda of Agreements with local authorities, the fire department, medical facilities, and other emergency services), LC 9.14 (HRI required to obtain necessary permits and licenses from the appropriate regulatory authorities), LC 10.16 (HRI required to reimburse operators of the Crownpoint water supply wells for any increased costs caused by the project), and LC 10.27 (HRI required to replace the town of Crownpoint's water supply wells).

16. "[Question] 6. What are the financial effects of uncertainties about the application of a tax on the CUP by the Navajo Nation? In light of these uncertainties and the possibility of litigation about this tax, are the parties willing to offer to begin negotiation with relevant governments? Have negotiations begun? Are negotiations producing results?"

As stated in FEIS Section 4.9.5.2:

Potential tax collections by the Navajo Nation would be through the Navajo Business Activities Tax (BAT) and the BAT Construction Tax. . . .

[These taxes] apply to activities on the Navajo Reservation and in areas outside the reservation if such areas meet the definition of "Indian country." The proposed project would not be located on the Navajo Reservation. However, the BAT could apply to the project's gross receipts if it is determined that the project would be within Indian country. The definition of Indian country may be viewed by some as vague and may ultimately be determined through litigation.

The above excerpt from Section 4.9.5.2 of the FEIS reflects that HRI is litigating such issues in the U.S. Court of Appeals for the 10th Circuit. While the Staff is of the opinion that the financial effects of uncertainties related to these taxes is unclear, the FEIS already recognizes that, for the Navajo Nation, if taxes are not applied to the project, there would be the loss of the potential tax revenues as reported in FEIS Table 4.29 on page 4-102.

17. The NRC Staff has no information as to whether the parties are willing to begin negotiations with relevant governments, whether negotiations have begun, or whether the negotiations are producing results.

18. “[Question] 7. For Church Rock [*sic*] Section 8 . . . What is your comparative analysis of the NRC Staff-Recommended Action to: (1) the non-action alternative, and (2) Alternative 2 (modified action) — including a concise, descriptive summary of the advantages and disadvantages of the options? See CEQ “Memorandum to Agencies; Answers to 40 Most Asked Questions on NEPA Regulations,” 46 Fed. Reg. 18,026; see also 40 C.F.R. § 1502.14 (Council on Environmental Quality, guidance). *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 98 (and 97-99) (1998). In your answers to this question, please consider the answers to the questions set forth above in your overall discussion. [footnote omitted]”

Tables 4 through 15 (attached) provide the NRC Staff’s comparative analysis for Church Rock Section 8 of the “NRC Staff-Recommended Action” alternative (Alternative 3) with the “No Action” alternative (Alternative 4) and the Modified Action alternative (Alternative 2). These tables summarize information in FEIS Sections 4.1 through 4.12.

19. In general, the NRC Staff-Recommended Action would have the advantage of allowing HRI to develop Section 8, while providing more environmental protection than the Modified Action (because of the additional mitigation measures recommended by Staff). The NRC Staff-Recommended Action would have the disadvantages of being more expensive for HRI than the Modified Action alternative and of creating impacts that would not exist under the No Action alternative.

20. The Modified Action alternative would have the advantage of allowing HRI to develop Section 8 at a lower cost than under the NRC Staff-Recommended Action, but would have the disadvantages of providing less environmental protection than the NRC Staff-Recommended Action (because there would be no additional mitigation measures recommended by staff) and of creating impacts that would not exist under the No Action alternative.

21. The No Action alternative would have the advantage of maintaining the status quo and avoiding the minimal impacts (to air quality and noise, geology and soils, groundwater, surface water, transportation risks, health physics and radiological risks, ecology, land use, socioeconomics, aesthetics, cultural resources and environmental justice) associated with development of Section 8. The disadvantages of the No Action alternative would be not allowing any uranium

production from Section 8 and any of the beneficial socioeconomic impacts discussed in the FEIS. See FEIS Sections 4.9.1, 4.9.5, 5.1.2 and 5.1.3.

22. Based on the Staff’s comparative analysis in the FEIS and summarized in Tables 4-15, below, Alternative 3 (Staff Recommended Action) was superior to Alternative 2 (Modified Action) with respect to mitigating environmental impacts from the project. Similarly, Alternative 3 (Staff Recommended Action) was considered favorable to Alternative 4 (No Action) because the environmental impacts are acceptable (*i.e.*, insignificant and/or mitigable) and has socioeconomic benefits that flow from conducting mining operations at Section 8. These socioeconomic [benefits] outweigh the benefits of the No Action alternative.

Table 4. Air Quality and Noise (Church Rock — Section 8)

Alternatives	Impacts	Comments
Alternative 2 (Modified Action)	Impacts more significant than under Alternative 3 (no mitigation measures except those proposed by HRI).	Air quality and noise impacts in Church Rock Section 8 will be relatively insignificant under both Alternatives 2 and 3.
Alternative 3 (Staff-Recommended Action)	Impacts less significant than under Alternative 2 (staff-recommended mitigation measures plus those proposed by HRI): – Utilize dust suppression techniques to reduce fugitive dust from unpaved roads	Under Alternative 3, the NRC Staff’s recommendation to utilize dust suppression techniques to reduce fugitive dust from unpaved roads was primarily for the Crownpoint and Unit 1 sites (<i>i.e.</i> , Church Rock Section 8 has only a short stretch of unpaved roadway). However, construction and maintenance activities at the Church Rock well fields, and traffic on the facility grounds could result in creation of some fugitive dust, thereby necessitating use of some form of dust suppression technique.
Alternative 4 (No Action)	No impacts to air quality; no noise impacts.	

Table 5. Geology and Soils (Church Rock — Section 8)

Alternatives	Impacts	Comments
Alternative 2 (Modified Action)	Impacts more significant than under Alternative 3 (no mitigation measures except those proposed by HRI).	Geological and soils impacts at Church Rock Section 8 are expected to be minimal under both Alternatives 2 and 3. Under Alternatives 2 or 3, HRI has not determined which of its proposed groundwater restoration approaches or methods of waste water disposal it will utilize.
Alternative 3 (Staff-Recommended Action)	Impacts less significant than under Alternative 2 (staff-recommended mitigation measures plus those proposed by HRI): 1. No construction of above grade wastewater retention ponds prior to NRC approval of embankment engineering system. 2. Maintain sufficient reserve capacity in retention pond system to enable transfer of contents among ponds. 3. Submit detailed site reclamation plan for NRC approval 12 months prior to shutdown. 4. Maintain adequate financial surety to cover reclamation costs.	Under Alternative 3, the NRC Staff imposes additional license requirements to ensure licensee compliance with regulatory requirements. – Reduces risk of surface water and soils being contaminated from structural failure of the retention ponds. – Reduces risk of surface water and soils being contaminated from over-topping of the retention ponds. – Ensures adequate safety evaluation review is conducted of licensee’s reclamation plan. – Establishes adequate funding to ensure all groundwater restoration and surface reclamation costs are covered.
Alternative 4 (No Action)	No impacts to geology or soils.	

Table 6. Groundwater (Church Rock – Section 8)

Alternatives	Impacts	Comments
Alternative 2 (Modified Action)	Impacts more significant than under Alternative 3 (no mitigation measures except those proposed by HRI).	Alternative 2 has a higher risk than Alternative 3 that groundwater could potentially be contaminated by vertical excursions and that the groundwater may not be properly restored.
Alternative 3 (Staff-Recommended Action)	Impacts less significant than under Alternative 2 (staff-recommended mitigation measures plus those proposed by HRI): 1. Perform well integrity tests on each injection and production well before use. 2. Dispose of all liquid effluents from process buildings and other process waste streams in NRC-approved manner. 3. Do not exceed maximum flow rate of 15,000 Lpm (4000 gpm) at ion exchange plant. 4. Establish NRC-approved effluent and environmental monitoring program. 5. Establish baseline water quality data at NRC-specified locations in well field. 6. Collect sufficient water quality data and conduct sufficient hydrologic confinement tests to characterize the Cow Springs aquifer.	– Reduces risk of aquifer contamination from vertical excursions. – Ensures licensee requirement to obtain NRC review and approval of any future liquid waste effluent disposal option. – Ensures potential risk scenarios are within the scope of the EIS/SER review. --- Ensures licensee’s environmental monitoring program meets NRC regulatory requirements. – Improves baseline characterization and reduces risk of inadequate restoration. – Reduces risk of Cow Springs aquifer contamination from vertical excursions.

(Continued)

Table 6. Continued

Alternatives	Impacts	Comments
Alternative 3 (Staff-Recommended Action)	7. Conduct acceptable groundwater restoration demonstration; determine number of pore volumes required for restoration; determine amount of surety based on demonstration.	--- Reduces risk of inadequate groundwater restoration by setting an adequate level of surety.
	8. Conduct Westwater Canyon aquifer step-rate injection test.	--- Reduces risk of contaminating overlying aquifers from vertical excursions caused by high injection pressures.
	9. In the event of vertical excursion, explore significant aquifers above Dakota sandstone aquifer for vertical excursions.	– Ensures that all aquifers contaminated by vertical excursions are identified and cleaned up.
	10. Develop NRC-approved groundwater restoration plan.	--- Reduces risk that groundwater will not be adequately restored.
	11. Maintain adequate financial surety to cover groundwater restoration costs.	--- Reduces risk that groundwater will not be adequately restored.
	12. Complete all wells to NRC-established specifications.	--- Reduces risk of contaminating overlying aquifers from vertical excursions.
Alternative 4 (No Action)	No impacts to groundwater.	

Table 7. Surface Water (Church Rock — Section 8)

Alternatives	Impacts	Comments
Alternative 2 (Modified Action)	Impacts more significant than under Alternative 3 (no mitigation measures except those proposed by HRI).	Surface water impacts in Church Rock Section 8 are expected to be minimal under both Alternatives 2 and 3. Under Alternative 2 no design details have been provided to NRC by HRI.
Alternative 3 (Staff-Recommended Action)	Impacts less significant than under Alternative 2 (staff-recommended mitigation measures plus those proposed by HRI): – No construction of wastewater retention ponds prior to NRC approval of embankment engineering system.	Under Alternative 3, the licensee will be required to provide design details to the NRC Staff for approval of its waste water retention ponds prior to operation. The NRC Staff has provided additional guidance to HRI for design of surface water impoundments and erosion protection measures, which will further minimize any potentially adverse impacts from construction of the facility.
Alternative 4 (No Action)	No impacts to surface water.	

Table 8. Transportation Risk (Church Rock — Section 8)

Alternatives	Impacts	Comments
Alternative 2 (Modified Action)	Impacts more significant than under Alternative 3 (no mitigation measures except those proposed by HRI).	Although the number of shipments of U_3O_8 and other materials would be the same under both Alternatives 2 and 3, transportation risk would be reduced under Alternative 3 because of additional NRC-required safety measures.
Alternative 3 (Staff-Recommended Action)	Impacts less significant than under Alternative 2 (staff-recommended mitigation measures plus those proposed by HRI): 1. All delivery trucks must carry appropriate certifications of safety inspections. 2. All delivery trucks must hold appropriate licenses.	
Alternative 4 (No Action)	No increased transportation risk.	

Table 9. Health Physics and Radiological Impacts (Church Rock — Section 8)

Alternatives	Impacts	Comments
Alternative 2 (Modified Action)	Impacts more significant than under Alternative 3 (no mitigation measures except those proposed by HRI).	Radiological impacts in Church Rock Section 8 are expected to be minimal under both Alternatives 2 and 3. HRI will restrict access to operating and restoring wellfields, which will reduce potential exposures to the public.
Alternative 3 (Staff-Recommended Action)	Impacts less significant than under Alternative 2 (staff-recommended mitigation measures plus those proposed by HRI): 1. All U ₃ O ₈ must be stored inside restricted area; liquid oxygen tanks must be located in well fields; other chemical storage tanks must be located on concrete pad near waste retention pond. 2. Maintain an area within restricted area boundary for storing contaminated materials prior to disposal; all contaminated waste must be disposed of at NRC- or Agreement State-licensed radioactive waste disposal site.	Under Alternative 3, HRI would be required to clean-up the wellfields (or any other part of the restricted area) after use before allowing unrestricted access. This will allow NRC staff to verify compliance with regulatory clean-up standards for those affected areas related to the mining process.
Alternative 4 (No Action)	No health physics or radiological impacts.	

Table 10. Ecology (Church Rock – Section 8)

Alternatives	Impacts	Comments
Alternative 2 (Modified Action)	Impacts more significant than under Alternative 3 (no mitigation measures except those proposed by HRI).	Ecological impacts in Church Rock Section 8 are expected to be minimal under both Alternatives 2 and 3. The amount of land disturbed in Section 8 would be the same (between 140 and 150 acres) under Alternatives 2 and 3.
Alternative 3 (Staff-Recommended Action)	Impacts less significant than under Alternative 2 (staff-recommended mitigation measures plus those proposed by HRI): <ol style="list-style-type: none"> 1. Revegetate disturbed areas with NRC-recommended seed mixture. 2. Follow NRC guidelines listed in FEIS for revegetating disturbed areas. 3. Implement methods for discouraging waterfowl use of project retention and evaporation ponds. 	Under Alternative 3, impacts would be further reduced because revegetation guidelines recommended by the NRC Staff (which were adopted from the Navajo Nation EPA guidelines) were specifically designed for the terrestrial and meteorological environment in which the project would be located. Additionally, Alternative 3 includes measures to discourage waterfowl use of project ponds, which should reduce potential impacts to waterfowl in the area.
Alternative 4 (No Action)	No impacts to ecological resources.	

Table 11. Land Use (Church Rock — Section 8)

Alternatives	Impacts	Comments
Alternative 2 (Modified Action)	Impacts same as under Alternative 3 (no grazing permits affected; no allottee lands affected).	Land use impacts in Church Rock Section 8 are expected to be minimal under both Alternatives 2 and 3. Surface rights to Section 8 of the project are owned by HRI, and therefore no grazing permits or allottee lands will be affected.
Alternative 3 (Staff-Recommended Action)	Impacts same as under Alternative 2 (no grazing permits affected; no allottee lands affected).	
Alternative 4 (No Action)	No land-use impacts.	

Table 12. Socioeconomics (Church Rock — Section 8)

Alternatives	Impacts	Comments
Alternative 2 (Modified Action)	Impacts more significant than under Alternative 3 (no mitigation measures except those proposed by HRI).	Adverse socioeconomic impacts from mining on Church Rock Section 8 are expected to be minor under both Alternatives 2 and 3. The number of jobs created (approximately 60), the amount of income generated (between \$1-1.7 million annually), and the amount of tax revenues generated (at least \$250,000) would be the same under both Alternatives 2 and 3.
Alternative 3 (Staff-Recommended Action)	Impacts less significant than under Alternative 2 (staff-recommended mitigation measures plus those proposed by HRI): <ol style="list-style-type: none"> 1. Document intention to hire local Navajo in written project hiring plan. 2. Provide annual report concerning employment of local Navajo. 3. Develop memorandum of understanding with local governments to outline responsibilities for emergency medical response and training. 	Under Alternative 3, beneficial effects would be increased because the Navajo hiring practices recommended by NRC Staff would help ensure that local residents benefit from the project. Alternative 3 also includes the additional measure of developing an MOU to ensure that local governments do not have to pay for increased fire and emergency medical services.
Alternative 4 (No Action)	No socioeconomic impacts.	Alternative 4 would mean the potential loss of jobs, royalties, increased salaries, and tax revenues to the local populace.

Table 13. Aesthetics (Church Rock — Section 8)

Alternatives	Impacts	Comments
Alternative 2 (Modified Action)	Impacts more significant than under Alternative 3 (no mitigation measures except those proposed by HRI).	Impacts on aesthetics at Church Rock Section 8 are expected to be minimal under both Alternatives 2 and 3.
Alternative 3 (Staff-Recommended Action)	Impacts less significant than under Alternative 2 (staff-recommended mitigation measures plus those proposed by HRI): – Develop and implement NRC-approved site reclamation plan.	Under Alternative 3, the long-term impacts (e.g., permanently disturbed land areas) would be minimized because of the development and implementation of an NRC-approved reclamation plan by the licensee — which would include the revegetation guidelines discussed under ecological resources.
Alternative 4 (No Action)	No impacts to aesthetic resources.	

Table 14. Cultural Resources (Church Rock — Section 8)

Alternatives	Impacts	Comments
Alternative 2 (Modified Action)	Impacts more significant than under Alternative 3 (no mitigation measures except those proposed by HRI).	Cultural resource impacts are expected to be minimal at Church Rock Section 8 for both Alternatives 2 and 3.
Alternative 3 (Staff-Recommended Action)	Impacts less significant than under Alternative 2 (staff-recommended mitigation measures plus those proposed by HRI): – Develop and implement NRC-approved cultural resources management plan.	Under Alternative 3, cultural resource protection would be enhanced because of the development and implementation of an NRC-approved cultural resources management plan. The plan would include additional NRC Staff recommended measures in the event that HRI’s policy of “total avoidance” is not practicable.
Alternative 4 (No Action)	No impacts to cultural resources.	

Table 15. Environmental Justice (Church Rock — Section 8)

Alternatives	Impacts	Comments
Alternative 2 (Modified Action)	Impacts more significant than under Alternative 3 (no mitigation measures except those proposed by HRI).	Adverse environmental justice impacts are potentially significantly higher under Alternative 2 than under Alternative 3.
Alternative 3 (Staff-Recommended Action)	<p>Impacts less significant than under Alternative 2 (staff-recommended mitigation measures plus those proposed by HRI):</p> <ol style="list-style-type: none"> 1. In the event of lixiviant excursion, notify Navajo Nation, BIA, and BLM by telephone within 24 hours and by letter within 7 days. Provide written report within 60 days. 2. In the event of retention pond leak, notify Navajo Nation, BIA, and BLM by telephone within 48 hours and provide written report within 30 days. 3. In the event of solution spill or embankment failure, notify Navajo Nation, BIA, and BLM by telephone within 48 hours and provide written report within 7 days. 4. Work with U.S. EPA and State of New Mexico to involve Navajo Nation in UIC permitting. 5. Facilitate negotiations between State of New Mexico and Navajo Nation in water rights permitting. 	Under Alternative 3, potentially significant environmental justice impacts would be avoided because HRI would implement the NRC Staff recommended measures for all resource areas. Additionally, the NRC Staff has included the Navajo Nation regulatory authorities in oversight and decision making regarding HRI's mining project in order to provide the Navajo Nation a more active role in regulating the project.

(Continued)

Table 15. Continued

Alternatives	Impacts	Comments
Alternative 3 (Staff- Recommended Action)	6. Consult with traditional practitioners of the Church Rock Chapter to ascertain whether specific ceremonies should be facilitated on project land.	
Alternative 4 (No Action)	No environmental justice impacts.	

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)

August 27, 1999

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), acting pursuant to 10 C.F.R. § 2.749, the Licensing Board grants summary disposition in favor of PFS in connection with contentions Security-A, Security-B, and Security-C, as they relate to the issue of the proper adoption of a cooperative agreement providing the local sheriff's office with law enforcement authority on the Native American reservation that houses the PFS site.

RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PERSUASION; BURDEN OF PROOF)

As with the analogous Rule 56 of the Federal Rules of Civil Procedure, the movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts and any supporting materials that accompany the dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. *See Advanced Medical*

MEMORANDUM AND ORDER
(Granting Motion for Summary Disposition Regarding Contentions
Security-A and Security-B and Partial Summary Disposition
Regarding Contention Security-C)

Applicant Private Fuel Storage, L.L.C. (PFS), has requested that summary disposition be entered in its favor regarding contentions Security-A and Security-B and that partial summary disposition be entered in its favor regarding contention Security-C. As admitted, these contentions allege that Tooele County, Utah, failed to properly approve a cooperative agreement providing the Tooele County sheriff's office with law enforcement authority on the reservation of Intervenor Skull Valley Band of Goshute Indians (Skull Valley Band), which is the site of PFS's proposed 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI). According to PFS, there is no genuine issue as to any material fact relevant to these contentions so that, in accordance with 10 C.F.R. § 2.749, it is entitled to a determination on these contentions as a matter of law. The NRC Staff supports the motion for summary disposition, which sponsoring Intervenor State of Utah (State) does not directly challenge.

For the reasons described below, on these issues we grant summary disposition in favor of PFS.

I. BACKGROUND

Pursuant to 10 C.F.R. § 72.180, PFS is required to "establish a detailed plan for security measures for [the] physical protection" of its proposed ISFSI facility. This plan must "describe how the applicant will meet the requirements of § 73.51 . . . and include within the plan the design for physical protection, the licensee's safeguards contingency plan, and the security organization personnel training and qualification plan." The specific requirements for an ISFSI's physical protection plan are set forth in 10 C.F.R. § 73.51(d), which, as pertinent here, requires:

- (5) A security organization with written procedures must be established. The security organization must include sufficient personnel per shift to provide for monitoring of detection systems and the conduct of surveillance, assessment, access control, and communications to assure adequate response. Members of the security organization must be trained, qualified, and requalified to perform assigned job duties in accordance with appendix B to part 73, sections I.A, (1)(a) and (b), (B)(1)(a), and the applicable portions of II.

(6) Documented liaison with a designated response force or local law enforcement agency (LLEA) must be established to permit timely response to unauthorized penetration or activities.

In addition, section 3 (“Licensee Planning Base”) of Appendix C to 10 C.F.R. Part 73 requires:

d. Law Enforcement Assistance — A listing of available local law enforcement agencies and a description of their response capabilities and their criteria for response; and a discussion of working agreements or arrangements for communicating with these agencies.

Thus, compliance with section 73.51 requires documented identification of a local law enforcement agency (LLEA) responsible for responding to unauthorized penetration or activities at the facility and a discussion of arrangements/working agreements for communication with the LLEA.

In this instance, although PFS will provide for onsite security, the Skull Valley Band on whose reservation the PFS ISFSI will be located does not possess the resources and facilities needed to act as LLEA to protect the PFS facility from offsite intrusions. Moreover, because of the sovereign nature of Native American reservations, state and local governments generally do not provide law enforcement on reservations, absent some agreement with the tribe. Therefore, as was indicated in the PFS security plan, in order to satisfy section 73.51 requirements, the United States Department of the Interior Bureau of Indian Affairs (BIA), the Skull Valley Band, and Tooele County entered into a cooperative law enforcement agreement (CLEA) in June 1997 that provided the Tooele County sheriff’s office with law enforcement authority on the Skull Valley Goshute Reservation.

On January 3, 1998, the State filed eight contentions challenging the PFS physical security plan (PSP). The Licensing Board ruled on the admissibility of the State of Utah’s contentions on PFS’s PSP on June 18, 1998. *See* LBP-98-13, 47 NRC 360 (1998). The Board held that contentions Security-A and Security-B were inadmissible because they sought “to rely on the question of the designated LLEA’s lack of jurisdiction and law enforcement authority on the Skull Valley Band’s reservation.” *Id.* at 368-69. The Board found that the State’s assertion that the CLEA failed to provide the Tooele County sheriff’s office, as the LLEA, with the needed law enforcement authority lacked adequate legal or factual support. Next, the Board found that part of contention Utah Security-C was inadmissible because “a [CLEA] ha[d] been shown to exist between the LLEA [or the sheriff’s office], [BIA], and the Skull Valley Band” and that the agreement “ha[d] not been subjected to an adequately supported legal or factual challenge by the State.” *Id.* at 370. Finally, the Board admitted another portion of Security-C that it limited to the issue whether the “LLEA will provide a ‘timely’ response to an unauthorized entry.” *Id.*

Following this ruling, the State moved for reconsideration based on the fact it recently had been given access to the CLEA and had identified problems with its enactment. In an August 5, 1998 ruling, the Board found reconsideration appropriate and admitted Security-A and Security-B as well as the remaining part of Security-C. *See* LBP-98-17, 48 NRC 69 (1998). The Board explained:

Our ruling here means the State may pursue its Security-C claim of regulatory noncompliance that the Tooele County sheriff's office cannot act as the designated LLEA because the alleged failure to comply with the requirements of Utah Code Annotated section 11-13-5 regarding approval of the June 1997 agreement arguably would deprive the sheriff's office of law enforcement authority on the Skull Valley Band reservation. Further, we admit contentions Security-A and Security-B on the same basis.

Id. at 75-76.

Thus, these three contentions, as admitted, allege that Tooele County's failure to approve the June 1997 CLEA creates a factual dispute about the validity of the section of the PSP that designated the Tooele County sheriff's office as the LLEA. Specifically, the State claimed that Tooele County did not comply with state statutory adoption requirements when it enacted this CLEA. Under Utah Code Ann. § 11-13-5 (1997):

Adoption of appropriate resolutions by the governing bodies of the participating public agencies are necessary before any [cooperative] agreement may enter into force.

Finding there was no evidence a written resolution had been passed by Tooele County relevant to the CLEA, the Board held that "the State has made a sufficient showing there is a genuine material dispute adequate to warrant further inquiry relative to the question whether the June 1997 agreement had been adopted by Tooele County [in accordance with section 11-13-5] so as to provide its officials with law enforcement authority at the Skull Valley Band reservation." *Id.* at 74.

As accepted by the Board for litigation, *id.* at 76-77, the three contentions thus read as follows:

SECURITY-A — Security Force Staffing

CONTENTION: The Applicant has failed to establish a detailed plan for security measures for physical protection of the proposed ISFSI as required by 10 C.F.R. § 72.180, including failure to demonstrate that it has adequate staffing capability to cope with or respond to safeguards contingency events.

* * * *

SECURITY-B — Equipment and Training

CONTENTION: The Applicant has not described the type or location of security equipment available to security force personnel, nor has the Applicant described adequate training for fixed site guards or armed response personnel.

* * * *

CONTENTION: The Applicant has not met the requirements of 10 C.F.R. Part 73, App. C, Contents of the Contingency Plan, Law Enforcement Assistance.

LBP-98-13, 47 NRC at 368, 369.

Thus, the Board found the question was whether, in the apparent absence of a written resolution, Tooele County complied with the “appropriate resolution” requirement of Utah Code section 11-13-5 in approving the CLEA. Without such a resolution, the Board suggested the effectiveness of the CLEA seemingly was in doubt, raising questions “about the Tooele County sheriff’s office status to act as the designated LLEA for the PFS facility in accordance with [the requirements of] 10 C.F.R. Part 73, App. C.” LBP-98-17, 48 NRC at 75.

As the forgoing makes apparent, under Utah law a CLEA among public agencies would enter into force only after it had been approved by Tooele County through an “appropriate resolution.” In a summary disposition motion filed on June 11, 1999, PFS now claims that subsequent events establish that BIA, the Skull Valley Band, and the Tooele County sheriff’s office have entered into a valid CLEA agreement. *See* [PFS] Motion for Summary Disposition of Contentions Utah Security-A and Security-B, and Partial Summary Disposition of Contention Utah Security-C (June 11, 1999) [hereinafter PFS Motion]. According to PFS, on September 1, 1998, a revised CLEA was approved and authorized by a written resolution of the Tooele County Board of Commissioners. During this meeting, the Commissioners voted “to approve Resolution 98-13 — Approving and Authorizing the Cooperative Law Enforcement Agreement (CLEA) Between Tooele County, the Bureau of Indian Affairs and the Skull Valley Band of Goshute Indians.” *Id.* exh. 1, at 12 (Tooele County Board of Commissioners Sept. 1, 1998 meeting minutes). PFS now contends that the August 1998 CLEA is an “appropriate resolution” and satisfies the Utah Code requirements. To this end, PFS has provided copies of both the August 1998 CLEA and the resolution passed by the Commissioners. *See id.* at 2-3, 6-7, exh. 1.

In its July 1, 1999 response to the motion, the Staff agrees with PFS’s claim that a procedurally valid CLEA is now in force. Referring to the September 1, 1998 resolution by Tooele County Board of Commissioners that ratified the CLEA, the Staff concludes that “an approved cooperative law enforcement agreement has been submitted, providing assurance that the Tooele County sheriff’s office can act as the LLEA for the PFS facility.” NRC Staff’s Statement of Position Concerning Group I Contentions (June 15, 1999) at 23.

As the contentions’ sponsor, the State does not directly challenge the PFS motion for summary disposition. Instead, it asserts that the Tooele County Commissioners’ approval of the August 1998 CLEA does not mean that the sheriff’s office has an obligation to respond to incidents at the Skull Valley Reservation. *See* [State] Response to [PFS] Motion for Summary Disposition

(July 1, 1999) at 2 [hereinafter State Response]. The State alleges that there “is nothing in the record to support reliance by PFS on law enforcement assistance from the Tooele County Sheriff.” *Id.* It maintains that the 1998 CLEA resolution was adopted without reference to PFS and that the county had not entered into an agreement allowing PFS to locate on the reservation at the time of this adoption. Therefore, the State concludes that even if the CLEA was properly adopted, Tooele County gave its approval without contemplating the role the sheriff’s office would be required to play on the reservation in order to comply with section 73.51. *See id.* at 2-3. It requests that the Staff require a “written agreement or understanding between Tooele County and PFS, that proves that PFS has ‘documented liaison with a LLEA’ as required by 10 C.F.R. § 73.51(d).” *Id.* at 3.

II. ANALYSIS

A party to an NRC proceeding is entitled to summary disposition on any or all matters

if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.

10 C.F.R. § 2.749(d). As with the analogous Rule 56 of the Federal Rules of Civil Procedure, the movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts and any supporting materials that accompany the dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant’s facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

In this instance, PFS has provided a statement of material facts, accompanied by two supporting documents, the Comprehensive Law Enforcement Agreement of August 7, 1998, and Resolution 98-13 by which the Tooele County Board of Commissioners approved the aforementioned agreement. These materials show that the deficiencies alleged in support of contentions Security-A, Security-B, and Security-C have been remedied by Tooele County’s adoption of the 1998 CLEA by “appropriate resolutions.”

As we have previously noted, under Utah Code Ann. § 11-13-5, local governing bodies like Tooele County are required to adopt cooperative agreements through “appropriate resolutions” before they enter into force. Further, resolutions adopted by municipalities must “be in writing before the vote is taken.” Utah Code

Ann. § 10-3-506 (1997). As the basis for its contentions, the State charged that Tooele County Board of Commissioners failed to comply with section 11-13-5 because the resolution they approved was not in written form. However, the Tooele Commissioners have rectified this procedural error with the approval and authorization of Resolution 98-13 on September 1, 1998. This written resolution accepted and approved the August 1998 CLEA and was executed by the Tooele Commission Chairman the following day. Also, as is evidenced by item nine of the “Minutes of the Regular Meeting of the Tooele County Board of Commissioners Held September 1, 1998,” which is included with the PFS motion, Resolution 98-13 was duly approved. Therefore, in terms of the county’s participation, the CLEA was ratified in a manner that complies with the requirements of Utah Code section 11-13-5 and by its terms provides the Tooele County sheriff’s office with law enforcement authority on the Skull Valley Goshute Reservation.

As we have noted, the State does not directly challenge PFS’s request for summary disposition. The State certainly does not deny that the August 1998 CLEA was adopted in compliance with the procedural requirements set out in the Utah Code. Instead, the State seeks to reintroduce an issue relative to contentions Security-A, Security-B, and Security-C that was rejected by the Board in our previous decision in LBP-99-7, 49 NRC 124 (1999). There, concluding that the State failed to satisfy the five-factor balancing test found in 10 C.F.R. § 2.714(a)(1) that governs the late admission of contentions, we refused to admit a late-filed contention based upon a statement by the Tooele County Attorney that the State claimed established PFS cannot fulfill the requirements of 10 C.F.R. § 73.51(d)(6) and 10 C.F.R. Part 73. *See id.* at 127; *see also* State Response at 2-3. Having previously refused to entertain this matter, the Board now declines to revisit that issue as it would be required to do if we were to consider whether we can impose any requirement that the Staff obtain a written agreement as requested by the State.

We thus conclude that PFS has met its burden of establishing that there are no material facts in dispute and that, relative to the issues admitted in the Board’s August 5, 1998 ruling in LBP-98-17, summary disposition should be entered in favor of PFS in toto on contentions Utah Security-A and Security-B and partially on contention Security-C. As admitted, these issues are, for all practical purposes, now moot.

III. CONCLUSION

With regard to contentions Security-A, Security Force Staffing, Security-B, Equipment and Training, and Security-C, Local Law Enforcement, as they were admitted relative to the question of whether a CLEA was appropriately adopted by Tooele County so as to be effective, PFS has established there is no genuine issue

as to any material fact and it is entitled to a judgment in its favor as a matter of law.

For the foregoing reasons, it is, this 27th day of August 1999, ORDERED that the June 11, 1999 PFS motion for summary disposition regarding contentions Security-A and Security-B, and for partial summary disposition regarding contention Security-C is *granted* and, for the reasons given in this Memorandum and Order, a decision regarding these contentions is rendered in favor of PFS.

THE ATOMIC SAFETY AND
LICENSING BOARD*

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 27, 1999

*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:

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)

August 27, 1999

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), acting pursuant to 10 C.F.R. § 2.749, the Licensing Board grants summary disposition in favor of PFS in connection with contention Utah G, Quality Assurance.

RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PERSUASION; BURDEN OF PROOF)

As with the analogous Rule 56 of the Federal Rules of Civil Procedure, the movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts and any supporting materials that accompany the dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993). Ultimately, however, the burden remains with the movant to

establish that no material facts are in dispute so that it is entitled to a dispositive ruling in its favor. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977) (if evidence before presiding officer does not establish absence of genuine issue of material fact, summary disposition motion must be denied even if unopposed).

TECHNICAL ISSUE DISCUSSED

The following technical issue is discussed: quality assurance.

MEMORANDUM AND ORDER (Granting Motion for Summary Disposition Regarding Contention Utah G)

Applicant Private Fuel Storage, L.L.C. (PFS), has requested that summary disposition be entered in its favor regarding contention Utah G, Quality Assurance. As admitted, that contention details Intervenor State of Utah's (State) claim that the PFS quality assurance (QA) program for its proposed Skull Valley, Utah independent spent fuel storage installation (ISFSI) fails to satisfy the requirements of 10 C.F.R. Part 72, Subpart G. PFS now asserts there is no genuine issue as to any material fact relevant to this contention so that, in accordance with 10 C.F.R. § 2.749, it is entitled to a determination on this contention as a matter of law. The NRC Staff supports this request, while the State, the contention's sponsor, does not directly oppose summary disposition, having declined to file a response to PFS's motion.

For the reasons described below, on this issue we grant summary disposition in favor of PFS.

I. BACKGROUND

Under 10 C.F.R. § 72.24(n), an ISFSI applicant like PFS must provide:

A description of the quality assurance program that satisfies the requirements of subpart G The description must identify the structures, systems, and components important to safety. The program must also apply to managerial and administrative controls used to ensure safe operation of the ISFSI or [multiple retrievable storage facility].

ISFSI quality assurance is also addressed by section 72.140(c) under which an applicant is required to "file a description of its quality assurance program, including a discussion of which requirements of [Subpart G] are applicable and how

they will be satisfied’ Additionally, an applicant’s QA organization ‘must have sufficient authority and organizational freedom to identify quality problems; to initiate, recommend, or provide solutions; and to verify implementation of solutions’ in order to comply with section 72.142(b).

In filing contention Utah G, the State challenged the sufficiency of the PFS QA program as outlined in the Safety Analysis Report (SAR) accompanying PFS’s application for its Skull Valley facility, alleging that the QA description in the PFS SAR failed to meet these NRC requirements. In our April 1998 decision addressing the validity of Intervenor contentions, we admitted contention Utah G, which reads as follows:

UTAH G — Quality Assurance

CONTENTION: The Applicant’s Quality Assurance (“QA”) program is utterly inadequate to satisfy the requirements of 10 C.F.R. Part 72, Subpart G.

LBP-98-7, 47 NRC 142, 252, *reconsideration granted in part and denied in part on other grounds*, LBP-98-10, 47 NRC 288, *aff’d on other grounds*, CLI-98-13, 48 NRC 26 (1998). Although the Board rejected bases two and three of the contention as impermissible challenges to agency regulatory program, rulemaking and/or generic determinations, it accepted the contention with “its bases one and four that assert a lack of detail in the PFS QA program description and a failure to demonstrate the independence of the PFS QA program.” LBP-98-7, 47 at 188.

Relying on its statement outlining twenty-four material facts not in dispute, the accompanying affidavit of former PFS QA committee chairman John G. Thorgersen, and the discovery deposition of State QA witness Dr. Marvin Resnikoff, PFS now argues that summary disposition is proper because the two issues raised by contention Utah G — the level of detail in its QA plan and the independence of its QA organization — have been resolved. PFS asserts that, in conjunction with its SAR, its QA program description, as provided to the Staff in August 1996 and revised in May 1999, complies with applicable standards because that plan contains a level of detail adequate for Staff review of the commitments contained within the plan description. PFS also declares that its QA plan ensures that the QA organization has the independence needed to perform its QA functions. *See* [PFS] Motion for Summary Disposition of Utah G (June 28, 1999) at 4-10 [hereinafter PFS Motion].

Agreeing that there are no issues of material fact in dispute, the Staff supports the PFS dispositive motion. As is explained in the affidavit of NRC Office of Nuclear Materials Safety and Safeguards safety inspection engineer Thomas O. Matula that accompanies the Staff’s response, after reviewing the PFS SAR and its QA plan and supporting documents, the Staff has determined that the level of detail in the QA plan and the independence of the PFS QA organization are sufficient, making summary disposition proper for this issue. *See* NRC Staff’s Response to

[PFS] Motion for Summary Disposition of Utah Contention G (Quality Assurance) (July 19, 1999) at 7-8, unnumbered exh. 1 [hereinafter Staff Response]; *see also* NRC Staff's Statement of Its Position Concerning Group I Contentions (June 15, 1999) at 9-13.

Finally, as previously indicated, the State, as the contention's sponsor, does not directly challenge the PFS motion, having chosen not to file a response to the PFS summary disposition request or the Staff's response. *See* [State] Response to [PFS] Motion for Summary Disposition of Utah Contention G (July 27, 1999) at 1.

II. ANALYSIS

A party to an NRC proceeding is entitled to summary disposition on any or all matters

if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.

10 C.F.R. § 2.749(d). As with the analogous Rule 56 of the Federal Rules of Civil Procedure, the movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts and any supporting materials that accompany the dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993). Ultimately, however, the burden remains with the movant to establish that no material facts are in dispute so that it is entitled to a dispositive ruling in its favor. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977) (if evidence before presiding officer does not establish absence of genuine issue of material fact, summary disposition motion must be denied even if unopposed).

Regarding basis one of contention Utah G, PFS asserts that the level of detail in its QA plan complies with the governing QA requirements of Subpart G. PFS acknowledges that under 10 C.F.R. § 72.140(c) it is required to file a QA program description that includes a discussion of the applicable requirements and how they will be satisfied. PFS asserts, however, that its QA plan furnishes enough information for the Staff to analyze whether its plan satisfies the terms of Subpart G.

In this regard, PFS declares that under the Appeal Board's analogous analysis in *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-

734, 18 NRC 11 (1983), the focus of the Staff's review is the commitments contained within the QA plan, not the details of the implementing methodology that may be developed at a later date. *See* PFS Motion at 5 & n.8. Under this interpretation, PFS asserts, the commitments within its QA plan are fully sufficient to satisfy 10 C.F.R. § 72.24. *Id.* at 5-6. PFS also maintains that the inadequacies alleged in the State's contention are "either immaterial, because the information is not required, or factually erroneous, because the material is actually present." *Id.* at 6.

Responding to the State's basis four claim that its QA program lacks the required independence, PFS declares that its "QA organization has sufficient independence to perform its QA functions during the licensing, construction, and operation of the facility." *Id.* at 7. More specifically, regarding the section 72.142(b) requirement that a QA organization have access to a management level that can ensure cost and schedule concerns will not override QA considerations, PFS notes that its QA committee reports directly to the PFS Board of Directors, the highest level of the organization. Further, addressing the State's concern that there is not a defined relationship between the PFS architect/engineer (A/E) and the PFS QA committee, PFS references the SAR and the QA plan provisions that discuss how the QA committee must approve, review, and audit the A/E and has authority to stop work if there is project QA noncompliance. *See id.*

As to the State's allegation that the facility SAR did not clearly describe the allocation of day-to-day organizational and scheduling responsibilities and the functional interrelations within the PFS organization, PFS declares that the SAR and the QA plan show that the Project Manager and the A/E, not the QA committee, have day-to-day project design, cost, and schedule responsibilities as well as outline the interaction between the QA organization and other PFS units. Finally, responding to the State's concern about compliance with 10 C.F.R. § 72.144(d) relative to each PFS unit's control over the adequacy of the QA in its own program, PFS maintains that this is based on a misunderstanding of the role of the unit manager relative to QA. According to PFS, unit managers are not to determine their unit's QA performance, but rather are to review that performance to ensure quality project design, construction, and operation, subject to an independent audit by the PFS QA organization. *See id.* at 8-9.

On this basis, PFS declares, and the Staff agrees, that there are no material factual issues remaining in dispute relative to contention Utah G, thereby entitling PFS to summary disposition in its favor on this issue.¹ For its part, the State has made no effort to refute this conclusion. After reviewing the PFS and Staff submissions, which include a copy of the PFS QA program description, *see* PFS

¹ Citing his deposition testimony, both PFS and the Staff also assert that Dr. Resnikoff cannot qualify as an expert for the State on QA matters. *See* PFS Motion at 3; Staff Response at 7 n.7. Because the State has not provided any response to the PFS motion, we need not decide this matter.

Motion exh. 1, attachs. 3, 5, we likewise have concluded that the matters of QA plan detail and QA organization independence that were of concern to the State both appear to have been adequately addressed in the PFS SAR and its QA plan. Accordingly, we grant summary disposition in favor of PFS on contention Utah G.

III. CONCLUSION

Relative to contention Utah G, Quality Assurance, and the issues of QA plan detail and QA organization independence that were admitted to this proceeding, PFS has established there is no genuine dispute as to any material fact and it is entitled to a judgment in its favor as a matter of law.

For the foregoing reasons, it is, this 27th day of August 1999, ORDERED that the June 28, 1999 PFS motion for summary disposition regarding contention Utah G is *granted* and, for the reasons given in this Memorandum and Order, a decision regarding this contention is rendered in favor of PFS.

THE ATOMIC SAFETY AND
LICENSING BOARD²

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 27, 1999

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

August 27, 1999

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), acting pursuant to 10 C.F.R. § 2.749, the Licensing Board grants summary disposition in favor of PFS in connection with contention Utah M, Probable Maximum Flood.

RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PERSUASION; BURDEN OF PROOF)

As with the analogous Rule 56 of the Federal Rules of Civil Procedure, the movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts and any supporting materials that accompany the dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993). Ultimately, however, the burden remains with the movant to

establish that no material facts are in dispute so that it is entitled to a dispositive ruling in its favor. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977) (if evidence before presiding officer does not establish absence of genuine issue of material fact, summary disposition motion must be denied even if unopposed).

TECHNICAL ISSUE DISCUSSED

The following technical issue is discussed: flood protection.

MEMORANDUM AND ORDER (Granting Motion for Summary Disposition Regarding Contention Utah M)

Applicant Private Fuel Storage, L.L.C. (PFS), has requested that summary disposition be entered in its favor regarding contention Utah M, Probable Maximum Flood, because that issue is now moot. As admitted, that contention details Intervenor State of Utah's (State) assertion that, as required by 10 C.F.R. §§ 72.24(d)(2), 72.98, PFS failed to estimate accurately the probable maximum flood (PMF) in its application for a license to construct and operate an independent spent fuel storage installation (ISFSI) in Skull Valley, Utah. According to PFS, there is no genuine issue as to any material fact relevant to this contention so that, in accordance with 10 C.F.R. § 2.749, it is entitled to a determination in its favor on this contention as a matter of law. The NRC Staff supports this request, while the State, as the contention's sponsor, does not directly oppose the PFS request and declines to file a response to the motion for summary disposition.

For the reasons described below, we grant summary disposition in favor of PFS on this issue.

I. BACKGROUND

As submitted in November 1997, contention Utah M challenged the accuracy of PFS's PMF calculation that, as an ISFSI applicant, PFS is required to perform in order to evaluate the ability of its proposed site to withstand possible flooding. Under 10 C.F.R. § 72.122(b)(2), ISFSI structures, systems, and components important to safety must be designed to withstand the effect of natural phenomena, such

as floods.¹ Further, the standard review plan for licensing ISFSIs indicates that an applicant's site assessment process must include a calculation of the greatest probable flood or PMF of the region surrounding a proposed site. *See* Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, NUREG-1567, Standard Review Plan for Spent Fuel Dry Storage Facilities at 2-8 to -9 (draft Oct. 1996). The State claimed that the PFS PMF calculation underestimated the flood volume for the area and failed to satisfy the dictates of 10 C.F.R. § 72.24(d)(2), which requires that in its Safety Analysis Report (SAR) an ISFSI applicant must discuss the ability of facility structures to withstand accidents and natural disasters such as floods. The State asserted that the underestimations contained in its PMF calculations meant that PFS could not prove adequate facility design as required by section 72.24(d)(2). *See* [State] Contentions on the Construction and Operating License Application by [PFS] for an Independent Spent Fuel Storage Facility (Nov. 23, 1997) at 96-97.

In an April 22, 1998 decision, the Board admitted a number of the State's contentions regarding the sufficiency of the PFS ISFSI proposal, including contention Utah M. As admitted, contention Utah M reads:

UTAH M — Probable Maximum Flood

CONTENTION: The application fails to accurately estimate the Probable Maximum Flood (PMF) as required by 10 C.F.R. § 72.98, and subsequently, design structures important to safety are inadequate to address the PMF; thus, the application fails to satisfy 10 C.F.R. § 72.24(d)(2).

1. The Applicant's determination of the PMF drainage area to be 26 sq. miles is inaccurate because the Applicant has failed to account for all drainage sources that may impact the ISFSI site during extraordinary storm events.
2. In addition to design structures important to safety being inadequate to address the PMF, the consequences of an inaccurate PMF drainage area may negate the Applicant's assertion that the facility is "flood dry."

LBP-98-7, 47 NRC 142, 253-54, *reconsideration granted in part and denied in part on other grounds*, LBP-98-10, 47 NRC 288, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998).

Relying on an eleven item statement of material facts not in dispute and the supporting affidavits of Stone & Webster Engineering Corporation (S&W) program manager Dr. George H.C. Liang and S&W project engineer Jerry Cooper, along

¹As it did in its response to the State's original contention, the Staff suggests that in addition to (or in lieu of) section 72.98, the contention Utah M should reference 10 C.F.R. § 72.122(b) as its established design criteria for the protection of structures important to safety against environmental conditions and natural phenomena, including floods. *See* Staff Response at 3 n.3. The absence of any reference in contention Utah M to section 72.122(b) has no substantive impact on our ruling here, however.

with assorted discovery materials,²PFS now asserts that the bases for the contention have been eradicated by its revision of the PMF in accordance with the concerns of the State and the Staff. PFS also claims that the revised PMF, which has been incorporated into section 2.4 of its SAR by a May 1999 license application amendment, satisfies applicable NRC regulations. As a result of these revisions, PFS argues, there are no longer material facts in dispute and summary disposition in its favor is proper. *See* [PFS] Motion for Summary Disposition of Utah Contention M — Probable Maximum Flood (June 28, 1999) at 4-7 [hereinafter PFS Motion].

For its part, the Staff champions the PFS dispositive motion, stating that all the material facts presented by PFS are correct. Supported by the affidavit of Colorado State University civil engineering professor Dr. Steven R. Abt, the Staff maintains the PFS revisions, first submitted as part of its responses to a December 1998 Staff requests for additional information (RAI), fully rectify the inaccuracies contained in the initial PMF that formed the basis for admission of contention Utah M. The Staff asserts that the revised PMF provides an accurate basis for PFS's conclusion that the design structures for its Skull Valley ISFSI adequately satisfy the applicable regulatory requirements. *See* NRC Staff's Response to [PFS] Motion for Summary Disposition of Utah Contention M — Probable Maximum Flood (July 19, 1999) at 8-9 [hereinafter Staff Response]; *see also* NRC Staff's Statement of Its Position Concerning Group I Contentions (June 15, 1999) at 17-18. The State, on the other hand, has declined to file a response to the PFS motion or the Staff's response. *See* [State] Response to [PFS] Motion for Summary Disposition of Utah Contention M (July 27, 1999) at 1.

II. ANALYSIS

A party to an NRC proceeding is entitled to summary disposition on any or all matters

if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.

10 C.F.R. § 2.749(d). As with the analogous Rule 56 of the Federal Rules of Civil Procedure, the movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts and any supporting materials

²There are no objections by PFS, the Staff, or the State to the qualifications or expertise of the various affiants whose statements are relied upon to provide support for other parties' assertions regarding the material factual matters at issue in connection with contention Utah M.

that accompany the dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993). Ultimately, however, the burden remains with the movant to establish that no material facts are in dispute so that it is entitled to a dispositive ruling in its favor. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977) (if evidence before presiding officer does not establish absence of genuine issue of material fact, summary disposition motion must be denied even if unopposed).

PFS's summary disposition motion is based upon its claim that the revised PMF analysis included in its response to the Staff's December 1998 RAI, as incorporated into section 2.4 of its SAR in May 1999, establishes that there are no longer material facts in dispute. In this instance, PFS has provided a statement of material facts, accompanied by the Liang and Cooper affidavits, excerpts from the deposition of State flood expert David B. Cole, and excerpts from the State's second amended discovery response. PFS asserts that these documents establish that the revised PMF corrects the underestimations that formed the basis of the concerns raised by the State in contention Utah M.

Initially, PFS declares that the current PMF accounts for all the drainage sources that may impact the ISFSI site during extraordinary weather. PFS has increased the area analyzed in the revised PMF from the 26 square miles in the original PMF to 270 square miles. This expansion addresses State concerns that the initial PMF was inaccurate because it failed adequately to explore all the possible drainage sources in the area. By expanding the PMF to 270 square miles, PFS asserts that its analysis both satisfies and exceeds the 240 square miles suggested by NRC Staff and the State's demand for a more expansive exploration of possible flooding. Furthermore, referencing the State's second discovery responses, PFS claims the State has acknowledged this "is an appropriate drainage area for calculating the PMF." PFS Motion at 3 (footnote omitted).

PFS also maintains that it "has adopted ultra conservative assumptions for calculating the PMF [as] suggested by the NRC, which are collectively more conservative than the assumptions used by the State in its PMF calculations." *Id.* at 5. As a result, PFS's present design, based upon PFS's calculation of a flood infiltration flow rate of 85,000 cubic feet per second (cfs) rather than the State's calculation of 64,500 cfs, is 31% larger than the design estimate advocated by the State. *See id.*

Next, PFS asserts that through the revisions, the current PMF complies with the requirements of 10 C.F.R. § 72.24(d)(2) by providing sufficient information to analyze the effects of possible floods on facility structures. The revised PMF contains data adequate to support PFS's conclusion that there will be no adverse impact on health or safety at the maximum probable flood level. PFS asserts

that under the revised PMF, the facility and all appropriate structures, systems, and components (SSCs) important to safety will remain flood-dry because peak flood level will be at least 5 feet below the ISFSI site's lowest elevations. PFS also describes the ways in which the design of the facility access road ensures that flood waters will remain away from the facility. *See* PFS Motion at 6-7. According to PFS, these conclusions, based upon the revised, accurate PMF, fulfill the demands of section 72.24(d)(2). This view, which likewise is advanced by the Staff, is not challenged by the State.

After reviewing the PFS and Staff submissions, we have concluded that the revised PMF seemingly has remedied the inaccuracies and inadequacies that formed the basis of contention Utah M and now satisfies the applicable regulatory requirements. Given that the changes made to the PMF exceed those advocated as necessary by the State at the contention's admission, we conclude that summary disposition in favor of PFS is appropriate in that this contention is now moot.

III. CONCLUSION

With regard to contention Utah M, Probable Maximum Flood, having revised its flood calculations in a manner that fully addresses the analytical deficiencies noted by the State relative to the admission of this contention, PFS has established there is no genuine issue as to any material fact and it is entitled to a judgment in its favor as a matter of law.

For the foregoing reasons, it is, this 27th day of August 1999, ORDERED that the June 28, 1999 PFS motion for summary disposition regarding contention

Utah M is *granted*, and, for the reasons given in this Memorandum and Order, a decision regarding this contention is rendered in favor of PFS.

THE ATOMIC SAFETY AND
LICENSING BOARD³

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 27, 1999

³Copies 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:

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)

August 30, 1999

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), acting pursuant to 10 C.F.R. § 2.749, the Licensing Board grants summary disposition in favor of PFS in connection with contention Utah B, License Needed for Intermodal Transfer Facility.

RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PERSUASION; BURDEN OF PROOF)

As with the analogous Rule 56 of the Federal Rules of Civil Procedure, the movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts and any supporting materials that accompany the dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material fact in dispute and supporting materials. If uncontroverted, the movant's facts will be deemed admitted. *See*

Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE OF COMMISSION RULE)

Agency adjudications are not the proper forum for challenging applicable federal regulations. *See* LBP-98-7, 47 NRC 142, 184 (1998).

REGULATIONS: INTERPRETATION (10 C.F.R. PART 71)

The established regulatory scheme for the transportation of spent nuclear fuel is found in 10 C.F.R. Part 71 and the complementary Department of Transportation regulations and is applicable to a proposed rail to heavy-haul truck intermodal transfer point that would be utilized in shipping spent fuel to a proposed ISFSI. Because a presiding officer cannot go afield of what is required by these regulations, Intervenor concerns challenging this regulatory scheme, to the degree it desires that scheme to mirror the various requirements of 10 C.F.R. Part 72, must be pursued as an effort to change those rules. *Compare* 10 C.F.R. § 2.758.

TECHNICAL ISSUE DISCUSSED

The following technical issue is discussed: transportation of nuclear materials.

**MEMORANDUM AND ORDER
(Granting Motion for Summary Disposition Regarding
Contention Utah B)**

Applicant Private Fuel Storage, L.L.C. (PFS), has requested that summary disposition be entered in its favor regarding contention Utah B, License Needed for Intermodal Transfer Facility. As admitted, the contention details the claim of Intervenor State of Utah (State) that the PFS application for a 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI) in Skull Valley, Utah, is incomplete because a planned Intermodal Transfer Point (ITP), to be located at Rowley Junction, Utah, is a de facto interim spent storage facility that does not comply with the requirements of 10 C.F.R. Part 72. According to PFS, however, there is no genuine issue as to any material fact relevant to this contention so that, in accordance with 10 C.F.R. § 2.749, it is entitled to a determination in its favor on this contention as a matter of law. The NRC Staff supports the motion for

summary disposition while the State opposes it on the ground that genuine issues of material fact remain in dispute.

For the reasons described below, on this issue we grant summary disposition in favor of PFS. In addition, because portions of other contentions admitted in this proceeding concern the ITP, we provide the parties an opportunity to make a filing outlining their positions on the impact of this ruling.

I. BACKGROUND

PFS submitted its proposal to construct and operate an independent spent fuel storage installation (ISFSI) on the reservation of the Skull Valley Band of Goshute Indians (Skull Valley Band) in a June 1997 license application. As detailed in the safety analysis report that accompanies the application, *see* [PFS] Safety Analysis Report at 4.5-3 (rev. 2 Aug. 1998), if PFS decides to transport the shipping casks containing spent reactor fuel by heavy-haul trucks from the Union Pacific railroad mainline to the PFS facility some 25 miles to the south, the ITP, which consists of rail sidings, a tractor/trailer yard, a gantry crane, and a weather enclosure, will serve as the point at which the shipping casks are transferred from railroad cars to trucks.¹ According to PFS, these casks will remain both sealed and in shipment mode throughout the time they remain at the ITP. *See* [PFS] Motion for Summary Disposition of Contention Utah B (June 11, 1999) at 4 [hereinafter PFS Motion].

The agency's regulations on transportation of spent nuclear fuel, 10 C.F.R. Part 71, make it clear that both NRC and the United States Department of Transportation (DOT) regulate the shipment of spent nuclear fuel. A memorandum of understanding, 44 Fed. Reg. 38,690 (1979), delegates responsibilities to each: NRC regulates transportation licensing, packaging, and physical protection while DOT regulates transportation preparation and operations. For its part, NRC licenses the shipment of spent nuclear fuel by general license granted under 10 C.F.R. § 71.12. As is pertinent here, that section provides:

(a) A general license is hereby issued to any licensee of the Commission to transport, or to deliver to a carrier for transport, licensed material in a package for which a license, certificate of compliance, or other approval has been issued by the NRC.

10 C.F.R. § 71.12(a).

In its contention Utah B, the State claimed that the size and nature of the operations to be performed at the Rowley Junction ITP mandated PFS compliance with the requirements of 10 C.F.R. Part 72, which governs the ISFSI storage of

¹As we have noted elsewhere in this proceeding, currently the PFS preferred transportation option is to move the shipping casks from the rail mainline to the facility using a spur line running from Low Junction, Utah. *See* LBP-98-29, 48 NRC 286, 289 (1998).

spent nuclear fuel and high-level radioactive waste. In admitting contention Utah B, the Board accepted those portions of the contention in which the State claimed that the ITP was “not merely part of the transportation but a de facto interim spent fuel storage facility” and that depending on how this material was handled, PFS might be required to provide “a security plan, and emergency plan and radiation dose plan” in compliance with 10 C.F.R. Part 72. LBP-98-7, 47 NRC 142, 184, *reconsideration granted in part and denied in part on other grounds*, LBP-98-10, 47 NRC 288, *aff’d on other grounds*, CLI-98-13, 48 NRC 26 (1998). In making this determination, the Board held:

In this instance, there is a genuine legal/factual issue that merits further inquiry as to whether the PFS scheme for operation of the Rowley Junction ITP will cause the materials delivered there to remain within the possession and control of an entity or entities that comply with the terms of the general license issued under section 71.12 or will be handled in such a way as to require specific licensing under Part 72.

Id. at 185 (citation omitted).² The contention, as admitted by the Board, reads as follows:

UTAH B — License Needed for Intermodal Transfer Facility

CONTENTION: PFS’s application should be rejected because it does not seek approval for receipt, transfer, and possession of spent nuclear fuel at the Rowley Junction Intermodal Transfer Point (“ITP”), in violation of 10 C.F.R. § 72.6(c)(1), in that the Rowley Junction operation is not merely a part of the transportation operation but a de facto interim spent fuel storage facility at which PFS will receive, handle, and possess spent nuclear fuel. Because the ITP is an interim spent fuel storage facility, it is important to provide the public with the regulatory protections that are afforded by compliance with 10 C.F.R. Part 72, including a security plan, an emergency plan, and radiation dose analyses.

Id. at 251.

In its pending motion for summary disposition, which is accompanied by an eleven item statement of material facts not in dispute, PFS argues there no longer are any genuine issues of material fact in dispute because the related questions posed by contention Utah B — whether the materials delivered to the ITP comply with the terms of section 71.12 and whether specific licensing under Part 72 is required — have been resolved. PFS argues that because it qualifies for the general license granted in section 71.12, it is authorized to undertake the activities proposed at the Rowley Junction ITP without a specific license issued under Part 72. This is so, PFS asserts, because its plan for ITP operation complies with applicable

² As originally submitted to the Board, contention Utah B also posed questions about the regulatory status of the Rowley Junction ITP under 10 C.F.R. Part 72 based on the volume and quantity of fuel shipments that would pass through the facility. *See* LBP-98-7, 47 NRC at 184. The Board, however, rejected these portions of the contention as “impermissibly challeng[ing] the Commission’s regulations or rulemaking-associated generic determinations, including the provisions of 10 C.F.R. Part 71.” *Id.*

NRC and DOT transportation and operational requirements. Relying upon the attached sworn declarations of several of those with substantial responsibility for the proposed project, PFS asserts that regulation under Part 72 is not warranted because all proposed activities at Rowley Junction will be within the scope of Part 71 as it governs the transportation of spent fuel. *See* PFS Motion at 3-4.

In addressing whether its activities are subject to regulation under the general license issued in Part 71 or require a specific license under Part 72, PFS maintains the agency already has held that a general license, not a specific license, is needed for the intermodal transportation of spent nuclear fuel. *See id.* at 8-9 & n.13 (citing *State of New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 294 (1993); *Shipments of Fuel from Long Island Power Authority's Shoreham Nuclear Power Station to Philadelphia Electric Co.'s Limerick Generating Station*, DD-93-22, 38 NRC 365 (1993) (ruling by director of NRC Office of Nuclear Materials Safety and Safeguards (NMSS) that specific licensing is not required for a licensee's intermodal transportation of spent nuclear fuel)). PFS claims that this proposition is further supported by the agency guidance in NUREG-0561 that addressed the physical protection of spent nuclear fuel during transportation. *See id.* at 9 & nn.14-15 (citing NMSS, U.S. Nuclear Regulatory Commission, NUREG-0561, Physical Protection of Shipments of Irradiated Reactor Fuel 2, 9, 33, 36 (rev. 1 1980), for the proposition guidance furnished operates on the premise transportation of spent nuclear fuel is governed by Part 71 and not Part 72).

The NRC Staff supports the PFS motion for summary disposition. Following PFS's initial June 1997 filing of its application and the Board's April 1998 decision to admit contention Utah B, the Staff in a December 10, 1998 requests for additional information (RAI) posed questions regarding the process by which the shipment of spent nuclear fuel would be transported between the rail mainline and the PFS facility using the Rowley Junction ITP. The Staff maintains that the PFS February 10, 1999 responses to the December 1998 RAI "establish that its operation of that [ITP] facility will be conducted in accordance with applicable NRC and DOT regulations" and that "materials delivered to the ITP will remain in the possession and control of an entity that will comply with the general license established for carriers, and will not be handled in a manner that requires licensing under 10 C.F.R. Part 72." NRC Staff's Response to [PFS] Motion for Summary Disposition of Contention Utah B (July 16, 1999) at 11-12 [hereinafter Staff Response]; *see also* NRC Staff's Statement of Its Position Concerning Group I Contentions (June 15, 1999) attach. at 1-3. Based on this information, the Staff contends there are no longer any material facts in dispute regarding contention Utah B so that summary disposition in favor of PFS is appropriate.

In opposing the PFS summary disposition motion, the State filed a supporting statement of material facts in dispute that lists twenty-three elements. As part of its argument, the State claims that PFS has failed to show how all activities at the

ITP will be regulated under Part 71, mandating NRC specific licensing under Part 72 so that potential dangerous situations do not “fall through the cracks” under the existing regulatory scheme. [State] Opposition to [PFS] Motion for Summary Disposition of Utah Contention B (July 16, 1999) at 6 [hereinafter State Response]. The State emphasizes the need to regulate under Part 72 the machinery that will lift and move the casks while at Rowley Junction. *See* State Response at 5-6. According to the State, Part 71 only regulates the “ ‘structural part of the package [cask] that could be used to lif[t] or tie down the package during transport’ ” and not stationary facilities or stationary structures like the gantry crane proposed by PFS. *Id.* at 8 (quoting 10 C.F.R. § 71.87(h)). This is a regulatory void in Part 71 that must be filled by requiring the facility to comply with Part 72, the State declares. Otherwise, various of the PFS commitments regarding ITP operation that are outlined in its motion will be nothing more than unenforceable promises. *See id.* at 11; *see also* [State] Response to NRC Staff’s Response to [PFS] Motion for Summary Disposition of Contention Utah B (July 26, 1999) at 2-3 [hereinafter State Reply].

In addition, the State distinguishes the present proposal from the Commission’s *New Jersey* ruling and the *Shoreham* 10 C.F.R. § 2.206 director’s decision cited by PFS, arguing that the size of the casks, the radioactivity of materials to be carried, and the mode of transportation are markedly different from those outlined in the PFS plan. *See id.* at 9-10. Finally, the State maintains that additional safety requirements must be imposed by NRC because of the unique nature of the activities and environment around Rowley Junction — e.g., nearby bombing ranges, rocket engine transportation on the adjacent interstate highway, and the Great Salt Lake. The State concludes that these factors, combined with the fact that the ITP facility will store spent nuclear fuel, mean that NRC must require compliance with Part 72 including the completion of an accident analysis, an emergency plan, and safeguards in order to guarantee safety at the site. *See id.* at 11-12. Since the PFS plan for the ITP does not comply with these Part 72 requirements, the State argues that genuine issues of material fact remain so that summary disposition would be improper.

II. ANALYSIS

A. Legal Standard for Summary Disposition

A party to an NRC proceeding is entitled to summary disposition on any or all matters

if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no

genuine issue as to any material fact and that the party . . . is entitled to a decision as a matter of law.

10 C.F.R. § 2.749(d). As with the analogous Rule 56 of the Federal Rules of Civil Procedure, the movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts and any supporting materials that accompany the dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material fact in dispute and supporting materials. If uncontroverted, the movant's facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).³

B. Board Ruling

The pivotal question regarding summary disposition for contention Utah B is whether the rail to truck transfer activity that is to be accomplished at the Rowley Junction ITP is a transportation function that falls within the scope of Part 71. In making this determination, we must also decide whether there could be any specific activities carried on at the ITP, such as cask handling, that would be governed by Part 72 such that a specific license is required.

The PFS February 1999 responses to the Staff's December 1998 RAI, *see* PFS Motion attach. 1, exh. 2 (February 10, 1998 PFS Response to Staff RAI), along with the affidavits of PFS technology committee chairman John A. Vincent (who is also a senior engineer nuclear fuel with GPU Nuclear) and PFS project director John Donnell,⁴ describe the nature of PFS's operation of the ITP as set forth in the ITP plan for the facility. And in doing so, they attempt to demonstrate that the spent fuel shipments to PFS's main storage facility via the Rowley Junction ITP would be regulated by Part 71 requirements.

³ As the Staff has noted, *see* Staff Response at 8 n.8, in the interest of avoiding unnecessary evidentiary hearings, the use of summary disposition has been encouraged by both the Commission and the Appeal Board when there are no genuine issues of material fact in dispute. *See Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 457 (1981); *see also Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982); *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 (1980). Nevertheless, in July 1998, the Commission directed that licensing boards should forego summary disposition absent a written justification explaining why permitting summary disposition motions to be filed would benefit the timeliness and efficiency of the proceeding. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 20-21 (1998). In this instance, the Board has contemplated since April of last year that the use of summary disposition would contribute substantially to the timely and efficient conduct of this proceeding. *See* LBP-98-7, 47 NRC at 244; *see also* Licensing Board Memorandum and Order (General Schedule for Proceeding and Associated Guidance) (June 29, 1998) at 8-10 (unpublished). We continue to hold that view.

⁴ There have been no objections by PFS, the Staff, or the State to the qualifications or expertise of these or the other affiants, including State declarants Dr. Marvin Resnikoff and Bronson W. Hawley, Ph.D, and Staff declarant Earl P. Easton, whose statements are relied upon to provide support for other parties' assertions regarding the material factual matters at issue in connection with contention Utah B.

The PFS plan establishes, among other things, that materials delivered to the ITP will remain under the possession and control of an entity complying with the terms of a section 71.12 general license. Spent fuel would be shipped in NRC-certified transportation casks from the originating reactor site to the PFS ISFSI facility. The shipper will be the originating reactor licensee, who will ship the spent fuel under the general license authority of section 71.12 and retain ownership of the spent fuel throughout the transportation process (as well as while the fuel is at the PFS ITP and the Skull Valley facility). By virtue of the section 71.12 general license, the originating reactor licensee/fuel owner is empowered to deliver the fuel for transport to the PFS ISFSI facility to one or more carriers authorized under the general license provided for by section 70.20a. Under the PFS plan, cask transport to its Skull Valley facility would be undertaken by one or more section 70.20a authorized carriers in an NRC-approved package or cask that carries a certificate of compliance or other NRC approval. Throughout the transportation operation (i.e., from the reactor, to the rail line, to the ITP, to the heavy-haul truck, to the PFS Skull Valley facility), the fuel would be sealed inside casks that will remain in shipment mode, with the carrier in possession of the spent fuel transportation casks having custody and control of the cask, subject to NRC and DOT regulations. *See* PFS Motion at 5-8, 10-11.

In connection with the Rowley Junction ITP, under its plan, PFS (or another entity if PFS elects not to be the carrier) would operate the ITP and be in possession of the spent fuel at the ITP as a “carrier” within the meaning of Part 71.⁵ PFS asserts that there appear to be no physical or legal impediments to it qualifying as a carrier, which would include qualifying with DOT as a motor carrier and as a carrier of hazardous materials, and that it will comply with the applicable DOT and NRC regulations if it becomes the carrier. *See* PFS Motion at 11-12.

In this regard, as a carrier PFS would be subject to the safety fitness requirements of the DOT Federal Highway Administration, *see* 49 C.F.R. Part 385, and the DOT hazardous materials transportation requirements, *see id.* Parts 107, 171-173, 177, 178, 180, as well as the NRC requirements in 10 C.F.R. Parts 71 and 73. As to the former, PFS would be required to verify that the cask is accompanied by appropriate shipping papers and is marked, labeled, and placarded in compliance with 49 C.F.R. §§ 172.3, 174.24, 177.817, which it has indicated it will do. Regarding the latter, PFS acknowledged that, during the time it is acting as a carrier at the ITP, to meet the general licensing requirements of section 71.12, the

⁵ In this regard, although 10 C.F.R. Part 71 defines a “carrier” to include either a common, contract, or private carrier, *see* 10 C.F.R. § 71.4 (definition of “carrier”), according to PFS, it would not act as a private carrier because it will never take title to or own the spent fuel. *See* PFS Motion at 6 n.7. Rather, in becoming a “carrier” authorized to transport material under a section 70.20a general license, PFS asserts it may choose to qualify as either a common or contract carrier, with the main difference between these being that under the regulations of DOT’s Federal Highway Administration, which regulates motor carriers, a common carrier must file proof of cargo insurance while a contract carrier need not do so. *See* PFS Motion at 12 n.19 (citing 49 C.F.R. § 365.109(a)(5)(iii)).

spent fuel would have to remain sealed in NRC-certified transportation casks and be handled in conformance with the cask's design basis as described in the cask's NRC certificate of compliance (CoC),⁶ as well as being protected in accordance with the physical protection requirements set forth in 10 C.F.R. § 73.37,⁷ all of which PFS has committed to doing as well. *See* PFS Motion at 11-12.

Based on this PFS transportation plan, we conclude that there are no material facts in dispute regarding contention Utah B and that PFS has established it is entitled to a judgment in its favor on the issue of whether Rowley Junction ITP activities are governed by the general licensing provisions of 10 C.F.R. Part 71 and the related DOT regulations for transporting spent nuclear fuel so as not to require specific licensing under 10 C.F.R. Part 72. In doing so, we also conclude that the State failed to demonstrate that there are material facts in dispute regarding the ITP plan or any ITP transportation-related activities.

To be sure, the State has attempted to interpose various material disputes, factual and otherwise. For instance, it argues that the close proximity of the ITP to several local activities and places (e.g., Interstate Highway 80 along which various potentially destructive items, including powerful rocket motors, are transported; the Great Salt Lake; military bombing ranges; flight patterns for the Salt Lake City International Airport) could result in accidents at the ITP not considered by PFS or the Staff. *See* State Response at 12. The State also maintains that NRC Part 71 and DOT regulations do not mandate protections for ITP workers — such as radioactivity inspections of casks or dosimeters — that will be afforded to employees 25 miles to the south when the casks are received at the PFS facility. *See id.* at 6-7. According to the State, this “regulatory gap” is further evidenced by the fact that an important component of the transportation cask handling process, the gantry crane, will not be regulated under Part 71. *See id.* at 7-9.

In light of the PFS showing in its motion regarding the Rowley Junction ITP, however, the answer to these concerns is the same as we provided in our April 1998 ruling on other aspects of contention Utah B. Agency adjudications are not the proper forum for challenging applicable federal regulations. *See* LBP-98-7, 47 NRC at 179, 184. The established regulatory scheme for the transportation of spent nuclear fuel is found in 10 C.F.R. Part 71 and the complementary DOT

⁶ In this regard, PFS declares that the sole operation at the ITP will be transferring the sealed transportation casks from a rail car to a heavy-haul trailer, during which time the cask will remain in its shipment mode, i.e., loaded on its transportation cradle, horizontally with impact limiters installed. Also according to PFS, all cask CoC requirements will be complied with and all ITP operations will be conducted in accordance with the cask's design basis and the PFS Part 71 quality assurance program. *See* PFS Motion at 3-4, 6; *id.* exh. 1, at 4-5.

⁷ PFS declares that under the general license provision of section 71.12, the “shipper” (i.e., the utility) is responsible for ensuring the provision of the physical protection elements mandated by section 73.37, while the general license provision of section 70.20a makes the carrier responsible for ensuring implementation of those requirements. PFS further notes that if it becomes the carrier at the ITP, it is prepared to meet the section 73.37 requirements as part of the transportation services agreements it will enter into with its utility/shipper customers, including providing armed escorts, a staffed communications center, and other safeguard precautions relative to the spent fuel transportation casks that will come into the ITP. *See* PFS Motion at 6-7 & n.9.

regulations and is applicable to the ITP.⁸ Because this Board cannot go afield of what is required by these regulations, the State's concerns challenging this regulatory scheme, to the degree it desires that scheme to mirror the various requirements of Part 72, must be pursued as an effort to change those rules.⁹ Compare 10 C.F.R. § 2.758.

We would add that our conclusion in this regard is bolstered by the Commission's *State of New Jersey* decision, CLI-93-25, 38 NRC at 294, holding that transportation activities for the shipment of spent nuclear fuel are governed by Part 71 and do not require a specific license under Part 72. Notwithstanding the State's claim of factual distinctions between that case and this proceeding (e.g., cask size, extent of radioactivity, and mode of transportation), these differences do not obviate the Commission's determination in *State of New Jersey* that Part 71 (rather than Part 72) governs the transportation of spent fuel. None of the matters presented by the State provides a basis for declining to follow that holding, which dictates that transportation activities, including activities at the ITP as they are described in the sworn declarations by PFS, are governed by Part 71 and the complementary DOT regulatory regime.

Accordingly, we grant the PFS request that summary disposition of contention Utah B be entered in its favor.

⁸ To the degree the State's arguments in this regard appear to rest upon the assumption that intermodal transfer activities (such as the unloading and reloading activities at an ITP) are somehow not part of the "transportation" process regulated under Part 71 and the complementary DOT regulations, they are misplaced. Under the terms of the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. §§ 5101-5127, from which DOT derives its authority to regulate the transportation of materials like spent nuclear fuel, "transportation" is defined as "the movement of property and loading, unloading, or storage incidental to the movement." *Id.* § 5102(12). DOT, as the agency with principal responsibility for implementing HMTA's provisions, further interprets "transportation" to mean "any movement of property by any mode, and any loading, unloading, or storage incidental thereto." 49 C.F.R. § 107.3. Nothing presented by the State suggests that DOT would characterize the loading and unloading activities performed at the ITP, as well as any incidental storage of spent fuel at the ITP, as outside of its definition of "transportation" or its jurisdiction.

⁹ In fact, the focus of much of the State's argument is not on the question whether there is a legal basis for applying the specific licensing provisions of Part 72. Rather, the State outlines its position that the existing general licensing requirements in Part 71 and the DOT hazardous waste transportation regulations are inadequate to address its safety concerns because they result in regulatory oversight of important ITP components, in particular the 150-ton gantry crane, that is either nonexistent or relies upon PFS commitments that cannot be enforced. According to the State, this situation must be corrected by the Board in the course of this adjudicatory proceeding. *See* State Response at 5-8; State Reply at 2-3.

We disagree with the State's basic premise. For instance, it is not apparent that the gantry crane that will be used to lift the casks from a rail car to trucks at the ITP falls outside the jurisdiction of the NRC or DOT under the existing NRC/DOT regulatory scheme. Although, as far as we can determine, stationary components such as a crane are not specifically mentioned in these regulations, their use at a facility like the proposed PFS ITP would clearly seem to be a part of the transportation process, and thus subject to scrutiny under this regime. *See* 49 C.F.R. 107.3 (definition of "transportation"). The degree to which DOT and NRC have sought to exercise that authority is, however, a separate question that goes to the scope of the existing regulations and, in any event, is not a matter with which we can deal in the context of this proceeding regarding the sufficiency of the PFS license application under 10 C.F.R. Part 72.

III. IMPACT OF RULING

As has been noted in other summary disposition rulings issued this date, *see* LBP-99-35, 50 NRC 180, 183 (1999) (contention Utah K/Confederated Tribes B); LBP-99-36, 50 NRC 202, 203 (1999) (contention Utah R), our ruling in favor of PFS on this issue is potentially dispositive of portions of other contentions that were admitted subject to a merits resolution of this contention. These contentions include Utah K/Confederated Tribes B, Inadequate Consideration of Credible Accidents; Utah N, Flooding; Utah O, Hydrology; Utah R, Emergency Plan; Utah S, Decommissioning; Utah T, Inadequate Assessment of Required Permits and Other Entitlements; Utah U, Impacts of Onsite Storage Not Considered; and Utah W, Other Impacts Not Considered. *See* LBP-98-7, 47 NRC at 190 n.12, 192 n.15, 193 n.16, 196 n.18, 197 n.19, 198 n.20, 199 n.22, 202 n.24. PFS has suggested that a ruling in its favor on this motion merits the dismissal of contentions (or portions of contentions) that concern the ITP. *See* [PFS] Motion for Partial Summary Disposition of Utah Contention R — Emergency Plan (June 28, 1999) at 2 n.2. In the absence of such a motion, however, we will afford the parties an opportunity to address the question of the continuing validity of the ITP-related portions of these issues. Accordingly, the parties shall have up to and including 1:00 p.m. EDT (11:00 a.m. MDT) on Tuesday, September 7, 1999, within which to provide the Board with their views on whether, in light of this ruling on contention Utah B, the above referenced contentions should be dismissed as they relate to the ITP.

IV. CONCLUSION

For the reasons explained above, we find that the Rowley Junction ITP and the transportation activities conducted at that facility are governed by, and subject to compliance with, 10 C.F.R. Part 71 and the complementary DOT regulations regarding hazardous materials transportation and, as such, cannot, and need not, be regulated under 10 C.F.R. Part 72. We also conclude that there are no material factual issues remaining pertaining to contention Utah B and that, as a matter of law, contention Utah B should be resolved in favor of PFS. Further, we afford the parties an opportunity to provide the Board with their views on the impact of this ruling on the ITP-related portions of other admitted contentions.

For the foregoing reasons, it is, this 30th day of August 1999, ORDERED that:

1. The June 11, 1999 motion for summary disposition of PFS regarding contention Utah B is *granted* and, for the reasons set forth in section II of this Memorandum and Order, a decision regarding contention Utah B is rendered in favor of PFS.

2. As outlined in section III of this Memorandum and Order, the parties may provide views on the impact of this ruling on the ITP-related portions of other admitted contentions.

THE ATOMIC SAFETY AND
LICENSING BOARD¹⁰

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 30, 1999

¹⁰ 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:

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)

August 30, 1999

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), acting pursuant to 10 C.F.R. § 2.749, the Licensing Board grants in part and denies in part a PFS request for summary disposition in its favor in connection with contention Utah K/Confederated Tribes B, Inadequate Consideration of Credible Accidents.

RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PERSUASION; BURDEN OF PROOF)

The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. *See Advanced Medical*

Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993); *see also* LBP-99-23, 49 NRC 485, 491 (1999).

RULES OF PRACTICE: SUMMARY DISPOSITION (SUFFICIENCY OF SUPPORTING EVIDENCE)

Agency caselaw indicates that a summary disposition opponent is entitled to the favorable inferences that may be drawn from any evidence submitted. *See Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361, *aff'd*, CLI-94-11, 40 NRC 55 (1994). This authority, however, does not relieve the opposing party from the responsibility, in the face of well pled undisputed material facts, of providing something more than suspicions or bald assertions as the basis for any purported material factual disputes. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 306-07 (1994), *aff'd*, *Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995) (table).

TECHNICAL ISSUES DISCUSSED

The following technical issues are discussed: aircraft and missile crash risk; aircraft crash probability; fire protection measures.

MEMORANDUM AND ORDER (Granting in Part and Denying in Part Motion for Partial Summary Disposition Regarding Contention Utah K/Confederated Tribes B)

Among the contentions that currently are the subject of summary disposition motions by Applicant Private Fuel Storage, L.L.C. (PFS), is contention Utah K/Confederated Tribes B. This issue challenges the sufficiency of PFS's consideration of credible accidents caused by external events and facilities that purportedly would affect its proposed 10 C.F.R. Part 72 Skull Valley, Utah independent spent fuel storage installation (ISFSI). In this instance, the PFS request is for partial summary disposition, which the NRC Staff supports and the State of Utah (State), as the lead intervenor party on this contention, opposes.

For the reasons set forth below, we grant in part and deny in part the PFS motion.

I. BACKGROUND

In our April 1999 decision ruling on the sufficiency of the intervening parties' contentions, the Board admitted portions of contention Utah K and contention Confederated Tribes B and consolidated them for consideration in this proceeding. *See* LBP-98-7, 47 NRC 142, 190-91, 234-35, 247-48, *reconsideration granted in part and denied in part on other grounds*, LBP-98-10, 47 NRC 288, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998). The contention, as admitted,¹ provides:

The Applicant has inadequately considered credible accidents caused by external events and facilities affecting the ISFSI and the intermodal transfer site, including the cumulative effects of the nearby hazardous waste and military testing facilities in the vicinity and the effects of wildfires.

Id. at 253. Further, in admitting this consolidated contention, the Board limited the scope of the contention to (1) the impact upon the PFS facility of (a) accidents involving materials or activities at or emanating from (i) the Tekoi Rocket Engine Test facility (Tekoi), (ii) Salt Lake City International Airport (SLCIA), (iii) Dugway Proving Ground (DPG), including Michael Army Airfield (MAAF), (iv) Hill Air Force Base (HAFB), and (v) the Utah Test and Training Range (UTTR), and (b) wildfires in Skull Valley; and (2) the impact upon the PFS proposed Rowley Junction, Utah intermodal transfer point (ITP) of (a) materials or activities from the above specified facilities; or (b) hazardous materials that pass through Rowley Junction from the Laidlaw APTUS hazardous waste incinerator, the Envirocare low-level radioactive and mixed waste landfill, or Laidlaw's Clive Hazardous Waste Facility and Grassy Mountain hazardous waste landfill. Finally, the Board made the State the lead intervenor party relative to this contention. *See id.* at 243.

In a June 7, 1999 filing, PFS sought partial summary disposition of contention Utah K/Confederated Tribes B. Relative to the impact of the specified facilities on the PFS facility, it asked for a ruling in its favor on the ground that no genuine issue exists concerning any facts material to whether accidents at those facilities would impact the PFS facility so as to result in radioactive releases in excess of regulatory limits. *See* [PFS] Motion for Partial Summary Disposition of Utah Contention K and Confederated Tribes Contention B (June 7, 1999) at 2-18 [hereinafter PFS Motion]. PFS also moved for summary disposition regarding that portion of the contention that concerns the potential negative impact of Skull Valley wildfires on the PFS facility. *See id.* at 18-20. Both aspects of this motion are supported by a statement of material facts not in dispute, affidavits or declarations by ten

¹ As admitted, this contention also included part of contention six of former Intervenor Castle Rock Land and Livestock, L.C., and Skull Valley Co., Ltd. (Castle Rock/Skull Valley). *See* LBP-98-7, 47 NRC at 214. That portion, however, was dismissed upon Castle Rock/Skull Valley's withdrawal from this proceeding earlier this year. *See* LBP-99-6, 49 NRC 114, 120-21 (1999).

individuals, depositions of State witnesses, and other State discovery responses.² PFS has not asked for summary disposition on the issue of credible accidents impacting the ITP in this pleading, *see id.* at 2 n.2; however, in a June 11, 1999 motion for summary disposition PFS has requested that a ruling in its favor be entered regarding whether the ITP requires specific licensing under Part 72, *see* [PFS] Motion for Summary Disposition of Contention Utah B (June 11, 1999), which potentially is dispositive of all ITP-related issues, including this one.

On June 22, 1999, the Staff submitted a response, with three affidavits, supporting the PFS motion for partial summary disposition. The Staff agreed that partial summary disposition is appropriate for contention Utah K/Confederated Tribes B in that there are no material factual disputes pertaining to credible accidents, with the exception of those associated with military aircraft crashes — a matter about which the Staff is still formulating a position — so that PFS is entitled to a decision in its favor on those matters. *See* NRC Staff's Response to [PFS] Motion for Partial Summary Disposition of Utah Contention K and Confederated Tribes Contention B (July 22, 1999) at 1-2 [hereinafter Staff Response].

Also on July 22, 1999, the State filed its opposition to the PFS motion, together with its statement of material facts in dispute and the sworn declarations of three individuals. The State opposed the motion by disputing numerous material facts proffered by PFS. In addition, the State raised the issue of cumulative risk by claiming that PFS has failed to consider the cumulative risk posed by the summation of all the hazards involving commercial/private aircraft and missile activities. *See* [State] Opposition to [PFS] Motion for Partial Summary Disposition of Utah Contention K and Confederated Tribes Contention B (July 22, 1999) at 4-12 [hereinafter State Response]. The State, however, did not address the issue of military aircraft crashes; instead, in a separate unopposed motion the State asked that this question be deferred pending the Staff's determination of its position regarding this matter. *See id.* at 2. The Board granted this request in a July 27, 1999 order. *See* Licensing Board Order (Granting Filing Extension Motions and Setting Schedule for Responses to Request for Admission of Late-filed Contention) (July 27, 1999) at 2 (unpublished). Thereafter, the State filed a reply to the Staff's response indicating that it disagreed with the Staff's position that summary disposition was appropriate. *See* [State] Reply to NRC Staff's Response in Support of [PFS] Partial Motion for Summary Disposition of Utah Contention K and Confederated Tribes Contention B — Inadequate Consideration of Credible Accidents (Aug. 4, 1999) [hereinafter State Reply].

Finally, on July 30, 1999, PFS moved to strike that portion of the State's July 22 opposition that dealt with transportation of rocket motors to and from Tekoi,

²There have been no objections by PFS, the Staff, or the State to the qualifications or expertise of the various affiants whose statements are relied upon to provide support for other parties' assertions regarding the material factual matters at issue in connection with contention Utah K/Confederated Tribes B.

asserting that the affiant supporting the State's position that there was a material factual dispute regarding this facility was not identified to PFS during discovery as a person knowledgeable about, or a testifying witness regarding, activities at Tekoi. *See* [PFS] Motion to Strike Part of [State] Response to [PFS] Motion for Summary Disposition of Contention Utah K (July 30, 1999) at 4-8. In an August 6, 1999 response, the State indicated it was voluntarily withdrawing its arguments relating to Tekoi, while reserving the right to oppose similar discovery disclosure arguments in the future. *See* [State] Response to [PFS] Motion to Strike Part of [State] Response to [PFS] Motion for Summary Disposition of Contention Utah K (Aug. 6, 1999) at 1 [hereinafter State Motion to Strike Response].

II. ANALYSIS

A. Summary Disposition Standards

In an earlier ruling on a PFS motion for summary disposition, we summarized the general standards governing our consideration of summary disposition requests as follows:

Under 10 C.F.R. § 2.749(a), (d), summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

LBP-99-23, 49 NRC 485, 491 (1999).

B. Application to Contention Utah K/Confederated Tribes B

With these principles in mind, we turn to the PFS summary disposition request, which the Applicant has organized into five parts. Adopting that construct, we address each portion separately below.

1. *Tekoi Rocket Engine Test Facility*

a. *PFS Position*

PFS proffers seventeen undisputed material facts, designated A1 through A17, in support of its argument that Tekoi poses no significant hazards to the PFS

facility, *see* PFS Motion, Statement of Material Facts at 1-3 [hereinafter PFS Undisputed Material Facts], which are supported by the affidavits of Stone and Webster Engineering Corporation (S&W) lead mechanical engineer Bruce Brunson, Alliant Techsystems, Inc., explosives safety specialist C. Floyd Davis, S&W licensing engineer Jeffrey Johns, and S&W lead electrical engineer Wesley Jacobs, *id.*, attachs. 1-4. In its motion, PFS first identifies the potential hazards to its proposed facility from Tekoi and then explains why each has no health and safety significance based on the likelihood of occurrence or consequence, or both. According to PFS, the State-identified hazards from Tekoi involve a rocket motor (1) exploding while being tested; (2) exploding while being transported to Tekoi; or (3) escaping from its test stand and striking the PFS facility. *See* PFS Motion at 4.

Regarding rocket motor explosions during testing, PFS states that it performed a standard calculation that shows such explosions would pose no significant hazard to the PFS facility. This is so, PFS declares, because the largest rocket motor that can be tested at Tekoi would contain 1.2 million pounds of Class 1.1 explosive propellant, the detonation of which the calculation shows would produce an overpressure of 1 pound per square inch (psi) or more only to a distance of 4,782 feet and an overpressure of 0.5 psi or more out to a distance of 7,970 feet (1.5 miles) from Tekoi. In light of the NRC Regulatory Guide 1.91 overpressure safe threshold of 1 psi for explosions postulated to occur near nuclear power plants, *see* Office of Standards Development, U.S. Nuclear Regulatory Commission, Regulatory Guide 1.91, at 1.91-2 (rev. 1 Feb. 1978), with the PFS facility at a distance of more than 2 miles from Tekoi, PFS asserts that its safety analysis report (SAR) conclusion that systems important to safety at the PFS facility would not be harmed by an explosion that created an overpressure of 1 psi or less, *see* PFS SAR at 3.3-9 (rev. 2 Aug. 1998), was correct. PFS thus concludes that these considerations, taken together, establish that rocket motor explosions at Tekoi would pose no significant hazard to its proposed facility. *See* PFS Motion at 4-5. So too, explosions of rocket motors in transit on Skull Valley Road, which runs south from Interstate 80 toward the Tekoi facility, or the Tekoi access road, which runs west from Skull Valley Road to the Tekoi facility, would pose no significant hazard to the ISFSI facility, PFS claims, because the restricted area is more than 2 miles from the access road at its closest point and is 1.9 miles from Skull Valley Road. At these distances, an explosion on either road of the largest motor that could be tested at Tekoi would not create an overpressure of 1.0 psi at the PFS facility, thus posing no threat to the facility. *See id.* at 5-6.

Regarding the risks posed by a rocket motor escaping its test stand at Tekoi and striking the PFS facility, PFS argues that such an event is not credible because of the design and safety procedures employed at Tekoi and the intervening distance and terrain between Tekoi and its facility. According to PFS, Tekoi has conservatively designed safety features to prevent rocket motors from escaping,

including a large thrust block into which the motor is directed and embedded structural steel to restrain and to retain the motor in place. Further, safety procedures require the inspection of the facility before each rocket motor is tested. Indeed, PFS declares, in nearly 25 years of operation no rocket motor has escaped a test stand at Tekoi. *See id.* at 6.

PFS further maintains that even in the unlikely event a motor were to escape, it is extremely unlikely it would strike the PFS facility. At a distance of more than 2 miles from Tekoi, the facility's restricted storage area would comprise a small fraction of the potential area to which an escaped rocket motor might fly. Additionally, any rocket motor headed in the direction of the PFS facility would likely strike Hickman Knolls — a large hummock located between the facility and Tekoi that is 270 feet higher than Tekoi and 400 feet higher than the PFS facility — before reaching the PFS ISFSI. This, PFS asserts, makes it extremely unlikely that a rocket motor escaping the test stand would strike the facility. Moreover, when combined with the highly unlikely possibility that a rocket motor would escape a test stand in the first place, it simply is not credible, PFS concludes, that the facility would be struck by a rocket motor escaping from the Tekoi facility. *See id.* at 6-7.

As to the portion of contention Utah K/Confederated Tribes B relating to Tekoi, PFS thus concludes it is entitled to summary disposition.

b. Staff Position

For its part, the Staff does not dispute any of the seventeen material factual statements provided by PFS on this issue. *See* Staff Response at 9-10. Further, as is outlined in the affidavit of Southwest Research Institute principal engineer Dr. Amitava Ghosh that accompanies the Staff's response, the Staff expresses its support for the PFS motion on this part of the contention based on its own evaluation as set forth in its June 15, 1999 statement of position on this issue (and most of the other Group I contentions). *See id.* unnumbered attach. 1; *see also* NRC Staff's Statement of Its Position Concerning Group I Contentions (June 15, 1999) attach. at 14 [hereinafter Staff Position Statement]. The Staff maintains that the analysis is acceptable and this part of the contention no longer has any material facts in dispute.

c. State Position

In opposing the PFS motion, the State disputed two material facts proposed by PFS, A10 and A17, claiming that flying objects propelled by an exploding rocket motor while being transported would pose a significant risk to the facility. *See* State Response, Statement of Material Facts in Dispute Regarding Utah Contention

K and Confederated Tribes Contention B at 1 [hereinafter State Disputed Material Facts]. This assertion, which was supported by the affidavit of Radioactive Waste Management Associates senior associate Dr. Marvin Resnikoff, *see id.* exh. 1, at 5, was not addressed explicitly by PFS in its motion or by the Staff in its position on Group I contentions or in its motion response. The State did not respond to the other PFS arguments that its concerns about overpressure from an exploding rocket motor at Tekoi, overpressure from an exploding rocket motor while being transported, and a rocket motor escaping from its test stand do not pose an undue risk to the PFS facility. Subsequently, however, in response to a PFS request to strike portions of Resnikoff's affidavit relating to this stated concern, the State voluntarily withdrew its arguments regarding Tekoi. *See State Motion to Strike Response at 1.*

d. Board Ruling

The only dispute raised by the State relates to the issue of flying objects propelled by an exploding rocket motor in transit threatening the PFS facility. The State, however, has voluntarily withdrawn its argument regarding Tekoi. Given the State's action, and the showing made by the PFS, as supported by the Staff, we conclude that there are no material facts in dispute relative to this portion of the contention and that, as a consequence, PFS is entitled to judgment as a matter of law on this item. We thus grant the PFS motion relative to Tekoi.

2. Salt Lake City International Airport

a. PFS Position

PFS outlines nine undisputed material facts, B1 through B9, that support its motion regarding the portion of this contention that concerns the impact of activities from SLCIA. *See PFS Undisputed Material Facts at 3-4.* The airport is located approximately 50 miles northeast of the PFS facility. According to PFS, the State has admitted that the only hazard that the SLCIA would pose to the facility would arise from overflights by aircraft flying to or from the airport. PFS argues, however, that such activity poses no significant hazard to the PFS facility because of (1) the substantial distance between SLCIA and the facility; (2) the lack of civilian airways near the PFS facility; and (3) the especially low crash rate of aircraft in the cruising phase of flight. *See PFS Motion at 7-8.* In support of this position, PFS provides the affidavit of National Air Traffic Controllers' Association executive director and former United States Air Force (USAF) Brigadier General James L. Cole, Jr. *See id.* exh. 5.

Initially, PFS declares that under NRC caselaw, the hazard posed by crashes of aircraft flying to or from an airport is insignificant and need not be considered

if the number of takeoffs and landings at the airport per year is less than $1,000 D^2$, where D is the distance from the airport to the facility in miles. Utilizing that formula here, PFS maintains that with a distance of 50 miles between SLCIA and the PFS facility, the number of takeoffs and landings would have to reach 2,500,000 ($1000 \cdot 50^2$), before SLCIA would pose any risk to the facility. According to PFS, in 1998 there were 365,000 total takeoffs and landings at SLCIA. PFS thus concludes that the risk posed to the facility by crashes of aircraft flying to and from SLCIA is insignificant and need not be considered. *See* PFS Motion at 8.

In addition, PFS asserts that under NRC caselaw, the hazard posed to a nuclear facility from aircraft flying in a civilian airway need not be considered if the closest edge of the airway is more than 2 miles from the facility. According to PFS, the closest civilian airway to the PFS facility is high altitude Jet Route J-56, which passes 10 nautical miles north of the PFS site. For the purpose of its analysis, PFS took the high altitude jet routes as having a width of 8 nautical miles. Therefore, the closest edge of J-56 is more than 5 statute miles from the facility. Similarly, the next closest civilian airway to the PFS facility is Low Altitude Route V257, which runs north and south 17 nautical miles to the east of the facility on the far side of the Stansbury Mountains, and is more than 10 statute miles from the PFS site at its closest edge. Thus, PFS declares the aircraft in both J-56 and V257 and any other airway farther from the PFS facility would also pose no significant hazard to it. *See* PFS Motion at 8-9.

Finally, PFS maintains that any civilian aircraft in the region of the PFS facility would be in the cruise phase of flight, given the long distance to SLCIA (or any other airport). According to PFS, aircraft during the cruise phase of flight exhibit very low crash rates relative to other aspects of flight. This factor, together with the distance from established airways, shows conclusively that SLCIA flights pose no significant risk to its Skull Valley facility. *See id.* at 9.

Accordingly, PFS asserts that it is entitled to summary disposition on this aspect of contention Utah K/Confederated Tribes B as well.

b. Staff Position

The Staff does not dispute any of the nine material facts proposed by PFS. Again citing the supporting Ghosh affidavit that accompanies the Staff's response, the Staff declares that it supports the PFS conclusion that aircraft flying to and from SLCIA (and other nearby municipal airports) would not pose a significant risk to the PFS facility. *See* Staff Response at 11.

c. State Response

The State disputes two material facts, B7 and B9, proposed by PFS. *See* State Disputed Material Facts at 1-2. As is detailed in the supporting affidavit of former

USAF Major General John W. Matthews, the State maintains that PFS expert Cole has erred in assuming that a commercial aircraft flying near the PFS facility would be in the cruising mode. According to Matthews, the formulas for determining initial descent for an aircraft approaching the SLCIA indicated that such aircraft would, instead of cruising, be descending as they went over the PFS facility. *See* State Response at 8. This is a material factual dispute, the State asserts, because, as outlined in Resnikoff’s affidavit, descending aircraft have higher accident rates than cruising aircraft. The State further declares, based on Resnikoff’s affidavit, that PFS should have considered the growth of air traffic in its evaluation of commercial aircraft risks. *See id.* at 8. Finally, in response to the Staff’s filing, the State questions whether PFS properly computed the aircraft crash risks for flights using paths J-56 and V257. *See* State Reply at 6-7.

d. Board Ruling

Of the matters raised by the State relating to SLCIA, at least two, the higher commercial aircraft risks posed by descending aircraft compared to cruising aircraft and the higher risks due to the growth of air traffic leading to a higher number of takeoffs and landings, have sufficient support to identify a genuine dispute of material fact relative to the SLCIA portion of this contention. We thus deny the PFS motion relative to this part of the contention.³

3. Dugway Proving Ground

a. PFS Position

PFS proposed twenty-two material facts not in dispute, C1 through C22, to support its motion for the part of the contention concerning DPG. *See* PFS Undisputed Material Facts at 4-7. PFS declares that the hazards the State has alleged DPG would pose to the PFS facility involve (1) the firing of conventional ground weapons in military testing and training; (2) the testing, storage, and disposal of chemical munitions and agents; (3) the testing of biological materials; (4) the transportation of biological, chemical, and hazardous materials to and from DPG; (5) unexploded ordnance; and (6) aircraft flights into and out of DPG’s Michael Army Airfield, including landings of military aircraft carrying “hung bombs” and the landing of the X-33 experimental space plane. *See* PFS Motion at 9-10.

³In connection with further litigation of Resnikoff’s remarks about SLCIA expansion, however, we note that the relevant issue appears to be whether the nearly seven-fold expansion in aircraft takeoffs and landings that, under the caselaw formula cited by PFS, seemingly would be necessary to have any material impact on the risk analysis at issue would have some reasonable likelihood of occurring during the 20-year term of the PFS facility Part 72 license.

Relying on the affidavits of Cole and former DPG Commander George A. Carruth, *see id.* exhs. 5-6, PFS generally attempts to dismiss the hazards from DPG based on the distance between its Skull Valley site and the DPG locations where the alleged hazardous activities take place, the nature of the activities, and the safety precautions that are taken at DPG with respect to potentially dangerous activities at that facility. Additionally, PFS claims that, in their deposition testimony, State witnesses knowledgeable about activities at DPG, including Matthews, State Division of Solid and Hazardous Waste/Waste Chemical Demilitarization Section (DSHW/WCDS) environmental engineer David C. Larsen, and DSHW/WCDS section manager Martin D. Gray, cited no specific, credible hazard at DPG that would threaten the PFS facility. Specifically, PFS points to the fact that State witness David Larsen, in response to the question, “So it’s safe to conclude as you said before, that you don’t see any hazard posed to the Private Fuel Storage facility from Dugway?” answered “Right. Right.” PFS Motion at 10 (quoting PFS Motion exh. 14, at 72 (Larson deposition)).

In connection with the individual PFS responses to purported hazards, PFS first indicates that military training exercises and the firing and testing of conventional weapons will not pose a hazard to the PFS facility because (1) the firing of weapons is covered by rigid procedures; (2) the closest firing position to the PFS site is more than 15 miles away; (3) the range of most of the weapons is insufficient to reach the Skull Valley facility from those distances; and (4) the weapons are fired toward the south and northwest, away from the PFS facility. PFS thus claims there is no credible scenario by which conventional munition fired from Dugway would strike its ISFSI. *See* PFS Motion at 11.

Relative to the second issue of chemical munitions and agents at Dugway, PFS likewise maintains these will pose no significant hazard to its facility. According to PFS, open air testing of chemical munitions and agents was prohibited by law in 1969 (50 U.S.C. § 1512), and has not been conducted since that time. Thus, activities at DPG involving chemical agents and munitions is limited to indoor testing of chemical agents, storage of agents and unexploded chemical munitions recovered from the firing ranges, and disposal of chemical agents. PFS claims these activities will not pose a credible hazard to its facility because of the distance between DPG and the PFS facility and the limited quantities of agents whose release would be credible. *See* PFS Motion at 11.

In this regard, PFS declares that the indoor testing of chemical agents is done in facilities nearly 20 miles from the PFS facility that are designed to preclude the release of chemical agents, and thus would pose no credible hazard to the Skull Valley facility. Similarly, chemical munitions and agents are stored in locations at DPG that are more than 17 miles from the Skull Valley facility and are subject to various restrictions, including State regulations under the federal Resource Conservation and Recovery Act (RCRA). PFS argues that by virtue of the distance to its facility and the many controls designed to protect public health

and safety, the release of chemical agents from chemical munitions or agents stored at DPG does not pose a credible hazard to that facility. *See id.* PFS asserts that the worst credible threat posed by a chemical agent at DPG would arise from the accidental detonation of a previously unexploded 8-inch projectile filled with chemical agent GB (which PFS likewise indicates is an extremely unlikely event). The distance at which such an event would pose a threat, however, is approximately 3 miles, much less than the actual distance to the PFS facility. Further, according to PFS, disposal of chemical munitions and agents is done under rigorous controls, including regulations by the State under RCRA, and would pose no credible hazard to the PFS facility. *See id.* at 12-13.

A third potential hazard addressed by PFS is the biological materials present on DPG, which PFS asserts also would not pose a credible hazard to its facility. According to PFS, the use of biological materials at DPG occurs at the Life Sciences Test Facility that is more than 20 miles from the PFS facility and is conducted under engineering and procedural controls designed to prevent the release of material to the environment. Furthermore, PFS claims that, even if biological material at the test facility were to escape, it would pose no significant hazard to the PFS facility because it would have little, if any, chance of surviving in the environment long enough to be carried the 20 miles from the testing facility to the PFS facility. Thus, PFS argues that the use of biological materials at DPG also poses no credible hazard to the PFS facility. *See id.* at 13.

PFS further maintains that the transportation of chemical agent or biological materials to or from Dugway does not pose a significant hazard to its facility. Larger shipments of such material are performed with safety precautions and, moreover, do not travel along Skull Valley Road. Although small, laboratory quantities of material could potentially be shipped by common carrier along Skull Valley Road, the safe packaging of those shipments is regulated by the United States Department of Transportation so as to prevent a release even in the event of an accident. PFS also maintains that hazardous wastes shipped from DPG do not include chemical agents but rather only chemically neutralized agents, which are less hazardous and would not threaten the PFS facility even if spilled on Skull Valley Road. *See id.* at 13-14.

The fifth PFS-identified item, unexploded ordnance in firing ranges on the DPG facility, is not a significant hazard to the Skull Valley facility, PFS asserts, because (1) it is very unlikely that such ordnance would explode spontaneously or accidentally; and (2) even if it did, the PFS facility is far enough away that the material in the unexploded round would not pose a significant hazard. Moreover, unexploded ordnance is not likely to be found off DPG close enough to pose a risk to the PFS facility, in that the firing ranges at DPG are all at least 15 miles away and Army records of where munitions were fired at DPG, while showing two offsite areas to the south of DPG in which there may be unexploded ordnance, give no indication that munitions were fired off site to the north of DPG in the

direction of the Native American reservation on which the PFS facility will be located. *See id.* at 14.

Finally, regarding Michael Army Airfield at DPG, PFS declares that the landing of aircraft at MAAF would not pose a hazard to the PFS facility. According to PFS, the airfield is over 17 miles from the PFS site, making it outside the takeoff and landing traffic pattern. Additionally, because the number of aircraft flying into MAAF annually is small and the crash rate those aircraft experience is very low (mostly transport aircraft that have a rate similar to commercial airliners), an air crash probability analysis in accordance with the agency caselaw endorsed reactor standard review plan analysis, *see* Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, NUREG-0800, Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants § 3.5.1.6 (rev. 2, July 1981), indicates that the likelihood that an aircraft flying into MAAF would crash into the PFS facility is insignificant. *See* PFS Motion at 14 & n.30.

Also in connection with MAAF, PFS states that aircraft with hung ordnance flying from the UTTR to MAAF would pose no significant hazard to the PFS facility. First, PFS declares only about five aircraft per year experience such problems. Second, aircraft on the UTTR with hung ordnance fly directly into MAAF following specially developed approach procedures without crossing Skull Valley. As a result, any aircraft with “hung ordnance” would not pose a hazard to the PFS facility. *See* PFS Motion at 14-15.

Relative to MAAF, PFS also contends that the proposed MAAF landing of the X-33 experimental aircraft does not pose a significant hazard to the Skull Valley ISFSI. Putting aside the fact that all flights of the X-33 are scheduled to be concluded by mid-2000, the proposed flight path for the X-33 would not bring the space plane over Skull Valley, let alone the PFS facility. *See id.* at 15.

In sum, PFS maintains that none of the activities of concern to the State concerning DPG would pose a credible hazard to the PFS facility so that PFS is entitled to summary disposition of this part of contention Utah K as well.

b. Staff's Position

As is outlined in the supporting Ghosh affidavit, after conducting its own evaluation and reviewing the PFS motion, the Staff has determined that it does not dispute any of the PFS material facts regarding the hazards posed to the PFS facility by DPG (which the Staff identifies as C17, C18, and portions of C20 and C22) other than those relating to military aircraft crashes for which it has not formulated a position. *See* Staff Response at 10-11; *id.* unnumbered attach. 1, at 3 (Ghosh affidavit); *see also* Staff Position Statement attach. at 15-16. It thus supports granting summary disposition in favor of PFS regarding all other aspects of the DPG issue.

c. State Position

Relying on information in the affidavits of Resnikoff, Matthews, and Gray, the State disputes nine of the twenty-two material facts proposed by PFS, including C2, C4, C6 through C9, C14, C15, and C22. *See* State Disputed Material Facts at 2-3. These include questions regarding whether ordnance from DPG training exercises could reach the PFS facility and ordnance disposal/unexploded ordnance.

In response to the PFS assertion that the firing of conventional weapons during military training sessions will not impact the PFS facility, the State points out that at the Wig Mountain site in the northwestern portion of DPG, which is 15 miles from the PFS facility, Army and National Guard troops fire a multiple rocket launch system with a range of 18 miles. *See* PFS Motion at 9; *see also* State Reply at 2-3 & n.3.

On the subject of ordnance disposal/unexploded ordnance, the State declares that relative to the risks involved in chemical and biological agent disposal, PFS has failed to analyze adequately the potentially significant sources of risk to PFS facility integrity posed by the historical disposal of chemical agents, biological agents, and/or explosives and propellants or by unexploded ordnance that has not yet been discovered/rediscovered. The State asserts that since 1988 DPG, in cooperation with State regulators, has identified 216 DPG ordnance disposal sites and three sites outside DPG's boundaries that were contaminated from past DPG disposal practices. The State also contends that the search for such sites is not yet completed, since 17 new DPG sites were added in 1998 and more are expected. The State also maintains that chemical agent munitions were discovered at three separate contaminated sites at DPG during the past 2 years and a biological munition was also found at another DPG contaminated site this year. The State argues that these finds, in conjunction with the Army's historically poor recordkeeping, establish a genuine dispute with the accuracy of PFS's statements claiming there is no factual dispute about the existence of unaccounted for ordnance as a result of chemical or biological ordnance disposal or munitions firing activities. *See* State Response at 10; *see also* State Reply at 5.

That such ordnance may be found near the PFS site is significant, the State further asserts, because in some cases unstable munitions must be detonated in place, raising the possibility of site evacuation, toxic fumes at the site (such as were detected following munitions detonations at the Aberdeen Proving Ground in Maryland), and other impacts. The State also argues that it is possible that undiscovered munitions will explode spontaneously. Nor, according to the State, is it possible to say what the worst-case or bounding accident is because an essential element of such analysis, the amount of contaminants, is unknown. Because these risks have not been adequately addressed in the PFS motion, the State asserts, summary disposition is inappropriate relative to the matter of disposal/unexploded ordnance. *See* State Response at 11; *see also* State Reply at 4-5.

d. *Board Ruling*

Of the six DPG-related items identified by PFS that do not relate to the deferred issue of military aircraft crashes, the State has raised no material factual dispute relative to the testing and storage of chemical munitions and agents; the testing of biological materials; the transportation of biological, chemical, and hazardous materials to and from DPG; and MAAF landings involving military aircraft carrying “hung bombs” or the X-33 experimental space plane. Further, based upon our own review of the materials provided by PFS and the Staff in support of the motion, we conclude there are no material facts at issue and that summary disposition in favor of PFS on these matters is appropriate.

In connection with the training exercise ordnance and ordnance disposal/unexploded ordnance issues about which the State has sought to establish there are disputed material facts, the State has provided a sufficient showing to establish that a genuine dispute of material fact exists regarding the training exercise ordnance issue. The State’s sworn assertions regarding the current training use of a missile at the Wig Mountain site that can reach the PFS facility establishes a litigable material factual dispute. We thus deny the PFS motion relative to this portion of contention Utah K/Confederated Tribes B.

With regard to the State’s assertion concerning impacts to the PFS facility relating to previously unaccounted for disposal sites or unexploded ordnance, the State references agency caselaw indicating that a summary disposition opponent is entitled to the favorable inferences that may be drawn from any evidence submitted. *See* State Response at 3 (citing *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361, *aff’d*, CLI-94-11, 40 NRC 55 (1994)). This authority, however, does not relieve the opposing party from the responsibility, in the face of well pled undisputed material facts, of providing something more than suspicions or bald assertions as the basis for any purported material factual disputes. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 306-07 (1994), *aff’d*, *Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995) (table). In seeking to base its opposition on three off-DPG disposal sites whose location and nature the State did not disclose; the existence of ordnance in offsite areas south of DPG that formerly were DPG range areas but are no longer within DPG borders, *see* PFS Motion attach. 15, at 74-75 (Gray deposition); *see also id.* attach. 14, at 39 (Larsen deposition) (no ordnance found north of DPG); and a purported presumption about the inadequacy of military recordkeeping, the State has failed to show there is a credible factual nexus between the ordnance disposal/unexploded ordnance deficiencies it sets forth in support of its position and the PFS ISFSI site sufficient to create a material factual dispute. We therefore grant the PFS motion on this point.

4. Utah Test and Training Range and Hill Air Force Base

a. PFS Position

Utilizing support from affiant Cole and discovery depositions of Matthews and State DSHW employee Bronson W. Hawley, PFS submits nineteen material facts, D1 through D19, to support its argument in favor of summary disposition on this portion of contention Utah K/Confederated Tribes B. *See* PFS Undisputed Material Facts at 7-9. The HAFB is located north of Salt Lake City on the eastern shore of the Great Salt Lake, approximately 65 miles from the PFS facility. USAF aircraft based at HAFB (and military aircraft based outside the State of Utah) utilize the UTTR, which is restricted to military training and testing operations. The UTTR is divided into a North Area, which is located on the western shore of the Great Salt Lake to the north of Interstate 80, and a South Area, which is located west of the Cedar Mountains to the south of Interstate 80 and northwest of DPG. *See* PFS Motion at 15-16.

According to PFS, the State's allegations regarding HAFB and UTTR center on the possibility that (1) aircraft flying to and from HAFB and over the UTTR pose a hazard to the PFS facility; and (2) the firing of air-delivered munitions (e.g., bombs and missiles) on the UTTR would pose a hazard to its ISFSI facility. *See id.* at 16. As is outlined below, PFS claims that both these hazards are not significant.

Regarding the overflight hazard, PFS maintains that the only aircraft from HAFB that approach the PFS facility are those that pass through Skull Valley en route to the UTTR South Area. Flying south, they pass west of Deseret Peak, near the Stansbury Mountains about 5 miles east of the PFS facility, to practice terrain masking to evade radar. During this portion of the flight they conduct no combat maneuvers and maintain their armament release switches on "safe" until they are inside United States Defense Department land boundaries. *See id.* at 16-17.

According to PFS, because aircraft en route to the UTTR South Area fly at low altitudes at a distance of about 5 miles from the PFS facility, the likelihood that such aircraft would crash into or otherwise impact the facility is low and would not pose a significant hazard. PFS states that the military traffic down the east side of Skull Valley is analogous to air traffic in a civilian airway that, in the context of its consideration of a nuclear power reactor, the NRC would consider insignificant if more than 2 miles away. PFS thus asserts that such aircraft likewise should be excluded here as posing no significant risk to its Skull Valley facility. *See id.* at 17.

Concerning the hazard involved in the use of air-delivered weapons on the UTTR, PFS claims this does not pose a significant hazard to its facility. PFS declares this is so because aircraft outside the UTTR and DPG are required to maintain weapons release switches on "safe," thus rendering insubstantial the likelihood of an accidental weapon release that would hit the PFS facility. In

addition, according to PFS, the weapon releases on the UTTR are so carefully planned and controlled, the UTTR has not experienced a weapon release outside an intended launch area. Further, the closest weapon launch/drop boxes are about 30 miles from the PFS facility so that weapon use at the UTTR is too far away to pose a risk to its facility, PFS maintains. *See id.* at 17-18.

Addressing a more specific State concern, PFS also claims that cruise missile launches at targets on the UTTR would not pose a significant hazard to its facility. According to PFS, there are about six launches per year and the targets in the UTTR South Area are approximately 30 miles west of the PFS facility. Furthermore, cruise missile run-ins, drops, and launches are normally conducted from north to south or east to west, away from the PFS facility and all missiles with the capability of exceeding range boundaries are equipped with a Flight Termination System (FTS) that permits the destruction of the missile if it goes off course. In fact, PFS asserts, the UTTR has not experienced an FTS failure. *See id.* at 18.

These facts, PFS argues, establish that it is entitled to summary disposition for this part of contention Utah K/Confederated Tribes B as well.

b. Staff's Position

While again expressing no position regarding military aircraft crashes involving planes en route to or from the UTTR and Hill, the Staff does not dispute the validity of the other material facts posited by PFS. Further, as described by Staff affiant Ghosh, based on its own review, the Staff agrees with the PFS position that munitions testing, including cruise missile launches at the UTTR, do not pose any significant hazard to the PFS facility. *See Staff Response* at 12.

c. State Position

Relying on the sworn statements of Resnikoff and Matthews, the State disputes eight of the nineteen material facts proposed by PFS, including D11 through D13 and D15 through D19. *See State Disputed Material Facts* at 3-4. These disputed facts involve the evaluation of noncrash hazards from overflights, including dropped ordnance and aircraft parts, and cruise missiles.

Regarding overflight hazards other than actual crashes into the PFS facility, the State notes that relative to the postponed portion of this contention concerning military aircraft crashes, it intends to show there will be military flights over or near the PFS facility. There is also the possibility of mechanical failure or pilot error relative to the use of "safe" switches during such overflights, which could result in the release of a bomb that, even if a dummy, could do radiologically significant damage to a storage cask. In addition, the State declares that PFS has failed to analyze another significant risk from overflights, the possibility of engine

problems that would cause the plane to actually lose an engine or have to jettison its fuel tank and munitions, any of which could do significant damage to a storage cask. *See* State Response at 8-9; *see also* State Reply at 9.

Also flawed, the State declares, is the PFS analysis showing cruise missiles pose no significant hazard to the proposed ISFSI. The State claims that, not only are cruise missile tests permitted in the vicinity of the ISFSI, they have actually been conducted there, and one has crashed in the same unit of military airspace. The State asserts that, as discussed by its expert Matthews, the USAF conducts cruise missile exercises in the Sevier B Military Operating Area (MOA) airspace. The Sevier B MOA airspace is directly over the PFS facility and adjacent to the UTTR land and is considered part of the UTTR airspace. According to the State, cruise missile flight patterns may include a cruise missile flight within 1 nautical mile of the site. Indeed, the State claims that in June 1999 a cruise missile crashed on United States Department of the Interior Bureau of Land Management property in the southern portion of the Sevier B MOA, the same MOA in which PFS proposes to build its facility. *See* State Response at 6; *see also* State Reply at 8-9.

The State also maintains that the FTS for the cruise missile that crashed in June 1999 was either ineffective or missing. The State declares that whether the system failed, was not installed in the missile, or was simply not activated because the missile was not off course is still unknown because the accident investigation is not complete. Additionally, the State claims that malfunctioning equipment was involved in a 1997 cruise missile crash in which the operators lost communication, and therefore control, of the cruise missile. As a result, the operators were unable to direct it away from the civilian observatory to which it was headed. Thus, although the missile had a working FTS, the operators were unable to use the system to prevent the crash. The 1997 and 1999 cruise missile crashes, according to the State, demonstrate that cruise missiles are prey to equipment failure and/or human error, with potentially serious results for the PFS facility. *See* State Response at 6-7; *see also* State Reply at 9-10.

Also in connection with the PFS arguments regarding cruise missiles, the State disputes the PFS assertion that targets for the cruise missile are no closer than 30 miles away from the proposed PFS facility. It declares that one cruise missile target is located approximately 15 miles from the proposed PFS facility. Additionally, the State observes that the December 1997 cruise missile crash mentioned in the PFS motion occurred on Cedar Mountain, which borders the proposed PFS facility on the west, and argues that because the missile was out of control at the time of the crash, it could have overflowed Cedar Mountain and struck a target in Skull Valley. Moreover, the State asserts, given the two local cruise missile incidents in the last 2 years, including one crash in the vicinity of the proposed PFS facility and the second within the Sevier B MOA which includes the proposed site, PFS's reliance on the small number of cruise missile launches in its evaluation is wholly misplaced. *See* State Response at 7; *see also* State Reply at 8-9.

In summary, the State maintains that in light of the cruise missile flight paths, the targets, the nature and number of recent mishaps for those missiles, and the magnitude of the consequences that would result from a cruise missile hit of the ISFSI, the risk posed by cruise missile activity alone is significant and has not been adequately analyzed by PFS.

d. Board Ruling

Relative to the issue of noncrash consequences of overflights, it is apparent this question hinges on whether UTTR aircraft will transit Skull Valley, a factual matter that the Staff has asked be deferred as part of its military aircraft crash analysis. *See* Staff Response at 4 n.3 (Staff takes no position on PFS material facts D2, D5 through D10). We thus will postpone any ruling on this aspect of the contention, with the understanding that at an appropriate point following the Staff's action, PFS may supplement its summary disposition motion on this point (with an opportunity for other interested parties to respond).

Concerning the issue of cruise missile activity, the circumstances of the recent cruise missile incidents provide a basis for disputing PFS material facts D11 through D13 and D15 through D19 that is sufficient to demonstrate that a genuine dispute exists regarding material facts concerning the possible impact of cruise missile activities upon the PFS facility. Accordingly, we deny the PFS motion relative to this matter.

5. Wildfires

a. PFS Position

Citing as support the affidavits of Texas Tech University professor Carlton Britton, S&W project engineer Jerry Cooper, and Holtec International president and chief executive officer Krishna Singh, PFS has proffered eleven material facts not in dispute, E1 through E11, to bolster its argument that wildfires do not pose a significant hazard to its facility. *See* PFS Undisputed Material Facts at 9-10. As summarized in the PFS motion, these proposed material facts contain the following observations.

The PFS facility restricted area, in which the spent fuel casks will be located at all times, will be enclosed by a fenced area and perimeter road that will have a surface of crushed rock. A wildfire could not be sustained inside this area. No spent fuel cask will be nearer than 162 feet from the edge of this crushed rock. Moreover, the restricted area will be surrounded by a 300-foot wide barrier of fire-resistant crested wheat grass. Together, the firebreak of crushed rock and the surrounding 300 feet of crested wheat grass will protect equipment, structures, and

life within the restricted area from any heat damage from a wildfire. *See* PFS Motion at 18-19.

PFS also notes that the storage casks to be used at the facility are designed to withstand a temperature of at least 1475°Fahrenheit (F) for significantly longer than the likely duration of a wildfire at the facility, even without the more than 150 foot crushed rock firebreak and 300 foot barrier of fire resistant crested wheat grass. In addition, a wildfire could not cause harm to any spent fuel casks or structures inside the canister transfer building because of that building's thick concrete walls. Further, because of the crested wheat grass and crushed rock barriers, a wildfire could not ignite or explode any of the diesel fuel present inside the restricted area. Nor would smoke from a fire threaten either the systems, structures, or components at the PFS facility that are important to safety or PFS facility security personnel. Finally, PFS declares that the threat a fire might pose to systems at the PFS facility other than those important to safety is irrelevant to the licensing of the facility. *See id.* at 19-20.

PFS thus submits that wildfires pose no credible hazard to the facility and it is entitled to summary disposition on this part of contention Utah K/Confederated Tribes B.

b. Staff's Position

With the affidavits of Ghosh, NRC senior reactor engineer Guttman, and NRC fire protection engineer Paul Lain as support, the Staff fails to accept only one of PFS's proposed material facts in support of this part of the contention. With respect to material fact E11, the Staff disagrees with PFS that the threat a wildfire may pose to systems at the PFS facility other than those important to safety are necessarily "irrelevant" to licensing. The Staff concludes, however, it is satisfied that wildfires would not pose a significant hazard to the PFS facility. *See* Staff Response at 12-14; *see also* Staff Position Statement attach. at 16.

c. State Position

In its response, the State declared it will not respond to the PFS proposed material facts relative to this issue. *See* State Response at 2-3.

d. Board Ruling

Because the PFS proposed statement of material facts is not disputed by the State, and our own review of the PFS motion and the Staff's supporting pleading leads us to conclude that there is a sufficient basis to support these material facts,

we find PFS is entitled to summary disposition in its favor regarding this portion of contention Utah K/Confederated Tribes B.⁴

6. *Cumulative Risks*

As part of its summary disposition response, the State also asserts that summary disposition is not appropriate regarding this contention because in evaluating the impacts of credible accidents upon its facility, PFS has failed to provide a sufficient analysis of the cumulative risks of those matters. Specifically, relying upon the Resnikoff affidavit, the State declares that, consistent with NUREG-0800, any analysis of aircraft accident probabilities must include an analysis of the sum of the risks from (1) military aircraft flying to and from MAAF; (2) military and private aircraft flying in the Sevier B MOA other than to and from MAAF; (3) commercial aircraft flying in airways V257 and J-56; (4) cruise missiles; and (5) aircraft parts or munitions (inert or alive) being intentionally or unintentionally dropped on the PFS facility. *See* State Response at 4-5; *id.* exh. 1, at 2; *see also* State Reply at 7. Given that a significant factual underpinning of this assertion is the deferred question of military aircraft crash impacts on PFS, we likewise will postpone any decision on this matter, albeit again with the caveat that it may be the subject of a PFS supplement to its summary disposition motion (and party responses) at an appropriate time after the Staff has provided its position on military aircraft crashes.

IV. CONCLUSION

The PFS June 7, 1999 motion for partial summary disposition of Utah K/Confederated Tribes B is denied in part, granted in part, and deferred in part as follows:

1. The Tekoi rocket engine test facility — Granted.
2. Salt Lake City International Airport — Denied.
3. Dugway Proving Ground — (a) the firing of conventional ground weapons in military testing and training, denied; (b) the testing and storage of chemical munitions and agents, granted; (c) the testing of biological materials, granted; (d) the transportation of biological, chemical, and hazardous materials to and from DPG, granted; (e) ordnance disposal/unexploded ordnance, granted; and (f) aircraft flights into and out of DPG's MAAF, deferred pending a Staff position on military aircraft crashes except for

⁴As we explain further in ruling today on the PFS motion for summary disposition of contention Utah R, we decline to adopt the PFS characterization of the fire threat to equipment and systems not designated as "important to safety" as "irrelevant." *See* LBP-99-36, 50 NRC 202, 207 (1999).

- those portions regarding landings of aircraft carrying ‘hung bombs’ and the landing of the X-33 experimental space plane, which are granted.
4. Utah Test and Training Range and Hill Air Force Base – (a) aircraft flying to and from HAFB and over the UTTR pose a hazard to the PFS facility, deferred pending a Staff position on military aircraft crashes; and (b) the firing of air-delivered munitions (e.g., bombs and missiles) on the UTTR would pose a hazard to its ISFSI facility, deferred as to bombs pending a Staff position on military aircraft crashes and denied as to cruise missiles.
 5. Wildfires — Granted.
 6. Aircraft Accident Cumulative Impacts — Deferred pending Staff position on military aircraft crashes.

For the foregoing reasons, it is, this 30th day of August 1999, ORDERED that (1) the June 7, 1999 motion for summary disposition of Applicant PFS is *granted in part, denied in part, and deferred in part* as outlined above in this Memorandum and Order; and (2) as to those portions of this contention for which summary disposition is granted, PFS having established there is no genuine issue as to any material fact, a decision regarding these matters is rendered in favor of PFS.

THE ATOMIC SAFETY AND
LICENSING BOARD⁵

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 30, 1999

⁵Copies 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:

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)

August 30, 1999

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), acting pursuant to 10 C.F.R. § 2.749, the Licensing Board denies a PFS request for summary disposition in its favor in connection with contention Utah R, Emergency Plan.

RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PERSUASION; BURDEN OF PROOF)

As with the analogous Rule 56 of the Federal Rules of Civil Procedure, the movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts in dispute and any supporting materials that accompany the dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials. If uncontroverted, the movant's facts will be deemed admitted. *See*

Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

TECHNICAL ISSUES DISCUSSED

The following technical issues are discussed: emergency plan(s); fire protection measures.

MEMORANDUM AND ORDER (Denying Motion for Partial Summary Disposition of Contention Utah R)

In LBP-98-7, 47 NRC 142, 196, 248, *reconsideration granted in part and denied in part on other grounds*, LBP-98-10, 47 NRC 288, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998), the Licensing Board admitted contention Utah R, which concerns emergency planning for the proposed 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI) of Applicant Private Fuel Storage, L.L.C. (PFS), on the Utah reservation of the Skull Valley Band of Goshute Indians (Skull Valley Band). PFS now requests that we grant partial summary disposition in its favor relative to the third (and last) portion of that contention concerning the adequacy of onsite firefighting support capability. The NRC Staff supports the entry of summary disposition for PFS, albeit on a basis different from that proffered by PFS. Intervenor State of Utah (State) opposes the PFS request, asserting there are material factual disputes outstanding that preclude summary disposition.

As we explain in more detail below, we agree with the State that partial summary disposition is inappropriate relative to the third portion of contention Utah R and, accordingly, deny the PFS motion.

I. BACKGROUND

As part of its June 1997 license application for its proposed Skull Valley ISFSI, in accordance with 10 C.F.R. § 72.32(a), PFS submitted an emergency plan (EP) for the facility. In seeking to challenge the adequacy of the PFS EP, the State sought the admission of a five-part contention. *See* LBP-98-7, 47 NRC at 195-96. Ultimately, the Board admitted only three portions of that contention. Two of these involved the proposed Rowley Junction, Utah Intermodal Transfer Point (ITP), which is the subject of another summary disposition motion ruling this date. *See* LBP-99-34, 50 NRC 168, 178 (1999). The third, which concerns the matter of

onsite firefighting capability, is the subject of the pending PFS summary disposition motion. As admitted by the Board, this portion of the contention provides:

UTAH R — Emergency Plan

CONTENTION: The Applicant has not provided reasonable assurance that the public health and safety will be adequately protected in the event of an emergency at the storage site or the transfer facility in that:

* * * *

3. PFS has not adequately described the means and equipment for mitigation of accidents because it does not have adequate support capability to fight fires onsite.

LBP-98-7, 47 NRC at 254.

In its June 28, 1999 motion, PFS has sought summary disposition of this portion of contention Utah R. Relying on a twenty-seven item statement of material facts not in dispute and supporting affidavits (with exhibits) from BNFL Fuel Solutions design engineering manager Ram Srinivasan, Stone & Webster Engineering Corporation (S&W) licensing engineer Jeffrey Johns, Texas Tech University professor Carlton Britton, S&W project engineer Jerry Cooper, S&W lead electrical engineer Wesley Jacobs, and Holtec International president and chief executive officer Krishna Singh,¹ PFS declares summary disposition is appropriate because the issues of the adequacy of the PFS facility water supply and PFS's general firefighting capability that the State seeks to raise are immaterial to any decision the agency must make regarding the adequacy of the PFS EP. Specifically, PFS asserts that its facility is designed to withstand the effects of credible fires without firefighting by response personnel or the operation of any automatic fire detection/suppression system. *See* [PFS] Motion for Partial Summary Disposition of Utah Contention R — Emergency Plan (June 28, 1999) at 2-3. PFS bases this conclusion on its analysis of the impacts of credible diesel fuel fires and wildfires upon the spent fuel shipping, transfer, and storage casks,² which it concludes would not have any detrimental radiological consequences so as to be cognizable under the direction in section 72.32(a)(5) that an EP contain a brief description of the

¹ There have been no objections by PFS, the Staff, or the State to the qualifications or expertise of the various affiants whose statements are relied upon to provide support for other parties' assertions regarding the material factual matters at issue in connection with contention Utah R.

² The PFS operational plan calls for the shipping cask holding the spent fuel canister to be moved into the canister transfer building (CTB) on a heavy-haul truck or rail car, taken off the truck or rail car by crane and moved to a canister transfer cell. There, the shipping cask lid is removed, a transfer cask with movable bottom shield doors is placed over the shipping cask by a crane and the spent fuel canister is lifted through the open shield doors into the transfer canister. The shield doors are then closed, the transfer canister is lifted by crane onto the top of a storage cask that also is located in the transfer cell, the transfer cask bottom shield doors are opened, and the spent fuel canister is lowered into the storage cask. The storage cask is then sealed with a lid and transported to the storage pads on the PFS facility using a cask transporter vehicle. *See* PFS Safety Analysis Report at 5.1-4 to -6 (rev. 1 & 2 May 1998 & Aug. 1998).

means of mitigating the radiological consequences of accidents, including onsite protection of workers. *See id.* at 6-9.

In response to the PFS motion, the Staff declares its support for the result sought by PFS, i.e., summary disposition in its favor, but on somewhat different grounds than PFS puts forth to justify that result. Although the Staff indicates it agrees with the PFS assertion that an applicant must describe the means of mitigating the consequences of radiological accidents at its ISFSI facility, the Staff expresses its disagreement with the PFS assertion that the focus of an applicant's consideration of fire events need go no further than those that would involve significant radiological releases. Instead, the Staff asserts, the focus should be on the adequacy of the PFS plans for detecting, assessing, and mitigating the consequences of facility fires. Further, relying on the supporting affidavits of NRC fire protection engineer Paul W. Lain and agency emergency preparedness specialist Randolph L. Sullivan, the Staff recommends that summary disposition be granted because the PFS EP demonstrates that the PFS onsite firefighting capability and equipment, including fire brigade staffing and training, fire water tank capacity, and sprinkler systems, are adequate to respond to a fire event. *See* NRC Staff's Response to [PFS] Motion for Partial Summary Disposition of Utah Contention R — Emergency Plan (July 28, 1999) at 10-11 & n.16; *see also* NRC Staff's Statement of Position Concerning Group I Contentions (June 15, 1999) at 20-22.

In its August 9, 1999 response to the PFS and Staff pleadings, based on a twenty-seven item statement of material facts in dispute, which raises a specific challenge to eight of the PFS statements of material fact, and the supporting affidavit of Radioactive Waste Management Associates senior associate Dr. Marvin Resnikoff, the State declares that it disagrees with both parties' positions.

Relative to PFS's assertion that the adequacy of its firefighting capabilities, including the water supply, is immaterial to an NRC decision about the sufficiency of the PFS EP, the State contends this is inconsistent with the terms of the Staff's spent fuel dry storage facility standard review plan. According to the State, that review plan declares the EP must describe the means of mitigating the consequences of each type of accident and a description of the facility equipment maintenance program and requires this analysis to include "'any non-radiological, hazardous material releases that could impact emergency response efforts'" and "'events which could lead to initiation of an alert . . . [including] fire onsite that might affect radioactive material or systems important to safety . . . [or compromise] ongoing security.'" [State] Response to [PFS] Motion for Partial Summary Disposition of Utah Contention R and Reply to the Staff's Response to the [PFS] Motion at 4 (quoting Office of Nuclear Materials Safety and Safeguards, U.S. Nuclear Regulatory Commission, NUREG-1567, Standard Review Plan for Spent Fuel Dry Storage Facilities at C-6, C-7 (draft Oct. 1996)) [hereinafter State Response].

Further, according to the State, PFS has failed to analyze the effects of fire to other systems, structures, and components (SSCs) that are important to safety, in particular a fire caused by spilled fuel inside the canister transfer building (CTB) at the PFS facility. A CTB fire is significant, the State asserts, because it is in this building that the canister containing the spent fuel is taken out of a shipping cask, placed in a transfer cask, and then transferred to a storage cask. Acknowledging that PFS purports to have done an analysis of a fire in the CTB resulting from a 300 gallon diesel fuel spill from a heavy-haul truck and a 50 gallon spill from a cask transporter vehicle, the State nonetheless contests the PFS assertion that none of the fuel from these accidents considered by PFS will spread beyond the CTB unloading bay into the transfer cells. According to the State, PFS has failed to show what “building designs” it proposes will prevent such a fuel movement. This is a significant deficiency, the State declares, given that a 300 gallon fuel fire will cause temperatures inside the CTB to rise above 1200 degrees Fahrenheit, a temperature beyond what the transfer casks are designed to withstand so as to cause spent fuel cladding degradation. *See* State Response at 5-6. Equally important, the State indicates, is the PFS admission that a 300 gallon fire could cause the loss of electrical power to SSCs inside the CTB, because neither the PFS motion nor the safety analysis report that accompanies its application discusses how PFS will recover from a fire-related electrical loss during the critical period of canister transfer operations or protect onsite electrical repair workers needed to repair faulty or burned out CTB wiring. *See id.* at 7.

Also wanting, the State asserts, is the PFS analysis of locomotive fuel fires, which could involve 6000 gallons of diesel fuel and could impact on the storage, transfer, and shipping casks, and SSCs. Noting that PFS again relies upon unspecified building design to prevent spill movement as well as administrative procedures that will keep a locomotive out of the CTB, the State asserts that a material factual dispute exists by reason of the PFS failure to explain how a 200 ton cask loaded rail car will be moved into the CTB and how the unloaded car will then be moved out of the CTB. This, in turn, raises the reasonable inference that a locomotive will be required to enter and exit the CTB to accomplish this task and creates a material deficiency in the PFS fire analysis. *See id.* at 8.

As to the Staff’s arguments that a material factual dispute has not been shown, the State finds the Staff’s reliance upon an onsite fire pumper truck, a Skull Valley Band reservation pumper truck, and an unsupported PFS declaration that there will be sufficient water for firefighting even though PFS has not sought State permission to withdraw groundwater are insufficient to support the Staff’s conclusion that PFS will have the means to provide sufficient water for firefighting. The State thus maintains that there are material factual disputes over the adequacy of PFS’s firefighting capabilities. *See id.* at 9-10.

II. ANALYSIS

A. Legal Standard for Summary Disposition

As we have recently noted elsewhere in this proceeding, a party to an NRC proceeding is entitled to summary disposition on any or all matters

if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and affidavits, if any, show that there is no genuine issue as to any material fact and that the party . . . is entitled to a decision as a matter of law.’’

10 C.F.R. § 2.749(d). As with the analogous Rule 56 of the Federal Rules of Civil Procedure, the movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts in dispute and any supporting materials that accompany the dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials. If uncontroverted, the movant’s facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

B. Board Ruling

As the Staff points out, events involving fires clearly are within the design basis of this facility based on the fact that the PFS EP indicates that certain types of fires warrant an emergency action level of Alert, the highest accident/off normal event classifications used by PFS. *See* Staff Response at 11 n.16. Among these is a fire affecting a loaded storage, transfer, or shipping cask if the cask is affected by fire longer than 15 minutes. *See* PFS EP at 2-15 (rev. 4 Aug. 1999). PFS declares that it has examined what it considers the only two possible (albeit not credible) large-scale fire scenarios — a 300 gallon diesel spill from a heavy-haul tractor trailer and a 50 gallon spill from a cask transporter vehicle. One other suggested scenario — involving a 6000 gallon diesel spill from a locomotive — PFS dismisses as not meriting further scrutiny because it has administrative procedures that prohibit a locomotive from entering the CTB, the area where a fuel-related conflagration is likely to be the most problematic.

As the State’s arguments suggest, however, a significant link in the factual chain that must be completed to eliminate this scenario from consideration is still unaccounted for. If, as PFS declares, a locomotive is not being used to move rail cars carrying a 142-ton shipping cask into, and, once unloaded, out of, the CTB, then the obvious query is what hauling method is going to be used that does not involve an unevaluated fire hazard. Absent a response to this question, at this point

we are unable to conclude there are no disputed material facts relative to contention Utah R, either as to the PFS assertion there are no radiologically significant fire hazards or the Staff's claim that PFS has adequate firefighting capabilities and equipment.³

Accordingly, because the State has established the existence of a material factual dispute,⁴ we decline to enter summary disposition for PFS relative to the third portion of contention Utah R.

III. CONCLUSION

Albeit for somewhat different reasons, PFS and the Staff assert there are no material facts in dispute in connection with the third portion of contention Utah R, Emergency Plan, which concerns the adequacy of PFS's onsite firefighting capability. The State, however, has established that a material factual dispute does exist relative to the question of fires in the CTB resulting from leakage and ignition of transportation vehicle fuel. Accordingly, we deny the PFS request for partial summary disposition on this part of contention Utah R.

For the foregoing reasons, it is, this 30th day of August 1999, ORDERED that:

1. The NRC Staff's July 28, 1999 unopposed request for a one-page extension of the page-limit for its response to the PFS summary disposition motion, *see* Staff Response at 1 n.1, is *granted*.

³ Given the potential size and duration of a fuel-related fire involving a locomotive, which thus far is the only PFS-identified device for moving rail cars into and out of the CTB, this unresolved factual question likewise negates the Staff's conclusion about the existence of material factual disputes regarding the adequacy of the PFS firefighting program in detecting, assessing, and mitigating fires. We note further, however, that with our ruling today on contention Utah K/Confederated Tribes B as it concerns wildfires, *see* LBP-99-35, 50 NRC 180, 199-200 (1999), such fires are not subject to further consideration in litigating this contention.

⁴ As was noted in the discussion above, the State has asserted that other material factual disputes exist, including questions about the effect of CTB design and water availability. Because we find a material factual dispute exists regarding this contention and can discern no ready basis for further parsing its substance, we see no need to resolve these additional State claims.

2. The June 28, 1999 motion of PFS for partial summary disposition of contention Utah R is *denied*.

THE ATOMIC SAFETY AND
LICENSING BOARD⁵

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 30, 1999

⁵Copies 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 PANEL

Before Administrative Judges:

Charles Bechhoefer, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of

Docket No. 40-8027-MLA-4
(ASLBP No. 99-770-09-MLA)

SEQUOYAH FUELS CORPORATION
(Gore, Oklahoma Site Decommissioning)

August 30, 1999

In a proceeding considering a proposed decommissioning plan for a uranium processing facility, the Presiding Officer denies reconsideration of his earlier order authorizing the State of Oklahoma to file a supplement to the State's previously filed request for a hearing.

RULES OF PRACTICE: INFORMAL PROCEEDINGS

Although a supplement to a request for a hearing is not explicitly provided for under the informal hearing procedures of 10 C.F.R. Part 2, Subpart L, a Presiding Officer has the general authority under 10 C.F.R. § 2.1209 to permit it in proceedings governed by those procedures.

MEMORANDUM AND ORDER
(Denying Motion for Reconsideration)

In my Memorandum and Order (Supplement to Request for Hearing), dated August 12, 1999, I provided an opportunity for the State of Oklahoma, a potential Intervenor in this proceeding, to supplement its previously filed request for a

hearing. (On the same day, the State of Oklahoma filed a petition for me to permit it to file a supplement — a petition that I had not received at the time I issued my Memorandum and Order but which sought the same relief as my Order had already granted.) Sequoyah Fuels Corporation (SFC or Applicant) on August 19, 1999 filed a Motion for Reconsideration of my August 12, 1999 Order. On August 23, Oklahoma filed a response opposing SFC's reconsideration motion. On August 27, the NRC Staff filed a response that also opposed the reconsideration motion.

For reasons set forth herein, I am denying SFC's reconsideration motion (and, by so doing, granting Oklahoma's request that it be given an opportunity to supplement its earlier request). The filing dates set forth in my August 12, 1999 Order still govern.

The substance of SFC's motion for reconsideration is that I should not have provided Oklahoma with an opportunity to file a supplement to its request for a hearing. SFC maintains in essence that, unlike the procedures for formal hearings under 10 C.F.R. Part 2, Subpart G, the informal hearing procedures under 10 C.F.R. Part 2, Subpart L, that govern this proceeding include no specific authority for a person requesting a hearing to amend its hearing request. According to SFC, the omission from Subpart L procedures was "deliberate." SFC urges that the only Subpart G procedures included in Subpart L are those expressly referenced in Subpart L.

Subpart L, of course, provides Presiding Officers with broad authority to conduct a fair and impartial hearing, including power to "[r]egulate the course of the hearing." 10 C.F.R. § 2.1209. Under that authority, I permitted Oklahoma to supplement its request for a hearing, as it would have an unqualified right to do under the more formal Subpart G procedures. I reasoned that the informal hearing procedures under Subpart L should be interpreted as providing at least as much procedural flexibility in treating participation requests as do the more formal and structured Subpart G procedures.

There has been precedent, of course, for presiding officers to have granted opportunities for persons in Subpart L proceedings to provide a supplemental filing. In my August 12 Order, I cited a published decision where that had occurred. *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149 (1992). (Oklahoma cites the same decision in its request to file a supplemental response.) SFC attempts to differentiate that decision, however, on the ground that, unlike here (where Oklahoma is represented by an experienced attorney), it permitted *pro se* petitioners to file supplemental requests.

In at least one other Subpart L proceeding, a Presiding Officer, in an unpublished order, permitted a large, well-funded entity to supplement its hearing request, for purposes of elaborating upon its statement of standing. *Quivera Mining Co.* (Memorandum and Order (Request for Hearing)), dated June 20, 1997. The Presiding Officer explained (at 3):

In proceedings subject to Subpart G of 10 C.F.R. Part 2, a petitioner would have a right to amend its petition without leave of the Presiding Officer (in those proceedings, an Atomic Safety and Licensing Board). 10 C.F.R. § 2.714(a)(3). In proceedings subject to Subpart L of 10 C.F.R. Part 2, such as this one, there is no specific right of this type, although there also is no prohibition.

Reflecting the common statutory derivation of the formal and informal hearing procedures (i.e., § 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a)), the Subpart L procedures, while differing in material respects from the formal procedures, do not appear to have been intended to make it more difficult to attain intervention in an informal proceeding than in a formal one. A meaningful opportunity for a hearing must of course be offered. *City of West Chicago, IL v. NRC*, 701 F.2d 633, 645 (7th Cir. 1983).

The Presiding Officer went on to conclude (at 3-4) that a ‘‘necessary concomitant’’ of a meaningful right to a fair hearing is that a petitioner have an adequate opportunity to provide the ‘‘minimal amount of detail essential to determine that a petitioner has standing and seeks to raise germane issues,’’ citing *Combustion Engineering, Inc.* (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140 (1989).

Further, nothing in the Statement of Considerations for Subpart L (54 Fed. Reg. 8269 (Feb. 28, 1989)) suggests that a petitioner should not be afforded an opportunity to file a supplemental statement. Given the foregoing considerations, I am here *denying* SFC’s motion for reconsideration and providing Oklahoma an opportunity to file a supplemental request. Such request must be filed (mailed) by September 3, 1999. SFC and the Staff may respond to Oklahoma’s supplement by no later than September 24, 1999, and October 1, 1999, respectively. (Copies of this Memorandum and Order are today being telefaxed to Oklahoma and SFC and hand delivered to the NRC Staff.)

IT IS SO ORDERED.

Charles Bechhoefer, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 30, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF ENFORCEMENT

R. W. Borchardt, Director

In the Matter of

Docket No. 50-443

NORTH ATLANTIC ENERGY
SERVICES CORPORATION
(Seabrook Station, Unit 1)

August 3, 1999

On March 31, 1999, the Petitioner, Mr. David Lochbaum of the Union of Concerned Scientists, requested the following three specific actions pursuant to the "other actions" provision of 10 C.F.R. § 2.206: (1) The Petitioner requested that the individuals responsible for discrimination against a contract electrician at the Seabrook Nuclear Generating Station as identified in an NRC Office of Investigations (OI) report be banned by the NRC from participation in licensed activities at and for any nuclear power plant for a period of at least 5 years; (2) the individuals responsible for creating a false record to cover up the concern raised by the contract electrician as identified in the cited OI report also be banned by the NRC from participation in licensed activities at and for any nuclear power plant for a period of at least 5 years; and (3) the Petitioner be permitted to attend the upcoming Predecisional Enforcement Conference (June 2, 1999) on this matter.

Based upon the NRC's review of the investigative records and the additional information developed during the June 2, 1999 Predecisional Enforcement Conference, the NRC Staff concluded that enforcement action was warranted against North Atlantic Energy Services Corporation (NAESCO), the Williams Power Corporation, and the Williams Power foreman for discriminating against a contract electrician in violation of 10 C.F.R. § 50.7. A finding that the foreman created a false document in violation of 10 C.F.R. § 50.9 was not substantiated. Instead of a section 50.9 violation, the NRC Staff believed that the foreman as well as the electrician committed minor violations of Seabrook procedural requirements.

In reaching the enforcement decision against the foreman, the NRC Staff weighed such factors as the past performance of the foreman and the electrician,

the fact that the Williams Power Corporation foreman was only an acting first-line supervisor, and the severity of the adverse action including the fact that Williams Power Corporation, at the request of NAESCo, promptly rehired the electrician to reduce the probability that there would be a chilling effect on other employees for raising safety concerns. Consideration was also given to evidence presented at the Predecisional Enforcement Conference which indicated that the foreman had encouraged and was receptive to safety concerns raised by employees in the past. The violation in this case is based on the NRC Staff's conclusion that the foreman selected the electrician for layoff because the electrician raised a safety concern with a NAESCo QC inspector. The NRC Staff considered issuing the foreman an order banning him from licensed activities, as requested by the Petitioner, but concluded that an order was not warranted in this case or necessary to protect public health and safety.

Even though the NRC Staff concluded that enforcement action against the foreman was warranted for the discrimination against the electrician, the Petitioner's specific request that the individual be banned from participating in licensed activities at and for any nuclear utility for a period of at least 5 years was denied. The Petitioner's request to attend the closed Predecisional Enforcement Conference was also denied. The reason was explained in a letter dated April 20, 1999 to the Petitioner. This letter informed the Petitioner that it is the Commission's policy to normally close conferences to public observation when the enforcement action being contemplated by the NRC Staff is based on the findings of an OI investigation report that has not been publicly disclosed or when the enforcement action being contemplated may be taken against an individual. The Petitioner was informed that the fact that a 2.206 petition has been filed does not provide a basis for permitting public observation.

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

I. INTRODUCTION

On March 31, 1999, David A. Lochbaum (Petitioner) filed a petition pursuant to 10 C.F.R. § 2.206 requesting that the U.S. Nuclear Regulatory Commission (NRC) take enforcement action against unspecified individuals working at the Seabrook Nuclear Power Station (Seabrook Station) who allegedly: (1) discriminated against a contract electrician in violation of 10 C.F.R. § 50.7; and (2) created a false record in violation of 10 C.F.R. § 50.9. More specifically, the Petitioner requested that the NRC ban these unspecified individuals from participating in licensed activities for a period of at least 5 years. The Petitioner also requested (3) permission to

attend an upcoming Predecisional Enforcement Conference between the NRC and the Licensee on this matter.

As the basis for his request, the Petitioner cited a March 16, 1999 letter from the NRC to the North Atlantic Energy Services Corporation (NAESCO), the owner of the Seabrook Station. This letter informed NAESCO that an investigation conducted by the Office of Investigations (OI) had concluded that a Williams Power Corporation foreman had discriminated against an electrician, in violation of section 50.7, for raising a safety concern and that this same Williams Power Corporation foreman had deliberately caused an inaccurate record to be created, in violation of section 50.9.

By a letter dated April 20, 1999, the Petitioner was informed that his requests for enforcement action had been referred to the Office of Enforcement and that pursuant to section 2.206, action on his requests would be taken within a reasonable time.

II. DISCUSSION

On May 29, 1998, OI issued Report 1-1998-005 which concluded that a Williams Power Corporation foreman had discriminated against an electrician for raising a safety concern, in violation of section 50.7, and that this same Williams Power Corporation foreman had deliberately caused an inaccurate record to be created, in violation of section 50.9. On March 16, 1999, the NRC sent a letter to NAESCO which summarized the findings of the OI report and invited NAESCO's representatives to meet with the NRC and present their views on the apparent violations identified in the report. As is customary, a copy of the NRC's March 16, 1999 letter to NAESCO was placed in the Public Document Room and made available for public inspection.

The Petitioner obtained a copy of the NRC's March 16, 1999 letter to NAESCO and used the summary of the OI findings contained in the letter as a basis for requesting enforcement action under section 2.206. A member of the NRC enforcement staff contacted the Petitioner on April 15, 1999, to determine whether the Petitioner had any information regarding his March 31, 1999 request for action under section 2.206 that was not contained in his petition or the NRC's March 16, 1999 letter to NAESCO. The Petitioner informed the NRC enforcement staff member that he had no knowledge of the apparent violations for which he was requesting enforcement action other than that information summarized in the NRC's March 16, 1999 letter.

A closed Predecisional Enforcement Conference was held on June 2, 1999, between the NRC and NAESCO, Williams Power Corporation, and the Williams Power Corporation foreman whose actions allegedly caused NAESCO to violate sections 50.7 and 50.9. This conference was closed to the public because it is the

Commission's policy to normally close conferences to public observation when the enforcement action being contemplated by the NRC Staff is based on the findings of an OI investigation report that has not been publically disclosed or when the enforcement action being contemplated may be taken against an individual. The Petitioner was informed that the fact that a 2.206 petition has been filed does not provide a basis for permitting public observation. During this conference, the participants discussed the circumstances that led to the foreman's decision to layoff the electrician who had raised a safety concern and the circumstances surrounding the creation of the document that OI concluded was inaccurate. The electrician who had raised the safety concern and was subsequently selected for layoff by Williams Power Corporation also attended the conference, and he met with the NRC participants following the conference to present his views on the matters discussed during the conference and to answer NRC questions.

Based on the information contained in OI Report 1-1998-005 and the information developed during the June 2, 1999 Predecisional Enforcement Conference, the NRC Staff concluded that a violation of section 50.7 had occurred as stated in the OI report but that no violation of section 50.9 had occurred because the allegedly inaccurate document was in fact complete and accurate in all material respects.

III. ANALYSIS

Based on the information contained in OI Report 1-1998-005 and the information developed during the June 2, 1999 Predecisional Enforcement Conference, the NRC Staff has concluded that enforcement action is warranted against NAESCo, the Williams Power Corporation, and the Williams Power foreman for discriminating against a contract electrician in violation of section 50.7. After carefully weighing all the circumstances of the case, the NRC Staff has concluded that it is appropriate to issue NAESCo a Severity Level III Notice of Violation and Proposed Civil Penalty in the amount of \$55,000 (EA 98-165), and to issue the Williams Power Corporation (EA 98-338) and the Williams Power Corporation foreman (IA 99-003) each Severity Level III Notices of Violation.

In reaching this enforcement decision against the foreman, the NRC Staff weighed such factors as the past performance of the foreman and the electrician, the fact that the Williams Power Corporation foreman was only an acting first-line supervisor, and the severity of the adverse action including the fact that Williams Power Corporation, at the request of NAESCo, promptly rehired the electrician to reduce the probability that there would be a chilling effect on other employees for raising safety concerns. Consideration was also given to evidence presented at the Predecisional Enforcement Conference which indicated that the foreman had encouraged his employees to raise their safety concerns with him and which indicated that the foreman had been receptive to safety concerns raised

by employees in the past. The violation in this case is based on the NRC Staff's conclusion that although the foreman might have encouraged his employees in the past to raise safety concerns, the foreman expected that his employees would bring all their concerns to him rather than raise their concerns directly with representatives of NAESCo. The NRC Staff concluded in this case that the foreman selected the electrician for layoff because the electrician raised a safety concern with a NAESCo QC inspector.

Given all the circumstances of this case, the NRC Staff concluded that issuing the foreman a Severity Level III Notice of Violation was an appropriate enforcement action to put the foreman on notice that discriminating against employees who take their safety concerns directly to representatives of NAESCo is unacceptable. After meeting with the foreman, the NRC Staff is satisfied that the foreman understands that employees are permitted by NRC regulations to raise their safety concerns with whomever they choose and that he cannot retaliate against individuals who choose to raise their concerns directly with NAESCo or the NRC. After meeting with the foreman, the NRC Staff is also confident that the foreman will comply with NRC regulatory requirements in the future. Therefore, while the NRC Staff considered issuing the foreman an order banning him from licensed activities, as requested by the Petitioner, the NRC Staff does not believe that an order is warranted in this case or necessary to protect public health and safety.

Based on the information contained in OI Report 1-1998-005 and the information developed during the June 2, 1999 Predecisional Enforcement Conference, the NRC Staff has concluded that no violation of section 50.9, "Completeness and Accuracy of Information," occurred. Specifically, the NRC concluded that, because the wiring discrepancy was noted in the work document by the contract electrician, the documentation of the control building air conditioning (CBA) system control panel work activities was accurate. However, the failure to terminate the conductors in accordance with the applicable design document constituted a violation of requirements contained in Seabrook site procedures. This violation was of minor significance and is not subject to formal enforcement action.

IV. CONCLUSION

For the reasons set forth above, the petition is denied. In accordance with 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review. As provided by this regulation, this Decision will constitute the final action of the Commission 25 days after issuance

unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

R. W. Borchardt, Director
Office of Enforcement

Dated at Rockville, Maryland,
this 3d day of August 1999.

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. 50-029-LA

**YANKEE ATOMIC ELECTRIC
COMPANY
(Yankee Nuclear Power Station)**

September 10, 1999

The Commission grants the motion of Licensee Yankee Atomic Electric Company to terminate without prejudice its pending appeal of the Licensing Board's Memorandum and Order in which the Board admitted four contentions. The Commission also vacates both Board orders as moot.

RULES OF PRACTICE: DISMISSAL WITH PREJUDICE

Dismissal of an appeal with prejudice (similar to termination of a proceeding with prejudice) generally implies that we have ruled on the merits of the appeal. *See Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 973 (1981).

RULES OF PRACTICE: DISMISSAL WITH PREJUDICE

Dismissal with prejudice (again like termination with prejudice) is a severe sanction reserved for unusual situations involving substantial prejudice to an opposing party or to the public interest in general. *See Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1132-33 (1981); *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 978-79 & n.14 (1981).

RULES OF PRACTICE: WITHDRAWAL OF APPLICATION

“[T]he possibility of future litigation with its expenses and uncertainties . . . is precisely the consequence of *any* dismissal without prejudice. It does not provide a basis for departing from the usual rule that a dismissal should be without prejudice.” *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1135 (1981) (emphasis in original), citing *Jones v. SEC*, 298 U.S. 1, 19 (1936), and 5 *Moore’s Federal Practice* ¶41.05[1] at 41-72 to 41-73 (2d ed. 1981).

RULES OF PRACTICE: WITHDRAWAL OF APPLICATION

The withdrawal of an application imposes no prejudice on Intervenors where the admitted contentions regarding that application were focused on alleged deficiencies and inadequacies of the withdrawn application, and where the withdrawal will leave the Intervenors in precisely the same position in any subsequent proceeding as if they had prevailed not only on their instant appeal but also on the subsequent merits portion of this proceeding.

RULES OF PRACTICE: VACATUR

“While unreviewed Board decisions do not create binding precedent, where as here the unreviewed rulings involve complex questions and vigorously disputed interpretations of agency provisions, the Commission chooses as a policy matter to vacate them and thereby eliminate any future confusion and dispute over their meaning or effect. *Cf. Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), CLI-96-2, 43 NRC 13, 15 (1996). Our decision to vacate the Board orders does not intimate any opinion on their soundness. *Id.*” *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113, 114 (1998) (internal quotation marks omitted).

MEMORANDUM AND ORDER

The Commission grants the motion of Licensee Yankee Atomic Electric Company (“Yankee Atomic” or “Licensee”) to terminate without prejudice its pending appeal of the Licensing Board’s Memorandum and Order (LBP-99-14, 49 NRC 238, *reconsideration denied*, LBP-99-17, 49 NRC 375 (1999)) in which the Board admitted four contentions. The Commission also vacates both Board orders as moot.

BACKGROUND

This proceeding concerns a license amendment application in which Yankee Atomic sought approval of its License Termination Plan (“LTP”) for the Yankee Nuclear Power Station (“Yankee Rowe”). On May 26, 1999, in a pleading supported by the NRC Staff, Yankee Atomic submitted to the Licensing Board a motion seeking leave to withdraw its LTP application without prejudice and, in the same filing, asked that the Commission dismiss without prejudice Yankee Atomic’s pending appeal of LBP-99-14. Responding to the latter request, Intervenor Citizens Awareness Network (“CAN”), the New England Coalition on Nuclear Pollution (“NECNP”) and the Franklin Regional Council of Governments (“FRCOG”) agreed that the Commission should dismiss the pending appeal, but asked that the dismissal be “with prejudice.”

In parallel filings before the Board, Intervenor similarly argued that the Board should terminate the entire proceeding “with prejudice.”¹ They also asserted that the Board should require Yankee Atomic to reimburse CAN’s and NECNP’s litigation expenses and provide Intervenor with various kinds of information regarding the decommissioning of Yankee Rowe. On July 28, 1999, the Board issued LBP-99-27, 50 NRC 45, rejecting these arguments and terminating, without prejudice or conditions, all portions of the proceeding — except for the instant pending appeal. Intervenor chose not to petition for Commission review of LBP-99-27.² Consequently, the only remaining portion of this proceeding is Yankee Atomic’s appeal of LBP-99-14 — a matter we have held in abeyance pending the August 17th conclusion of the appeal period for LBP-99-27. For the reasons set forth below, we dismiss the appeal without prejudice (as moot) and vacate both LBP-99-14 and LBP-99-17.

DISCUSSION

1. Requested Dismissal of Appeal With Prejudice

Intervenor’s request that we dismiss Yankee Atomic’s appeal with prejudice suffers from two serious flaws. First, the dismissal of an appeal with prejudice (similar to termination of a proceeding with prejudice) generally implies that we have ruled on the merits of the appeal — clearly not the situation here. *See Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 973 (1981).

¹ NECNP later clarified that it was not asking the Board to dismiss the proceeding with prejudice. NECNP’s Reply to LBP-99-22, dated June 24, 1999, at 2 n.2.

² The Commission is also declining to take review *sua sponte* of the Licensing Board’s Memorandum and Order (LBP-99-27) terminating, without prejudice or conditions, all portions of the proceeding except for the instant appeal of LBP-99-14.

Second, dismissal with prejudice (again like termination with prejudice) is a severe sanction reserved for unusual situations involving substantial prejudice to an opposing party or to the public interest in general. *See Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1132-33 (1981); *Fulton*, 14 NRC at 978-79 & n.14. We see here no prejudice (much less substantial prejudice) to either the Intervenor's or the public's interest. The admitted contentions were focused on alleged deficiencies and inadequacies of the withdrawn LTP. Moreover, the Intervenor will be in precisely the same position in any subsequent proceeding as if they had prevailed not only on their instant appeal but also on the subsequent merits portion of this proceeding, i.e., they will be faced with Yankee Atomic returning to the Commission in the future with a second proposed LTP which Intervenor may oppose if they wish.³

For these reasons, we decline to dismiss the appeal with prejudice. Rather, we dismiss it as moot.

2. *Vacation of LBP-99-14 and LBP-99-17*

We exercise our inherent authority over adjudications and vacate LBP-99-14 and LBP-99-17. As we indicated in *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113, 114 (1998):

While unreviewed Board decisions do not create binding precedent, where as here the unreviewed rulings "involve complex questions and vigorously disputed interpretations of agency provisions," the Commission chooses as a policy matter to vacate them and thereby eliminate any future confusion and dispute over their meaning or effect. *Cf. Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), CLI-96-2, 43 NRC 13, 15 (1996). Our decision to vacate the Board orders "does not intimate any opinion on their soundness." *Id.*

CONCLUSION

For the reasons given above, the Commission (1) grants Yankee Atomic's motion to withdraw without prejudice its pending appeal of the Licensing Board's Memorandum and Order (LBP-99-14) and (2) vacates LBP-99-14 and LBP-99-17.

³ "[T]he possibility of future litigation with its expenses and uncertainties . . . is precisely the consequence of any dismissal without prejudice. It does not provide a basis for departing from the usual rule that a dismissal should be without prejudice." *North Coast*, 14 NRC at 1135 (emphasis in original), citing *Jones v. SEC*, 298 U.S. 1, 19 (1936), and 5 *Moore's Federal Practice* ¶41.05[1] at 41-72 to 41-73 (2d ed. 1981). *See also Fulton*, 14 NRC at 979 ("it is well settled that the prospect of a second lawsuit — or, in this case, another application to construct a nuclear reactor at Fulton — does not provide the requisite quantum of legal harm to warrant dismissal with prejudice" (citing *Jones, supra*)). (Both *North Coast* and *Fulton* are decisions of the Atomic Safety and Licensing Appeal Board, an entity that the Commission abolished in 1991. However, despite its defunct status, the Appeal Board's decisions still carry precedential weight. *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 n.2 (1994).)

Therefore, the proceeding is terminated.
IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 10th day of September 1999.

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**

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

September 24, 1999

The Commission waives the time limit for comments set forth in 10 C.F.R. § 2.1305 and refers the comments to the NRC Staff.

MEMORANDUM AND ORDER

The Commission had closed this proceeding on July 23, 1999. CLI-99-23, 50 NRC 21. However, on September 15, 1999, Local 29 of the International Brotherhood of Electrical Workers (“Local 29”) filed with the Commission a pleading styled “Petition to Waive Time Limits in 10 C.F.R. § 2.1305 and Supplemental Comments” in this license transfer proceeding involving the Beaver Valley Power Station. Duquesne Light Company, FirstEnergy Nuclear Operating Company, and Pennsylvania Power Company (collectively “FirstEnergy”) filed answers opposing Local 29’s petition and comments. The NRC Staff, as is its usual practice in license transfer proceedings, has chosen not to participate as a

party in this case. For the reasons set forth below, we waive the time limit set forth in section 2.1305 and refer the comments to the NRC Staff.

BACKGROUND

This proceeding involves a proposed transfer of interests in the Beaver Valley Power Station from Duquesne Light Company to FirstEnergy. Application, dated May 5, 1999. On June 3d, Local 29 sought to intervene and offered comments addressing FirstEnergy's failure to indicate how it intended to staff the Beaver Valley facility. In CLI-99-23, 50 NRC at 22, the Commission denied the Union's petition to intervene on the following ground:

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. 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. . . . 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. [Footnote omitted.]

On September 15th, Local 29 filed supplemental comments out-of-time, explaining that, until September 2d, it had lacked access to the information necessary to make specific arguments regarding the safety implications of FirstEnergy's proposed staffing levels for the Beaver Valley facility. Now that Local 29 has obtained this information, it wishes to file comments pursuant to 10 C.F.R. § 2.1305(b), despite that regulation's provision that comments must be submitted within 30 days after the Commission issues a public notice of its receipt of the application. In sum, Local 29 argues that FirstEnergy's plan to eliminate the jobs of 104 members of the Local will adversely affect plant safety. *See* Petition at 3-7. Local 29 seeks three forms of relief: (1) waiver of the time limit for submitting its supplemental comments, (2) a requirement that FirstEnergy demonstrate its ability to operate Beaver Valley safely despite the 104 layoffs, and (3) such hearings or other proceedings as may be necessary to ensure the safe operation of the Beaver Valley facility if the application is granted. *See* Petition at 7.

DISCUSSION

We construe Local 29's instant requests for relief to fall within Subpart M's "comments" option rather than its "adjudicatory hearing" option. Local 29 has not attempted in its petition to meet the regulatory standards for intervention

petitions and adjudicatory hearing requests set forth in 10 C.F.R. § 2.1306. Indeed, it does not even cite those standards. Moreover, it repeatedly refers to its wish to submit supplemental “comments,” and only once even uses the word “hearing” (in the final sentence of its petition). Further, the “hearing request” in that last sentence does not seek an adjudicatory hearing *per se* but rather is phrased far more generally — asking the Commission “to hold such hearings or other proceedings as may be necessary to ensure the safe operation of Beaver Valley . . . if the application is granted.” Petition at 7.

We therefore will treat Local 29’s request in an administrative (“comment”) rather than an adjudicatory (“hearing”) context. Regarding Local 29’s first and second requests for relief, we grant Local 29 a waiver of the time limits for filing comments, in view of Local 29’s claim of newly available information, and we refer Local 29’s comments to the Staff with instructions to consider, expeditiously, whether those comments call into question FirstEnergy’s ability to operate the Beaver Valley plant safely. As to Local 29’s third request for relief (seeking “such hearing or other proceedings as may be necessary”), we consider the NRC Staff’s ongoing review to be sufficient, in Local 29’s words, “to ensure the safe operation of Beaver Valley.” Local 29’s petition provides no justification for conducting a parallel adjudication on issues that the NRC Staff will already be considering. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 236 (1986), *aff’d sub nom. Ohio v. NRC*, 814 F.2d 258 (6th Cir. 1987).

IT IS SO ORDERED.

For the Commission¹

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 24th day of September 1999.

¹Commissioner 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

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Charles Bechhoefer, Presiding Officer
Dr. Linda W. Little, Special Assistant

In the Matter of

Docket No. 030-34610-ML
(ASLBP No. 99-768-02-ML)
(M22/GID-3 Automatic
Chemical Agent
Detector/Alarm)

DEPARTMENT OF THE ARMY
(Aberdeen Proving Ground, Maryland)

September 13, 1999

In a proceeding in which the NRC Staff denied the exempt-status registration and licensing request for an Automatic Chemical Agent Detector/Alarm, the Presiding Officer denies a petition for leave to intervene by the manufacturer of the device for lack of standing, outlines other means by which the manufacturer might participate, and schedules a prehearing conference to consider such participation as well as a definition of issues for litigation and schedules for various filings.

RULES OF PRACTICE: STANDING (INFORMAL PROCEEDINGS)

To demonstrate a person's standing to participate as a party in a proceeding adjudicated under the informal licensing procedures of 10 C.F.R. Part 2, Subpart L, the Commission has long looked to "contemporaneous judicial concepts of standing."

RULES OF PRACTICE: STANDING (ZONES OF INTEREST)

Where a petitioner's stated injury is purely economic, unrelated in any respect to radiation or environmental impacts, such injury is outside the zones of interest arguably protected by the governing statutes, here the Atomic Energy Act or the National Environmental Policy Act.

MEMORANDUM AND ORDER (Intervention Request; Schedules; Prehearing Conference)

I. BACKGROUND

In my Memorandum and Order (Request for Hearing), dated July 12, 1999, I granted the request of the Department of the Army (Army or Applicant) for a hearing with respect to the denial by the NRC Staff of Army's application for registration and licensing of the model M22/GID-3 Automatic Chemical Agent Detector/Alarm (ACADA). On the same day, I published a Notice of Hearing that, *inter alia*, permitted the filing of requests for a hearing and petitions for leave to intervene.

Finally, based on advice that the Army wished to discuss possible settlement with the Staff, I placed the proceeding in abeyance and postponed the filing by the NRC Staff of a hearing file until 3 weeks subsequent to the termination of settlement negotiations (if unsuccessful). I also required periodic reports on the progress of settlement negotiations.

In its second status report, dated August 23, 1999, the Staff, on behalf of both itself and the Army, reported that, although the parties have attempted to resolve their dispute, the Army and the Staff have not been able to reach a settlement. Under the schedule previously established, the Staff will provide (mail) a hearing file to the Presiding Officer, his Special Assistant, and the Army by today, Monday, September 13, 1999. Schedules for other filings will be determined at the prehearing conference set forth below.

II. PROPOSED INTERVENTION

In response to the Notice of Hearing, which was published in 64 Fed. Reg. 38,484 (July 16, 1999), a timely petition for leave to intervene was filed on August 13, 1999, by Graseby Dynamics Ltd. (Graseby), manufacturer of the M22/GID-3 Automatic Chemical Agent Detector/Alarm for which the Army seeks registration and licensing. Graseby seeks intervention in support of the Army. The Army has not responded to Graseby's petition. On August 23, 1999, the Staff filed

a response opposing Graseby's petition, both for lack of standing and for failing to define an area "germane" to the proceeding that it wishes to litigate.

To intervene in a proceeding of this type, a petitioner such as Graseby needs to establish (1) its interest in the proceeding (i.e., its standing); (2) how that interest may be affected by the results of the proceeding; (3) the petitioner's area of concern about the licensing activity that is the subject matter of the proceeding; and (4) the circumstances establishing that the petition was timely submitted. 10 C.F.R. § 2.1205(e).

As indicated earlier, Graseby's petition was timely filed. But there are problems with respect to other elements of Graseby's petition, particularly its demonstration of standing.

To demonstrate a person's standing to participate as a party in a proceeding adjudicated under the informal licensing procedures of 10 C.F.R. Part 2, Subpart L, the Commission has long looked to "contemporaneous judicial concepts of standing." *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), LBP-97-20, 46 NRC 257, 262 (1997), *aff'd*, CLI-98-11, 48 NRC 1 (1998), *appeal docketed*, No. 98-1426 (D.C. Cir. Sept. 15, 1998) (*citing, among others, Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976)). As the Presiding Officer in *Quivira* pointed out, and as the Staff reiterates here, a contemporary delineation of judicial concepts of standing appeared in a recent Supreme Court decision, *Bennett v. Spear*, 520 U.S. 154 (1997). In pertinent part, the Court stated that the "irreducible constitutional minimum" requirements for standing are that the litigant suffer an "injury-in-fact," that is "actual or imminent, not conjectural or hypothetical," that there is a causal connection between the alleged injury and the action complained of, and that the injury will be redressed by a favorable decision. 520 U.S. at 167. *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1991)

In addition, there may be "prudential" standing requirements, such as that the litigant's asserted interests fall within the "zones of interest" arguably protected by the governing statutes — here, the Atomic Energy Act or the National Environmental Policy Act (NEPA). *Bennett, supra*, 520 U.S. at 162. The Commission applies both the constitutional and prudential aspects of the standing doctrine. *See, e.g., International Uranium (USA) Corp.* (Receipt of Material from Tonawanda, New York), CLI-98-23, 48 NRC 259 261-65 (1998).

Although Graseby's statement of interests is somewhat cryptic, it apparently is seeking intervention as the manufacturer of the ACADA for which the Staff has denied a license to the Army. It asserts that

[t]he results of the proceeding will impact the U.S. Government's strategy, plans & procedures in the fielding & maintenance of the [Detector/Alarm] on behalf of the U.S. armed services. The company is under contract to the Government for warranty and maintenance activities and will therefore be directly affected by the results. The decision could also affect the company's business strategy regarding such activities.

Graseby goes on to state that its area of concern about the licensing activity relates to the technical reasons for supporting the Army's case and that its request is timely because the Army "has begun to field the above equipment, which is mission critical, to various service users."

Evaluating this brief statement against governing standards for standing, Graseby has established injury in fact — the imminent diminution of its ability to market its ACADA and supporting services; that this result emanates from the Staff's action vis-à-vis the Army; and how this proceeding might alleviate that injury — i.e., by permitting registration and licensing of Graseby's ACADA without regard to the limits imposed by the Staff on the Army's use of the device. Beyond that, Graseby's petition was timely filed.

Where Graseby's statement of standing falls short, however, is in establishing that Graseby's alleged injury falls within the zones of interest arguably protected by the governing statutes, here, the Atomic Energy Act or NEPA. Graseby's stated injury is purely economic, unrelated in any respect to radiation or to environmental impacts. Such injury is outside the zones of interest arguably protected by the Atomic Energy Act or NEPA. *Quivira*, CLI-98-11, *supra*, 47 NRC at 8-11.

For these reasons, Graseby lacks standing to intervene on its own right. Accordingly, I *deny* its intervention request for lack of standing.

That does not mean, however, that Graseby may not participate in this proceeding in any capacity. Graseby has not thus far indicated with sufficient particularity what information, as the manufacturer of the ACADA, it could contribute to the record to assist me in making an informed decision. Graseby has stated that it desires to support the Army's case. The Army may thus wish to utilize Graseby in the presentation of its case. In addition, were Graseby further to identify the detailed information that it could supply for the record, it might be able to gain party status as a discretionary intervenor. See *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 102-07 (1976) (standing lacking because of failure to satisfy "zone of interest" criterion); *id.*, ALAB-363, 4 NRC 631 (1976) (intervention permitted on the basis of discretionary standing).

I do not have before me sufficient information to determine whether admittance of Graseby as a matter of discretion would be beneficial. I hereby invite the Army to determine whether it wishes to utilize Graseby in the presentation of its case or, alternatively, whether Graseby believes that its admission on a discretionary basis would be beneficial. At the prehearing conference set forth below, I will entertain the views of the Army and Graseby, as well as the NRC Staff, on these matters.

III. PREHEARING CONFERENCE

A prehearing conference is hereby scheduled for Wednesday, October 13, 1999, beginning at 9:30 a.m., in the Atomic Safety and Licensing Board hearing room,

3d floor, 11555 Rockville Pike, Rockville, Maryland. That conference will consider, *inter alia*, the definition of issues for litigation, the form of participation, if any, of Graseby Dynamics, and schedules for further filings. Graseby Dynamics is invited to appear on matters concerning its participation.

Parties, as well as Graseby, are requested to provide the Presiding Officer, the Special Assistant, and the other participants with an outline of issues to be raised as well as the form of participation, if any, of Graseby. Such outline should be in the hands of the Presiding Officer, the Special Assistant, and other participants by close of business Friday, October 8, 1999.

IT IS SO ORDERED.

Charles Bechhoefer, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland,
September 13, 1999

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)

September 20, 1999

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), in accordance with its prior ruling in LBP-99-34, 50 NRC 168 (1999), granting summary disposition on contention Utah B, License Needed for Intermodal Transfer Point (ITP), the Licensing Board dismisses contention Utah N, Flooding, and the portions of contentions Utah K/Confederated Tribes B, Inadequate Consideration of Credible Accidents; Utah O, Hydrology; Utah R, Emergency Plan; and Utah S, Decommissioning, that relate to the proposed Rowley Junction, Utah rail to heavy haul-truck ITP. Further, in connection with its decision in LBP-99-35, 50 NRC 180 (1999), the Board denies a PFS request for reconsideration of its ruling denying summary disposition on the portion of contention Utah K/Confederated Tribes B concerning the use of training exercise ordinance at Dugway Proving Ground, and clarifies its ruling regarding Utah Test and Training Range-related overflights.

MOTION FOR RECONSIDERATION: RAISING MATTERS FOR THE FIRST TIME; MISUNDERSTOOD OR OVERLOOKED RECORD MATERIAL; SEEKING CLARIFICATION

RULES OF PRACTICE: MOTION FOR RECONSIDERATION (RAISING MATTERS FOR THE FIRST TIME; MISUNDERSTOOD OR OVERLOOKED RECORD MATERIAL; SEEKING CLARIFICATION)

Although a party may not base a reconsideration motion on new information or a new thesis, *see* LBP-98-10, 47 NRC 288, 292 (1998) (citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997)), a request to reexamine existing record material that may have been misunderstood or overlooked, or to clarify a matter that a party believes is unclear, is appropriate, *see id.* at 296-97 (citing *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 687 (1983)).

**MEMORANDUM AND ORDER
(Summary Disposition-Related Rulings)**

In late August 1999 rulings, LBP-99-34, 50 NRC 168 (1999), and LBP-99-35, 50 NRC 180 (1999), the Licensing Board addressed two motions filed by Applicant Private Fuel Storage, L.L.C. (PFS), seeking summary disposition of contentions Utah B, License Needed for Intermodal Transfer Facility, and Utah K/Confederated Tribes B, Inadequate Consideration of Credible Accidents. Now pending with the Board are party pleadings relating to these determinations. Relative to contention Utah B, at the Board's request the parties have submitted their views on the impact on other pending contentions of the Board's ruling that the specific licensing provisions of 10 C.F.R. Part 72 do not apply to the planned Rowley Junction, Utah rail to heavy-haul truck intermodal transfer point (ITP). Also, the Board's determination on contention Utah K/Confederated Tribes B regarding the use of ground-launched ordnance during military training exercises at Dugway Proving Ground (DPG) and military aircraft overflights relating to the use of the Utah Test and Training Range (UTTR) is the subject of a PFS reconsideration/clarification motion.

For the reasons set forth below, we dismiss all or part of contentions Utah K/Confederated Tribes B, Utah N, Utah O, Utah R, Utah S, as they relate to the Rowley Junction ITP and deny the PFS request for reconsideration of our ruling regarding training exercise ordnance at DPG. Further, we provide additional information regarding our ruling on UTTR-related overflights.

I. BACKGROUND

A. Impact of Ruling on Contention Utah B

In our LBP-99-34 ruling concerning contention Utah B, the Board found that the ITP that PFS has proposed may be constructed and operated at Rowley Junction, Utah, to move spent fuel shipments from the rail mainline some 25 miles north of its planned Skull Valley, Utah 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI) is “governed by the general licensing provisions of 10 C.F.R. Part 71 and the related [United States Department of Transportation (DOT)] regulations for transporting spent nuclear fuel so as not to require specific licensing under 10 C.F.R. Part 72.” 50 NRC at 176. In addition, citing its earlier contentions-admission decision in LBP-98-7, 47 NRC 142, *reconsideration granted in part and denied in part on other grounds*, LBP-98-10, 47 NRC 288, *aff’d on other grounds*, CLI-98-13, 48 NRC 26 (1998), the Board indicated that this determination could be dispositive of the ITP-related portions of eight other delineated State contentions. *See* LBP-99-34, 50 NRC at 178. As a consequence, the Board requested that the parties address the question “whether, in light of this ruling on contention Utah B, the [referenced] contentions should be dismissed as they relate to the ITP.” *Id.*

In filings dated September 7, 1999, PFS, Intervenor State of Utah (State), and the NRC Staff discuss the impact of the Board’s August 30, 1999 contention Utah B ruling on contentions Utah K/Confederated Tribes B; Utah N, Flooding; Utah O, Hydrology; Utah R, Emergency Plan; Utah S, Decommissioning; Utah T, Inadequate Assessment of Required Permits and Other Entitlements; Utah U, Impacts of Onsite Storage Not Considered; and Utah W, Other Impacts Not Considered. PFS and the Staff declare that, with the exception of contention Utah U, the Board’s ruling on Utah B renders all or portions of these other contentions subject to dismissal as they relate to the Rowley Junction ITP. *See* [PFS] Position on Dismissal of ITP-Related Contentions (Sept. 7, 1999) at 3-10; NRC Staff’s Position Regarding the Impact of LBP-99-34 on Other Contentions (Sept. 7, 1999) at 2-8. Relative to contention Utah U, both PFS and the Staff assert that, notwithstanding the Board’s identification of this contention as having an ITP connection, as admitted this issue has no ITP-related aspects and so is not to be subject to dismissal based on the Board’s contention Utah B ruling.

The State takes a somewhat different stance. Although agreeing with PFS and the Staff that contention Utah U has no ITP-related features, the State disagrees that the Board’s ruling in LBP-99-34 is dispositive of several of the other contentions. *See* [State] Response to the Impact of the Board’s Ruling in LBP-99-34 (Utah Contention B) as the Ruling May Relate to Other Admitted Contentions (Sept. 7, 1999) at 3-6. Specifically, the State declares that the ITP-related portions of emergency plan and decommissioning contentions Utah R and Utah S should

be retained because there is nothing in the record to show that the public will be adequately protected from PFS activities at the ITP or that PFS has adequate assets to decommission the ITP. Additionally, the State asserts that because contentions Utah T and Utah W involve issues that arise under the National Environmental Policy Act of 1969 (NEPA), their ITP-related aspects are not subject to dismissal as a consequence of LBP-99-34.

**B. Reconsideration/Clarification of Ruling on Contention
Utah K/Confederated Tribes B**

The other summary disposition-related matter concerns a September 3, 1999 PFS filing seeking reconsideration and/or clarification of two aspects of the Board's LBP-99-35 ruling on summary disposition for contention Utah K/Confederated Tribes B. In this submission, PFS asks that the Board reconsider its determination denying summary disposition in PFS's favor regarding the firing of military ordnance during training exercises on DPG. *See* [PFS] Motion for Reconsideration and Clarification of Ruling on [PFS] Motion for Summary Disposition of Contention Utah K/Confederated Tribes B (Sept. 3, 1999) at 2-4. In addition, PFS suggests that the Board should clarify its ruling concerning the UTTR to address specifically the question of the hazard posed by aircraft using air-delivered ordnance other than cruise missiles on targets located within the United States Department of Defense (DOD) land boundaries of the UTTR. *See id.* at 4-6.

In its September 9, 1999 response to the PFS reconsideration/clarification motion, the Staff indicates its support for the relief requested in the PFS motion based on its position, as expressed in the Staff's response to the PFS dispositive motion regarding this contention, that PFS was entitled to summary disposition on these aspects of contention Utah K/Confederated Tribes B. *See* NRC Staff's Response to "[PFS] Motion for Reconsideration and Clarification of Ruling on the [PFS] Motion for Summary Disposition of Contention Utah K/Confederated Tribes B" (Sept. 9, 1999) at 2. The State, on the other hand, asserts that the PFS reconsideration/clarification request should be denied. Regarding the matter of training exercise ordnance at DPG, the State maintains that its showing there were ground-based weapons used at DPG that exceeded the ranges described by PFS was sufficient to establish a material factual dispute because it showed PFS had not accounted for all training munitions used. *See* [State] Response to [PFS] Motion for Reconsideration and Clarification of Ruling on the [PFS] Motion for Summary Disposition of Contention Utah K/Confederated Tribes B (Sept. 13, 1999) at 3-6. Further, regarding the PFS request for clarification of the issue of UTTR air-delivered ordnance other than cruise missiles, the State declares that PFS is now trying to rewrite its motion to draw a distinction between air munitions fired over DOD property and air munitions fired over non-DOD land, including the Skull Valley site of the PFS ISFSI. The State declares this is inappropriate and, in any

event, does not exempt these concerns from consideration as part of the cumulative aircraft hazards analysis that is still outstanding. *See id.* at 6-8.

II. ANALYSIS

A. Impact of Ruling on Contention Utah B

Of the eight contentions identified by the Board in LBP-99-34 as potentially impacted by that ruling, there apparently is no dispute among PFS, the State, and the Staff that our determination there is dispositive of all or part of three contentions — Utah K/Confederated Tribes B, Utah N, and Utah O as they relate to the ITP. As a consequence, we dismiss the admitted portion of contention Utah K/Confederated Tribes B regarding the alleged impact on the Rowley Junction ITP of accidents involving (1) materials or activities at or emanating from (a) the Tekoi Rocket Engine Test facility (Tekoi), (b) Salt Lake City International Airport (SLCIA), (c) DPG, including Michael Army Airfield (MAAF), (e) Hill Air Force Base (HAFB), and (f) the UTTR; or (2) hazardous materials that pass through Rowley Junction from the Laidlaw APTUS hazardous waste incinerator, the Envirocare low-level radioactive and mixed waste landfill, or Laidlaw's Clive Hazardous Waste Facility and Grassy Mountain hazardous waste landfill. In addition, we dismiss the admitted portion of contention Utah O regarding groundwater impacts relative to the Rowley Junction ITP as well as contention Utah N, which raised only an ITP-related concern, in its entirety.

Relative to the four contentions that the State asserts are not subject to dismissal, the State's argument regarding contentions Utah R and Utah S is simply a variation on its already rejected assertion that the existing program for regulating spent fuel transportation under 10 C.F.R. Part 71 and the complementary DOT regime is inadequate. *See* LBP-99-34, 50 NRC at 176-77. Accordingly, based on our ruling regarding contention Utah B, we dismiss the aspects of these contentions that relate to the ITP.

Relative to contentions Utah T and Utah W, however, as the State points out, these raise issues that go to the NEPA responsibilities that are part of the agency licensing process relative to the PFS ISFSI. Although, as we pointed out in ruling on contention Utah B, the ITP is not subject to the Part 72 licensing process, like the more recently proposed Low Junction rail spur, it is proposed to be constructed as part of the PFS application for that license and, as such, is subject to consideration under NEPA. *See* LBP-99-3, 49 NRC 40, 53 (1999). Accordingly, we take no action regarding these two contentions as they relate to the ITP.

Finally, with respect to contention Utah U, we agree with the parties that this issue was mislabeled as including ITP-related concerns. Accordingly, our ruling in LBP-99-34 had no impact on the substance of contention Utah U as it was admitted by the Board.

We include as Appendix A to this Decision a revised version of contentions Utah K/Confederated Tribes B, Utah O, and Utah R that reflect our ruling here and, in the case of Utah K/Confederated Tribes B, our ruling in LBP-99-35 as well.

**B. Reconsideration/Clarification of Ruling on Contention
Utah K/Confederated Tribes B**

1. Reconsideration Standard

Although a party may not base a reconsideration motion on new information or a new thesis, *see* LBP-98-10, 47 NRC at 292 (citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997)), a request to reexamine existing record material that may have been misunderstood or overlooked, or to clarify a matter that the party believes is unclear, is appropriate, *see id.* at 296-97 (citing *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 687 (1983)).

2. DPG Training Exercise Ordinance

In its August 30 ruling on the PFS motion relative to the issue of DPG training exercise ordinance, the Board noted that “[t]he State’s sworn assertions regarding the current training use of a missile at the Wig Mountain site that can reach the PFS facility establishes a litigable material factual dispute.” LBP-99-35, 50 NRC at 194. Nonetheless, according to PFS, the State’s showing that DPG-fired ordinance is capable of reaching the PFS facility is not sufficient given the PFS assertion that “most” of the training weapons do not have the range to reach the PFS facility and its showing that training weapons are fired away from the facility and only under stringent safety precautions. What this PFS claim fails fully to account for, however, is the nature of the ordinance involved. As is apparent from other portions of this contention, it has not been established that missiles necessarily travel in the direction they are fired. Accordingly, given the uncontroverted showings about the range of missiles utilized in training exercises and the distance between their firing area and the location of the PFS facility, we reaffirm our ruling regarding this portion of the contention and deny the PFS motion for reconsideration.¹

¹ Under the circumstances, we are unwilling to parse this portion of the contention based on the type of ordinance used, but would note that ordinance that is not capable of reaching the PFS facility from DPG training exercise areas, either because of its range or the manner in which it is delivered, seemingly provides little or no substantive support for the State’s claims.

3. *UTTR-Related Non-Cruise Missile Overflights*

In ruling on the matter of UTTR-related overflights not involving cruise missiles, the Board indicated that “[r]elative to the issue of noncrash consequences of overflights, it is apparent this question hinges on whether UTTR aircraft will transit Skull Valley, a factual matter that the Staff has asked be deferred as part of its military aircraft crash analysis.” LBP-99-35, 50 NRC at 198 (citation omitted). By way of further explanation, we note that this Board ruling was an acknowledgment of the Staff’s “no position” determination regarding the various PFS undisputed material factual statements that described the parameters of UTTR-related overflights in Skull Valley and the State’s assertion that military aircraft “overflying” Skull Valley present a significant risk to the PFS facility as contrasted with the PFS asserted undisputed material factual statement that military aircraft on UTTR “run-ins for weapon delivery do not cross Skull Valley.” *Compare* NRC Staff’s Response to [PFS] Motion for Partial Summary Disposition of Utah Contention K and Confederated Tribes Contention B (July 22, 1999) at 4 n.3 and [State] Opposition to [PFS] Motion for Partial Summary Disposition of Utah Contention K and Confederated Tribes Contention B (July 22, 1999) at 8-9 with [PFS] Motion for Partial Summary Disposition of Utah Contention K and Confederated Tribes Contention B (June 7, 1999), Statement of Material Facts at 8. By the Board’s reckoning, these assertions by the parties leave open the possibility that there will be UTTR-related military overflights that, by reason of their proximity to the PFS facility, can have some direct impact on the PFS facility.

Of course, as the Board noted, PFS will be permitted to supplement its summary disposition motion as it concerns Skull Valley overflights once the Staff has taken its position on such flights. *See* LBP-99-35, 50 NRC at 198.

III. CONCLUSION

The Board’s prior ruling in LBP-99-34 granting summary disposition in favor of PFS on contention Utah B concerning the proposed Rowley Junction ITP mandates the dismissal of contention Utah N and the ITP-related portions of contentions Utah K/Confederated Tribes B, Utah O, Utah R, and Utah S. Further, the Board denies the PFS request for reconsideration of its LBP-99-35 ruling denying summary disposition for contention Utah K/Confederated Tribes B on the matter of DPG training exercise ordnance and clarifies its ruling regarding UTTR-related non-cruise missile overflights as set forth above.

For the foregoing reasons, it is, this 20th day of September 1999, ORDERED that:

1. Contention Utah N and the ITP-related portions of contentions Utah K/Confederated Tribes B, Utah O, Utah R, and Utah S are *dismissed*.

2. The PFS September 3, 1999 motion for reconsideration and/or clarification of LBP-99-35 is *denied* as to the portion of contention Utah K/Confederated Tribe B regarding DPG training exercise ordnance and is *clarified* on the matter of UTTR air-delivered ordnance as is discussed in section II.B.3 above.

THE ATOMIC SAFETY AND
LICENSING BOARD²

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 20, 1999

²Copies 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.

APPENDIX A

REVISED CONTENTIONS

1. UTAH K/CONFEDERATED TRIBES B — Inadequate Consideration of Credible Accidents

CONTENTION: The Applicant has inadequately considered credible accidents caused by external events and facilities affecting the ISFSI, including the cumulative effects of military testing facilities in the vicinity.

2. UTAH O — Hydrology

CONTENTION: The Applicant has failed to adequately assess the health, safety and environmental effects from the construction, operation, and decommissioning of the ISFSI, as required by 10 C.F.R. §§ 72.24(d), 72.100(b) and 72.108, with respect to the following contaminant sources, pathways, and impacts:

1. Contaminant pathways from the applicant's sewer/wastewater system; routine facility operations; and construction activities.
2. Contaminant pathways from the applicant's retention pond in that:
 - a. The ER fails to discuss potential for overflow and therefore fails to comply with 10 C.F.R. Part 51.
 - b. ER is deficient because it contains no information concerning effluent characteristics and environmental impacts associated with seepage from the pond in violation of 10 C.F.R. § 51.45(b) and § 72.126(c) & (d).
3. Potential for groundwater and surface water contamination.
4. The effects of applicant's water usage on other well users and on the aquifer.
5. Impact of potential groundwater contamination on downgradient hydrological resources.

3. UTAH R — Emergency Plan

CONTENTION: The Applicant has not provided reasonable assurance that the public health and safety will be adequately protected in the event of an emergency at the storage site in that PFS has not adequately described the means and equipment for mitigation of accidents because it does not have adequate support capability to fight fires onsite.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of

Docket No. 50-213

CONNECTICUT YANKEE ATOMIC
POWER COMPANY
(Haddam Neck Plant)

September 9, 1999

By a petition dated March 11, 1997, Rosemary Bassilakis, on behalf of the Citizens Awareness Network and the Nuclear Information Resource Service (Petitioners), requested that the U.S. Nuclear Regulatory Commission (NRC or Commission) (1) commence enforcement action against the Connecticut Yankee Atomic Power Company (CY) by means of a large civil penalty to ensure compliance with safety-based radiological control routines; (2) modify CY's license for the Haddam Neck Plant, pursuant to 10 C.F.R. § 2.202, to prohibit any decommissioning activity, which would include decontamination or dismantling, until CY manages to conduct routine maintenance at the facility without the occurrence of any contamination events for at least 6 months; and (3) place the Haddam Neck Plant on the NRC Watch List.

The Director of the Office of Nuclear Reactor Regulation issued a Partial Director's Decision on September 3, 1997, and a Completion of a Previously Issued Partial Director's Decision on September 9, 1999. The Partial Director's Decision denied Petitioners' second and third requests noted above. The completion of the Director's Decision granted the first request above in part, in that the NRC commenced enforcement action against the Licensee, and denied it in part, in that the NRC concluded that no civil penalty would be assessed against the Licensee.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206
(Completion of Previously Issued Partial Director's Decision)

I. INTRODUCTION

On March 11, 1997, Rosemary Bassilakis submitted a petition pursuant to Title 10 of the *Code of Federal Regulations*, § 2.206 (10 C.F.R. § 2.206), on behalf of the Citizens Awareness Network and the Nuclear Information Resource Service (Petitioners) requesting that the NRC (1) commence enforcement action against the Connecticut Yankee Atomic Power Company (CY, or Licensee) by means of a large civil penalty to ensure compliance with safety-based radiological control routines; (2) modify CY's license for the Haddam Neck Plant, pursuant to 10 C.F.R. § 2.202, to prohibit any decommissioning activity, which would include decontamination or dismantling, until CY manages to conduct routine maintenance at the facility without any occurrence of contamination events for at least 6 months; and (3) place the Haddam Neck Plant on the NRC Watch List. The Petitioners stated that their particular concern was the inability of CY management to maintain proper radiological controls at the Haddam Neck Plant.

In support of their requests, the Petitioners noted three radiological deficiencies that occurred at the Haddam Neck Plant. The first occurred on various dates in 1996 and involved inadequate calibration of various detectors in the radiation monitoring system. The second occurred in November 1996 and involved two individuals who received an unplanned exposure while working in the fuel transfer canal. The third occurred in February 1997 and involved the release of contaminated video equipment to a nonlicensed vendor.

The Petitioners' requests and the NRC's evaluation and conclusions are discussed in the sections below. The background section provides relevant information on NRC oversight and enforcement activities at Haddam Neck and briefly describes the Partial Director's Decision sent to the Petitioners in September 1997. The discussion section describes the enforcement actions taken in response to the events noted in the petition and explains the purpose of assessing civil penalties. The conclusion section presents the Director's Decision.

II. BACKGROUND

CY submitted certifications of permanent cessation of operations at the Haddam Neck Plant and permanent defueling of its reactor on December 5, 1996. Prior to that date, the NRC identified a number of significant regulatory concerns regarding the Licensee's performance. The NRC took a number of actions over the next few months to bring the Licensee into compliance with applicable regulations. The actions most relevant to the Petitioners' requests and concern were the issuance of Confirmatory Action Letter (CAL) No. 1-97-007 on March 4, 1997, a civil

penalty of \$650,000 on May 12, 1997, and a supplement to the CAL on November 17, 1997. The CAL was issued in response to weakness in managing and controlling radiological work at the Haddam Neck Plant. The three events noted in the petition were identified in the CAL as examples of radiological weaknesses. The civil penalty did not specifically address radiological issues, but did identify programmatic weaknesses that required prompt and comprehensive correction of violations. In the November 17, 1997 supplement to the CAL, the NRC found, after conducting several inspections, that CY had achieved radiation program improvement in several areas. Subsequently, on May 5, 1998, the NRC found that the Licensee had completed all the commitments listed in the CAL and that it could safely conduct significant radiological work.

The NRC issued a Partial Director's Decision (DD-97-19, 46 NRC 91) on September 3, 1997, in response to the three requests contained in the petition. The first request, to take enforcement action and impose a large civil penalty on the Licensee, was deferred until inspections and investigations could be completed and enforcement actions evaluated for the deficiencies noted. The Partial Director's Decision did not consider the May 12, 1997 civil penalty to be a response to the Petitioners' first request because radiological issues were not included in the notice of violation. The second request, to impose a 6-month moratorium on decommissioning activities, was denied because (1) on the basis of experience, there was no reason to expect that 10 C.F.R. Part 20 dose limits would be exceeded at the Haddam Neck Plant, (2) a senior resident inspector was on site to monitor and inspect the Licensee's performance on a day-to-day basis, and (3) a confirmatory action letter was issued to CY on March 4, 1997, to document the Licensee's commitments to improve its radiation protection program. The third request, to place Haddam Neck on the NRC Watch List, was denied on the basis that the inspection program in place at the plant was sufficient to monitor Licensee performance at a permanently shutdown and defueled reactor.

III. DISCUSSION OF PETITIONERS' DEFERRED REQUEST

The three radiological deficiencies noted by the Petitioners have been inspected and investigated. In considering the Petitioners' deferred request, the NRC determined whether violations of NRC requirements had occurred. Identified violations were then dispositioned in accordance with the NRC's Enforcement Policy.

The first deficiency, involving inadequate calibration of various detectors in the radiation monitoring system (RMS) during 1996, was identified as a violation by NRC letter dated January 15, 1998. The NRC determined that a violation of regulatory requirements occurred in that the Licensee failed to establish and implement RMS test procedures as required by Technical Specification 6.8.

Such programmatic deficiency on the part of a licensee would normally be subject to escalated enforcement action. However, the NRC determined that the provisions of section VII.B.2, "Violations Identified During Extended Shutdowns or Work Stoppages," of the Enforcement Policy applied, and it decided to exercise enforcement discretion in this case. Therefore, the NRC did not issue a notice of violation or propose a civil penalty. This decision was made on the basis that (1) the events leading to the violation took place before the permanent shutdown of the plant in December 1996 and (2) the Licensee had already been issued a \$650,000 civil penalty on May 12, 1997, for technical and safety review program inadequacies that led to the inadequate RMS calibrations and other violations.

The second deficiency, involving an unplanned radiation exposure, resulted in a notice of violation issued to the Licensee on April 5, 1999. The NRC identified several violations that occurred during the event and classified them in the aggregate as a Severity Level III violation. In accordance with the Enforcement Policy, a civil penalty is normally considered for a Severity Level III violation or problem. However, the NRC determined that section VII.B.6 of the Enforcement Policy, "Violations Involving Special Circumstances," applied to the event, and it exercised enforcement discretion to not impose a civil penalty in this case. Therefore, the NRC did not propose a civil penalty because (1) the violations occurred before CY's decision, in December 1996, to permanently shut down and defuel the Haddam Neck facility and (2) CY had already been issued a \$650,000 civil penalty on May 12, 1997, to address poor performance that existed before the decision was made to permanently shut down the reactor.

The third deficiency, involving release of contaminated equipment, was the subject of two enforcement actions, both issued on May 12, 1999. The first enforcement action was issued as a notice of violation to an individual on the basis that he attempted to conceal the release of contaminated video equipment to a nonlicensed vendor. The NRC classified the violation as Severity Level III. The NRC considered issuing an order to the individual to prevent him from engaging in licensed activities at NRC-licensed facilities. The NRC did not issue an order to the individual because, among other factors, he was not in a management or supervisory position at the facility and was no longer employed in, or seeking work in, the nuclear industry. The second enforcement action was issued to CY for failure to perform an adequate survey, with subsequent loss of control of material. However, CY promptly achieved compliance by retrieving the contaminated equipment. CY then investigated the cause of the release and took corrective actions to prevent recurrence. Therefore, because the release of the contaminated material and the resultant loss of control of material were not willful on the part of the Licensee, the NRC classified the violation as Severity Level IV and treated it as a noncited violation in accordance with Appendix C of the Enforcement Policy. Violations treated in this manner are not subject to a civil penalty.

As discussed above, although the events noted by the Petitioners constituted violations of the NRC's regulations and certain enforcement actions were taken, a civil penalty was not assessed on the Licensee. This result partially fulfills the Petitioners' request to take enforcement action against the Licensee. With regard to imposing a civil penalty, the NRC Enforcement Policy (NUREG-1600, Rev. 1, § VI.B) states, "Civil penalties are used to encourage prompt identification and prompt and comprehensive correction of violations, to emphasize compliance in a manner that deters future violations, and to serve to focus Licensees' attention on violations of significant regulatory concern." Based on numerous inspections, the NRC has concluded that the Licensee has taken timely and comprehensive corrective actions to improve its radiation protection program, has achieved adequate compliance in the time after the events occurred, and has focused its attention on maintaining adequate radiological controls. An additional civil penalty is unnecessary in light of the improvement in the Licensee's performance. Consequently, consistent with the Enforcement Policy, discretion was exercised to not impose civil penalties for these violations. Therefore, the request to take enforcement action by means of a large civil penalty on CY in response to the events noted in the petition is granted in part, in that enforcement action has been taken against the Licensee, and denied in part, since no civil penalty was imposed.

IV. DECISION

For the reasons stated above and in Director's Decision DD-97-19, issued September 3, 1997, the petition is granted in part and denied in part. The Decision and the documents cited in the Decision are available for public inspection and copying in the Commission's Public Document Room, the Gelman Building, 2210 L Street NW, Washington, DC.

In accordance with 10 C.F.R. § 2.206(c), a copy of the Decision will be filed with the Secretary of the Commission for the Commission's review. As provided by this regulation, the Decision will constitute the final action of the Commission 25 days after issuance, unless the Commission, on its own motion, institutes a 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 9th day of September 1999.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of

Docket Nos. 50-336
50-423
(License Nos. NPF-65,
NPF-49)

NORTHEAST NUCLEAR ENERGY
COMPANY
(Millstone Nuclear Power Station,
Units 2 and 3)

September 28, 1999

On April 14, 1999, Mr. Scott Cullen filed two separate but related petitions pursuant to 10 C.F.R. § 2.206 on behalf of Standing for Truth About Radiation, the Nuclear Information Resource Service, New York State Senator Ken LaValle, and New York State Assembly members Fred Thiele and Patricia Acampora (the Petitioners).

The first petition requested that (1) the NRC immediately suspend Northeast Nuclear Energy Company's licenses to operate the Millstone Nuclear Power Station until there are reasonable assurances that adequate protective measures for Fishers Island, New York, can and will be taken in the event of a radiological emergency at Millstone; (2) the operating licenses be suspended until such time as "a range of protective actions have been developed for the plume exposure pathway EPZ [emergency planning zone] for emergency workers and the public"; and (3) these matters be the subject of a public hearing, with full opportunity for public comment. The basis for the Petitioners' requests is that the Petitioners contend that the site is in violation of 10 C.F.R. §§ 50.54(q) and 50.47 with regard to emergency planning requirements because Fishers Island, New York, which is located within the 10-mile EPZ for Millstone, has no functional emergency plan.

The second petition requested that the NRC institute a proceeding, pursuant to 10 C.F.R. § 2.202, to suspend the operating licenses for the Millstone Nuclear

Power Station until the facility is in full compliance with the law. Specifically, the Petitioners maintain that there are no mechanisms by which the conditional factors of demography, topography, land characteristics, access routes, and jurisdictional boundaries can be evaluated, resulting in a complete lack of reasonable assurances that adequate protective measures can and will be taken on Long Island in the event of an accident at Millstone. The Petitioners contend that this constitutes a violation of sections 50.54(q) and 50.47.

In the May 14, 1999 acknowledgment letter to the petitions, the NRC provided the basis for denial of the Petitioners' request to immediately suspend the operating licenses for Millstone, and the basis for denying the request for an informal hearing. This information was again provided in this Final Director's Decision. The only issue remaining to be addressed related to the protective measures for Fishers Island, New York. The NRC requested the support of the Federal Emergency Management Agency with the assessment of the protective measures for Fishers Island.

On the basis of the NRC Staff's review of the Federal Emergency Management Agency evaluation of offsite emergency plans, and the findings of the NRC regarding onsite emergency preparedness for the Millstone Nuclear Power Station, the Petitioners' request to suspend the operating licenses until such time as "a range of protective actions have been developed for the plume exposure pathway EPZ for emergency workers and the public" for Fishers Island was denied.

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

I. INTRODUCTION

By letter dated April 14, 1999, Mr. Scott Cullen, on behalf of Standing for Truth About Radiation (STAR), the Nuclear Information Resource Service (NIRS), New York State Senator Ken LaValle, and New York State Assembly members Fred Thiele and Patricia Acampora (the Petitioners) submitted two separate but related petitions pursuant to Title 10 of the *Code of Federal Regulations*, § 2.206 (10 C.F.R. § 2.206). In the first petition, the Petitioners requested that (1) the U.S. Nuclear Regulatory Commission (NRC) immediately suspend Northeast Nuclear Energy Company's (NNECO's) licenses to operate the Millstone Nuclear Power Station until there are reasonable assurances that adequate protective measures for Fishers Island, New York, can and will be taken in the event of a radiological emergency at Millstone; (2) the operating licenses be suspended until such time as "a range of protective actions have been developed for the plume exposure pathway EPZ [emergency planning zone] for emergency workers and the public"; and (3) these matters be the subject of a public hearing, with full opportunity for public

comment. The basis for the Petitioners' requests is that the Millstone Nuclear Power Station is not in full compliance with the law. Specifically, the Petitioners contend that the site is in violation of 10 C.F.R. §§ 50.54(q) and 50.47 with regard to emergency planning requirements because Fishers Island, New York, which is located within the 10-mile EPZ for Millstone, has no functional emergency plan.

In the second petition, the Petitioners requested that the NRC institute a proceeding, pursuant to 10 C.F.R. § 2.202, to suspend the operating licenses for the Millstone Nuclear Power Station until the facility is in full compliance with the law. Specifically, the Petitioners maintain that there are no mechanisms by which the conditional factors of demography, topography, land characteristics, access routes, and jurisdictional boundaries can be evaluated, resulting in a complete lack of reasonable assurances that adequate protective measures can and will be taken on Long Island in the event of an accident at Millstone. The Petitioners contend that this constitutes a violation of sections 50.54(q) and 50.47.

The NRC informed the Petitioners in a letter to Mr. Cullen dated May 14, 1999, that their request for immediate suspension of the operating licenses for the Millstone Nuclear Power Station, Units 2 and 3 (First Petition, Request 1), was denied. The denial was based on the NRC's finding about the current state of emergency preparedness at Millstone. The federal agency with lead responsibility for assessing the emergency preparedness of state and local governments within the EPZs surrounding nuclear power plants is the Federal Emergency Management Agency (FEMA). FEMA's responsibilities are defined in NRC's and FEMA's regulations (10 C.F.R. Part 50 and 44 C.F.R. Part 350, respectively) and in a memorandum of understanding between the two agencies (58 Fed. Reg. 47,996 (Sept. 14, 1993)). The NRC evaluates onsite emergency planning and reviews FEMA's evaluation of offsite emergency preparedness for the purpose of making findings on the overall state of emergency preparedness. As stated in 10 C.F.R. § 50.54(s)(3):

The NRC will base its finding on a review of the FEMA findings and determinations as to whether State and local emergency plans are adequate and capable of being implemented, and on the NRC assessment as to whether the licensee's emergency plans are adequate and capable of being implemented.

FEMA has reviewed the State of Connecticut's emergency plan. FEMA has also reviewed the plans for the nine local communities within the Millstone plume exposure pathway EPZ, including Fishers Island, New York. Further, FEMA has evaluated several exercises of these plans. FEMA originally provided its findings and determinations to the NRC in October 1984 on the adequacy of offsite planning for Millstone, in accordance with 44 C.F.R. Part 350 of its regulations. Following the latest exercise, FEMA confirmed that the offsite radiological emergency response plans and procedures for the State of Connecticut

and the affected local jurisdictions, including Fishers Island, New York, specific to the Millstone Nuclear Power Station, can be implemented and are adequate to provide reasonable assurance that appropriate measures can be taken to protect the health and safety of the public in the event of a radiological emergency at Millstone. This was documented in a December 29, 1997 letter from FEMA to the NRC. The letter forwarded FEMA's report for the August 21, 1997 full-participation plume pathway and the October 8-10, 1997 ingestion pathway exercises of the offsite radiological emergency plans for Millstone. Regarding Fishers Island, no deficiencies or areas requiring corrective action were identified in the exercises.

Further, the NRC has found that the Licensee's emergency plans are an adequate basis for an acceptable state of onsite emergency preparedness in accordance with the requirements of 10 C.F.R. § 50.47(b) and Appendix E to 10 C.F.R. Part 50 as documented in the NRC's letter to the Licensee dated June 4, 1998.

In the first petition, the Petitioners raised a concern about the evacuation of Fishers Island residents to New London, Connecticut, a direction closer to the site and to an area that may have already been affected by a radiological emergency at Millstone. Fishers Island is located about 7 1/2 miles east/southeast of Millstone. The New London port is located about 5 miles northeast of Millstone. As stated in the NRC's May 14, 1999 letter to the Petitioners, the NRC found no *prima facie* evidence in the information submitted by the Petitioners that the protective action of evacuation to New London will not provide an adequate level of protection to the public. Further, the Petitioners did not submit any other information that would raise an immediate concern with the NRC's finding regarding the adequacy of emergency planning for Millstone. On the basis of a review of FEMA's findings and determinations on the adequacy of offsite emergency preparedness and on the NRC's assessment of the adequacy of onsite emergency preparedness, the NRC determined that (1) there was reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency and (2) there was insufficient evidence to grant the Petitioners' request to immediately suspend the operating licenses for Millstone Nuclear Power Station, Units 2 and 3.

The Petitioners were also told in the May 14, 1999 acknowledgment letter that their request for an informal public hearing (First Petition, Request 3) was denied. The denial was based on the NRC's finding about the current state of emergency preparedness at Millstone. Specifically, the denial was based on the NRC Staff's determination that the information provided in the petitions did not identify deficiencies in offsite emergency preparedness that would preclude the implementation of adequate protective measures for the public in the event of a radiological emergency at Millstone. Further, the NRC Staff determined that the issues did not rise to the level of significance that justified conducting an informal hearing on the petitions.

The Petitioners were told, however, that their petition did raise the potential that enhancements could be made to emergency planning for Millstone that could improve the protection of public health and safety. Further, the May 14, 1999 acknowledgment letter indicated that the areas identified in the petitions related to the adequacy of evacuation and protective measures planning for Fishers Island would be evaluated within a reasonable time. Since FEMA has the primary responsibility for evaluating the emergency preparedness of state and local governments, the NRC requested the assistance of FEMA, in a letter dated June 4, 1999, in evaluating the potential enhancements identified in the petitions.

The NRC also told the Petitioners in the May 14, 1999 letter that the request in their second petition to initiate a proceeding, pursuant to 10 C.F.R. § 2.202, to suspend the operating licenses for Millstone did not satisfy the criteria for consideration as a section 2.206 petition. Specifically, the NRC concluded that the referenced factors regarding the determination of the 10-mile plume exposure pathway EPZ were properly taken into account. The NRC determined that the second petition request did not contain sufficient information to warrant further action by the NRC to require that the 10-mile EPZ be expanded to include the eastern end of Long Island, New York.

II. DISCUSSION

The Commission's regulations in 10 C.F.R. § 50.54(q) and (s) governing emergency planning for operating nuclear power plants require the submittal and implementation of licensee (onsite) and state and local government (offsite) emergency plans that conform to the emergency planning standards in 10 C.F.R. § 50.47(b) and the requirements in Appendix E to 10 C.F.R. Part 50. FEMA is the federal agency with the lead responsibility for evaluating offsite radiological emergency response plans and preparedness.

Fishers Island, New York, is located within the 10-mile plume exposure pathway EPZ for the Millstone Nuclear Power Station and is included in the State of Connecticut's Radiological Emergency Response Plan for Millstone. This plan has been approved by FEMA in accordance with 44 C.F.R. Part 350 of its regulations. The Connecticut emergency plan (Revision 1, dated July 1997) contains the following information regarding Fishers Island:

Fishers Island, located about 7 1/2 miles east/southeast of Millstone, is primarily residential with a small year-round population of about 300 persons and a summer population estimated to be approximately 3000 persons. On the Independence Day (July 4) weekend, this transient population may peak at approximately 5000 persons. Fishers Island is a Hamlet, [a] political subdivision of the Town of Southold, New York, which is in Suffolk County on Long Island.

Because of the logistics associated with the island's location, there has been a long-standing operational agreement between officials of Fishers Island, the Town of Southold, Suffolk

County, the State of New York, and the State of Connecticut. Under this agreement, the lead responsibility for assessing the initial radiological impact of an incident on Fishers Island, and providing assistance with the implementation of any protective actions, belongs to the State of Connecticut. Officials of Fishers Island and the Town of Southold, however, have the authority to implement public protective actions.

The State of New York coordinates the assessment process and resulting protective action recommendations made by the State of Connecticut for Fishers Island, maintains communications with Suffolk County, and provides support to Suffolk County and Fishers Island, as necessary. The Town of Southold, as well as Suffolk County, provides back-up communication capabilities and support, and would lend additional emergency services to the island, if requested.

The State of Connecticut offers resource support to Fishers Island in the area of protective actions. Emergency Alerting System (EAS) announcements for Fishers Island will be made over the Connecticut Emergency Alerting System. The island relies on the nearby Town of Groton, Connecticut, for back-up activation of the public alerting system. Fishers Island residents are designated to go to the host community of Windham[, Connecticut].

On September 2, 1999, FEMA responded to the NRC's request for assistance, including a report prepared by the Regional Assistance Committee (RAC) Chair of FEMA Region I, the FEMA region in which Millstone is located. The RAC Chair is the leading staff technical person with radiological emergency preparedness responsibilities in each FEMA region. FEMA stated that they performed a thorough review and assessment of the emergency evacuation planning for Fishers Island, New York. FEMA noted that Fishers Island is included in the State of Connecticut's approved radiological emergency response plan and that the Fishers Island plan has been tested several times since it was approved, most recently during the August 1997 exercise of the State of Connecticut's plans for Millstone.

FEMA's report stated that in the unlikely event of a nuclear incident at Millstone, the residents of Fishers Island would be directed to shelter in place or to evacuate. If directed to evacuate, the Fishers Island evacuees would be moved by ferry to New London, then transported by bus to the host community in Windham, Connecticut. New London was chosen as the ferry's destination because the Fishers Island Ferry District, which would provide service in the event of an evacuation, is based on Fishers Island and normal everyday traffic travels between New London and Fishers Island. Should an incident at Millstone require the evacuation of Fishers Island, residents would evacuate the island using the regular ferry service, and would be transported to the host community in Windham, Connecticut, by way of the Port of New London. Should New London not be available to the Fisher Island evacuees (i.e., if radiological conditions have resulted in its evacuation), then the Connecticut Emergency Management Director and the State of New York Emergency Management Office would jointly choose to direct the ferry to another port, such as Stonington, Connecticut, located northeast of Fishers Island and east of New London. FEMA's report noted that the protective actions of sheltering and

evacuation are the same two protective actions that appear in all other Connecticut emergency response plans.

With regard to the Petitioners' specific concern about the August 8, 1997 Millstone exercise, FEMA's report stated that the postulated condition of the Millstone plant during the exercise was such that the Governor of Connecticut ordered residents in all EPZ communities to evacuate. With the postulated conditions, the protective action for Fishers Island was to evacuate through New London. The Petitioners were concerned that this was a direction that brought the evacuees closer to the plant. FEMA indicated that the Fishers Island evacuees would not have been at risk during the conduct of this protective action because the plume, had it been real, was traveling in a westerly direction, away from New London, according to the exercise scenario. As such, during this scenario, the evacuees could pass through New London without the threat of exposure to radiation. As discussed previously, should New London not be available (for example, the plume has passed over New London and adverse radiological conditions exist), the ferry would be directed to another port.

FEMA's report indicates that certain enhancements to the Fishers Island plan are being considered and its September 2, 1999 report summarized some of the ongoing emergency planning activities. In July 1998, Northeast Utilities (the Licensee), the Connecticut Office of Emergency Management, and FEMA Regions I and II participated in a demonstration of a ferry run from Fishers Island to Stonington, Connecticut. The objective of this demonstration was to determine the feasibility of having the ferry pick up people from Fishers Island and take them to Stonington, which is located about 7 miles northeast of Fishers Island. The plan and preparations for adding the Port of Stonington, Connecticut, as a receiving port for Fishers Island evacuees is projected to be completed by the end of 1999. Windham, Connecticut, will continue to be used as the host community for Fishers Island residents. FEMA will review changes to the offsite emergency plans to ensure that the plans are adequate and capable of being implemented.

FEMA's report stated that an agreement exists between the Connecticut Office of Emergency Management and the Fishers Island Ferry District for the exclusive use of their ferries in the event of an incident at Millstone. Further, FEMA indicated that negotiations are in progress for an agreement between the Connecticut Office of Emergency Management and the Cross Sound Ferry Company for the use of five of their ferries in the event of an emergency at Millstone.

FEMA's report also noted that in September 1998, a meeting between Connecticut and New York State emergency management agencies was held in Hartford, Connecticut, to discuss offsite emergency preparedness for Millstone and the degree of coordination and communications. At the meeting were representatives of the Connecticut Office of Emergency Management, the New York State Emergency Management Office, Northeast Utilities, FEMA, and the NRC. Further, in October 1998, the Connecticut Office of Emergency Management and the New

York State Emergency Management Office met to discuss other ways of improving communications in making appropriate protective action decisions for Fishers Island.

On June 22, 1999, the Connecticut Office of Emergency Management held its quarterly emergency management director's meeting on Fishers Island to discuss emergency response issues concerning Millstone. The emergency management directors from the Millstone EPZ communities attended this meeting, including those from Fishers Island, the Town of Southold, New London, Stonington, and the host community of Windham, Connecticut. This meeting gave these key emergency management directors an opportunity to communicate directly.

In its September 2, 1999 letter to the NRC, FEMA stated that on the basis of its assessment of emergency planning for the Millstone Nuclear Power Station, there is continued reasonable assurance that adequate protective measures can be taken to protect the public health and safety in the event of a radiological emergency at Millstone.

III. CONCLUSION

After reviewing FEMA's findings and determinations on the adequacy of offsite emergency preparedness and the NRC's assessment of onsite emergency preparedness, the NRC has determined that there is continued reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at Millstone. In addition, based on FEMA's findings on the adequacy of emergency preparedness for Fishers Island, the NRC concludes that the Fishers Island emergency plan is adequate and there is reasonable assurance that it can be implemented. Further, the NRC recognizes that potential enhancements are being implemented to improve the protection of the health and safety of the population on Fishers Island. As a result of these findings by FEMA and the NRC, the NRC has determined that the Petitioners' request to suspend the operating licenses for Millstone Units 2 and 3 until a range of protective actions are developed for the 10-mile EPZ (First Petition, Request 2) is denied.

A copy of this Final Director's Decision will be placed in the Commission's Public Document Room, the Gelman Building, 2120 L Street NW, Washington, DC, and at the local public document rooms located at the Learning Resources Center, Three Rivers Community-Technical College, 574 New London Turnpike, Norwich, Connecticut, and at the Waterford Library, 49 Rope Ferry Road, Waterford, Connecticut.

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

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 28th day of September 1999.

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. 30-16055-ML
30-16055-ML-REN

ADVANCED MEDICAL SYSTEMS, INC.
(Cleveland, Ohio)

October 20, 1999

The Commission denies a petition for review of a Presiding Officer's decision that terminated a proceeding following the NRC's transfer of regulatory jurisdiction to an agreement state.

MEMORANDUM AND ORDER

The City of Cleveland has petitioned the Commission for review of a Presiding Officer's decision, LBP-99-28, 50 NRC 67 (1999), which (1) suspended these license renewal proceedings pending the NRC's transfer of regulatory jurisdiction over byproduct material to Ohio, and (2) terminated these proceedings once the NRC-Ohio transfer agreement took effect. The City of Cleveland seeks to have the NRC retain jurisdiction over both pending related proceedings (one on the renewal application and one on the NRC Staff's denial of that application) or, if not both proceedings, then at least over the license denial proceeding, involving AMS's alleged lack of the requisite financial assurance for decommissioning. Both the NRC Staff and Advanced Medical Systems (AMS) oppose the petition for review.

The Commission denies the petition for review. It does not meet the standards set out in 10 C.F.R. § 2.786(b)(4). *See* 10 C.F.R. § 2.1253. The NRC-Ohio Agreement became effective on August 31, 1999. The NRC initiated the present

adjudicatory proceedings to consider discrete issues related to license renewal. Contrary to the City of Cleveland's apparent view, an adjudication on license renewal is an inappropriate forum to contest the scope of the recently entered agreement between the NRC and the State of Ohio. Petition for review denied.

IT IS SO ORDERED.

For the Commission¹

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of October 1999.

¹Commissioner 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 Matters of

Docket Nos. 50-443-LT-2
50-423-LT
(consolidated)

NORTH ATLANTIC ENERGY
SERVICE CORPORATION
(Seabrook Station, Unit 1)

NORTHEAST NUCLEAR ENERGY
COMPANY
(Millstone Nuclear Power Station,
Unit 3)

October 21, 1999

In this Order, the Commission finds that Petitioners have both demonstrated standing and proffered two admissible issues (regarding foreign ownership and financial qualifications). The Commission also sets the case for oral hearing, establishes a procedural schedule for the proceeding and makes various other procedural rulings.

RULES OF PRACTICE: STANDING

To show standing in a license transfer proceeding, a petitioner must

- (1) identify an interest in the proceeding by
 - (a) alleging a concrete and particularized injury (actual or threatened) that
 - (b) is fairly traceable to, and may be affected by, the challenged action (the grant of an application), and

- (c) is likely to be redressed by a favorable decision, and
 - (d) lies arguably within the “zone of interests” protected by the governing statute(s).
- (2) specify the facts pertaining to that interest.

See 10 C.F.R. § 2.1308; *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 214-15 (1999). See generally *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 194-96 (1998).

RULES OF PRACTICE: STANDING

Petitioners in this proceeding advance an injury claim similar to that which the Commission accepted when admitting an intervenor in another license transfer proceeding involving Seabrook, i.e., “the potential that NRC approval of the license transfer would put in place a financially incapable co-licensee, thereby increasing . . . [their] risk of being forced to assume a greater-than-expected share of Seabrook’s [and Millstone-3’s] operating and decommissioning costs.” *Seabrook*, CLI-99-6, 49 NRC at 215. Indeed, as the Commission stated in *Seabrook*, “it is hard to conceive of an entity more entitled to claim standing in a license transfer case than a co-licensee whose costs may rise . . . as a result of an ill-funded license transfer. This kind of situation justifies standing based on ‘real-world consequences that conceivably could harm Petitioners and entitle them to a hearing.’” CLI-99-6, 49 NRC at 215, quoting *Yankee Nuclear*, CLI-98-21, 48 NRC at 205.

RULES OF PRACTICE: STANDING

“The [Atomic Energy Act (‘AEA’)] protects not only human health and safety from radiologically caused injury, but also the owners’ property interests in their facility.” *Seabrook*, CLI-99-6, 49 NRC at 216 (and cited authority). “Persons or entities who own (or co-own) an NRC-licensed facility plainly have an AEA-protected interest in licensing proceedings involving their facility.” *Id.*

RULES OF PRACTICE: STANDING

Grievances on foreign ownership are general in nature — the foreign ownership restriction protects national, not individual, interests — and therefore do not provide a separate basis for standing. See generally *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 333 (1983).

RULES OF PRACTICE: ADMISSIBILITY

To show admissible issues, a petitioner must

- (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those issues fall within the scope of the proceeding,
- (3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant regarding the issues, and
- (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. § 2.1308; *Seabrook*, CLI-99-6, 49 NRC at 215. *See generally Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348-49 (1998).

LICENSE TRANSFER: FINANCIAL QUALIFICATIONS

FINANCIAL QUALIFICATIONS

Section 50.80(b) of 10 C.F.R. requires a license transfer application to include information necessary to establish such financial qualifications as are required under 10 C.F.R. § 50.33. Under these regulations, an applicant may either establish that it is an “electric utility” (as defined in 10 C.F.R. § 50.2) that is not subject to a case-specific financial qualifications review under section 50.33(f) or it must submit information demonstrating that it either possesses or has reasonable assurance of obtaining the funds necessary to cover the estimated operating costs for the license period.

LICENSE TRANSFER: FINANCIAL QUALIFICATIONS

FINANCIAL QUALIFICATIONS

DEFINITIONS: ELECTRIC UTILITY

Section 50.2 of 10 C.F.R. states that the term “electric utility” encompasses investor-owned utilities, including generation or distribution utilities, as well as a number of other types of enterprises, including cooperatives and government-owned utilities. This portion of the regulatory definition is not a separate definition at all but is intended merely to indicate that investor-owned utilities (like other types of utilities listed in the rule, such as a cooperative) *may* fall within the category of “electric utility” — not that they *always* fall within that category. Any other result would allow an investor-owned utility to qualify for the “electric utility” exception specified in 10 C.F.R. § 50.33, even if it were to lack the rate-based

financial assurance on which the Commission relied in creating that exception. Such a result would contravene the Commission's intent in creating the exception. The Commission has always understood the definition to call for some form of rate-based reimbursement.

LICENSE TRANSFER: FINANCIAL QUALIFICATIONS

FINANCIAL QUALIFICATIONS

The Commission needs to know the answers to the following questions before determining whether the Applicant NEP satisfies our "financial qualifications" requirements (unless of course NEP chooses instead to attempt a demonstration that it satisfies the financial qualifications requirements that 10 C.F.R. § 50.33(f) imposes on entities other than electric utilities): (i) what portion of NEP's business would lie within this "principal" focus, (ii) what portion of its costs would be recovered — "either directly or indirectly" (10 C.F.R. § 50.2) — through FERC-approved rates, through rates approved by state public utility commissions ("PUCs"), and through spot market sales (the rates for which are, strictly speaking, set by neither the FERC nor the PUCs), and (iii) why interstate sales pursuant to the FERC's rate caps (which differ from the more typical cost-of-service based rates allowed by state PUCs) would provide *any* guarantee of cost recovery.

MEMORANDUM AND ORDER

This proceeding involves a March 15, 1999 application by the New England Power Company ("NEP" or "Licensee") seeking authorization of an indirect transfer of its 9.9% ownership interest in the Seabrook Station, Unit 1, and its 12.2% ownership interest in the Millstone Station, Unit 3 ("Millstone-3").¹ More specifically, pursuant to section 184 of the Atomic Energy Act of 1954 ("AEA")² and 10 C.F.R. § 50.80 of our regulations,³ NEP seeks the Commission's approval of indirect license transfers to the extent that they are effected by a transaction under which NEES (of which NEP is a wholly owned subsidiary) would itself become

¹ A pending merger of the New England Electric System ("NEES," the parent company of NEP) with Eastern Utilities Associates, which owns Montaup Electric Company, would result in an increase in NEES's ownership interest in Millstone-3 to approximately 16.2% and its ownership interest in Seabrook to approximately 12.9%. The Commission has granted Montaup's request for approval of the sale of its share of Seabrook to Little Bay Power Corporation. However, the sale itself has not yet been finalized.

² 42 U.S.C. § 2234 (precluding the transfer of any NRC license unless the Commission both finds the transfer in accordance with the AEA and gives its consent in writing).

³ This regulation reiterates the requirements of AEA § 184, sets forth the filing requirements for a license transfer application, and establishes the following test for approval of such an application: (1) the proposed transferee is qualified to hold the license and (2) the transfer is otherwise consistent with law, regulations, and Commission orders.

a wholly owned subsidiary of The National Grid Group plc (“National Grid”), a company incorporated under the laws of England and Wales. NEP would remain a co-licensee of both plants with the company’s rights and obligations unaltered, and with the only change being in its upstream ownership. Consequently, NEP does not seek to amend the Seabrook and Millstone-3 licenses. Three other co-owners have filed petitions to intervene and requests for hearing, seeking to oppose NEP’s application. For the reasons set forth below, we find that Petitioners have both demonstrated standing and proffered two admissible issues (regarding foreign ownership and financial qualifications). We also set the case for oral hearing, set the schedule for the proceeding, defer appointing a presiding officer, and make various other procedural rulings.

I. BACKGROUND

The Commission published the notice of NEP’s application on June 30, 1999, in the *Federal Register*. 64 Fed. Reg. 35,190-92. In response, Connecticut Light and Power Company and Western Massachusetts Electric Company filed a joint petition to intervene and request for hearing of the Millstone-3 portion of the application. Motion of the Connecticut Light and Power Company and Western Massachusetts Electric Company for Leave to Intervene and Petition for a Hearing, dated July 20, 1999. Similarly, Connecticut Light and Power Company and North Atlantic Energy Corporation (“NAEC”) filed a virtually identical petition and request for hearing concerning the Seabrook portion of the application.⁴ Motion of the Connecticut Light and Power Company and North Atlantic Energy Corporation for Leave to Intervene and Petition for a Hearing, dated July 20, 1999. The three petitioners are all among the subsidiaries of Northeast Utilities (“NU”) which, either directly or through its various subsidiaries, holds approximately a 68% interest in Millstone-3 and a 40% interest in Seabrook. In addition, NU is the licensed operator of Millstone-3, and NAEC is the licensed operator of Seabrook.

Petitioners assert that the application provided neither sufficient assurances that NEP will remain financially qualified nor a sufficient mechanism (called a “negotiation action plan”) to prevent foreign control of NEP’s licenses. On July 27, 1999, NEP filed a response to both petitions. Response of New England Power Company to Requests for Hearing (“Response”). The three petitioners filed a Reply Brief on August 3d, to which NEP filed a further Response Brief on August 10th. The Staff, as is its usual practice in license transfer cases, has chosen not to participate as a party in the adjudicatory portion of the proceeding.

⁴ Because of the identical nature of the issues and the close similarity of the pleadings, we consolidate these two proceedings.

II. DISCUSSION

To intervene as of right in any Commission licensing proceeding, a petitioner must demonstrate that its “interest may be affected by the proceeding,” i.e., it must demonstrate “standing.” See AEA § 189a, 42 U.S.C. § 2239(a). The Commission’s rules also require that a petition to intervene raise at least one admissible contention or issue. The standards for meeting these two requirements in license transfer cases come both from our Subpart M procedural regulations and from judicial cases on standing (to which we look for guidance).

A. Standing

To show standing in a license transfer proceeding, a petitioner must

- (1) identify an interest in the proceeding by
 - (a) alleging a concrete and particularized injury (actual or threatened) that
 - (b) is fairly traceable to, and may be affected by, the challenged action (the grant of an application), and
 - (c) is likely to be redressed by a favorable decision, and
 - (d) lies arguably within the “zone of interests” protected by the governing statute(s).
- (2) specify the facts pertaining to that interest.

See 10 C.F.R. § 2.1308; *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 214-15 (1999). See generally *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 194-96 (1998).

Petitioners are all co-owners of one or both of the facilities at issue and claim that they may suffer financial harm and harm to their property if NEP no longer provides sufficient financial resources to support safe and efficient operation of the plants, or if NEP’s foreign owner takes action not in the best interest of the plants. See *Petitions to Intervene* at 3-4. NEP does not contest Petitioners’ standing, other than to suggest, briefly, that their two arguments “present . . . a strained interpretation of NEP’s Application and do not appear to serve any interests of petitioners.” Response at 3.

Petitioners advance an injury claim similar to that which we accepted when admitting NEP itself as an intervenor in another license transfer proceeding involving Seabrook, i.e., “the potential that NRC approval of the license transfer would put in place a financially incapable co-licensee, thereby increasing . . . [their] risk of being forced to assume a greater-than-expected share of Seabrook’s [and Millstone-3’s] operating and decommissioning costs.” *Seabrook*, CLI-99-6, 49 NRC at 215. Indeed, as we stated in *Seabrook*, “it is hard to conceive of an entity more entitled to claim standing in a license transfer case than a co-licensee

whose costs may rise . . . as a result of an ill-funded license transfer. This kind of situation justifies standing based on ‘real-world consequences that conceivably could harm petitioners and entitle them to a hearing.’” CLI-99-6, 49 NRC at 215, quoting *Yankee Nuclear*, CLI-98-21, 48 NRC at 205.

Petitioners’ allegations regarding increased risk, although not supported by affidavits or other documents (as in the earlier *Seabrook* proceeding), are nonetheless sufficiently concrete and particularized to pass muster for standing. The threatened injury is fairly traceable to the challenged action (here, the grant of the license transfer application) because the alleged increase in risk associated with National Grid indirectly taking over NEP’s interest in the two plants could not occur without Commission approval of the application. Similarly, the threatened injury can be redressed by a favorable decision because the Commission’s denial of the application would prevent the indirect transfer of interest. *Cf. Seabrook*, CLI-99-6, 49 NRC at 215.

Likewise, as in the earlier *Seabrook* proceeding, the risk to Petitioners’ interest in the Seabrook and Millstone-3 plants lies within the “zone of interests” protected by the AEA. “The AEA protects not only human health and safety from radiologically caused injury, but also the owners’ property interests in their facility.” *Seabrook*, CLI-99-6, 49 NRC at 216 (and cited authority). “Persons or entities who own (or co-own) an NRC-licensed facility plainly have an AEA-protected interest in licensing proceedings involving their facility.”⁵

B. Admissibility of Issues

To show admissible issues, a petitioner must

- (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those issues fall within the scope of the proceeding,
- (3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant regarding the issues, and
- (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner’s position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. § 2.1308; *Seabrook*, CLI-99-6, 49 NRC at 215. *See generally Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348-49 (1998).

⁵*Id.* As an independent matter, we would observe that grievances on foreign ownership are general in nature — the foreign ownership restriction protects national, not individual, interests — and therefore do not provide a separate basis for standing. *See generally Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 333 (1983) (generalized grievances to the public provide no basis for individual standing). However, because we are granting standing based on the Petitioners’ obvious economic interests, we need not reach the question whether Petitioners’ foreign ownership grievances provide any basis for standing.

1. Financial Qualifications

Section 50.80(b) of 10 C.F.R. requires a license transfer application to include information necessary to establish such financial qualifications as are required under 10 C.F.R. § 50.33. Under these regulations, an applicant may either establish that it is an “electric utility” (as defined in 10 C.F.R. § 50.2) that is not subject to a case-specific financial qualifications review under section 50.33(f) or it must submit information demonstrating that it either possesses or has reasonable assurance of obtaining the funds necessary to cover the estimated operating costs for the license period. Petitioners criticize the application for failing to provide information sufficient to show either that it will remain an “electric utility” within the meaning of 10 C.F.R. §§ 50.2 and 50.33(f) or that it satisfies the criteria for non-utilities.

NEP responds by assuring the Commission that NEP will continue to be an “electric utility” under either of what it considers to be the two definitions of that term found in 10 C.F.R. § 50.2. That regulation states that the term “[e]lectric utility means any entity that generates or distributes electricity and which recovers the cost of this electricity, either directly or indirectly, through rates established by the entity itself or by a separate regulatory authority.” The regulation goes on to say that the term “electric utility” encompasses investor-owned utilities, including generation or distribution utilities, as well as a number of other types of enterprises, including cooperatives and government-owned utilities. NEP states in its application that its “primary role has been to generate and transmit electricity” for sale to its affiliates, which are electric distribution companies. Application at 8. NEP further states that, in the future, its “principal focus” will be the wholesale transmission of electricity (*id.*), in which its rates will be regulated by the Federal Energy Regulatory Commission (“FERC”). NEP asserts, therefore, that it falls within what it describes as the first of the two regulatory definitions of “electric utility.” Response at 5. It also claims to be an investor-owned utility, and therefore to fall as well within what it considers the second definition. In either case, according to NEP, its financial qualifications requirements are deemed under 10 C.F.R. § 50.33(f) to have been met.⁶ *Id.* at 5-6.

We reject at the outset NEP’s claim that its status as an investor-owned utility brings it within a so-called “second definition” of the term “electric utility.” This portion of the regulatory definition is not a separate definition at all but is intended merely to indicate that investor-owned utilities (like other types of utilities listed in the rule, such as a cooperative) *may* fall within the category of “electric utility” — not that they *always* fall within that category. Any other result would allow an investor-owned utility to qualify for the “electric utility” exception specified in section 50.33, even if it were to lack the rate-based financial assurance on which

⁶NEP has not attempted in its application to satisfy the financial qualifications requirements for a non-electric utility.

the Commission relied in creating that exception. Such a result would contravene the Commission's intent in creating the exception. The Commission has always understood the definition to call for some form of rate-based reimbursement.

NEP's other argument is that NEP fits within the "first definition" — the portion providing that an "electric utility" is an entity that generates or distributes electricity and that recovers the cost of this electricity, either directly or indirectly, through rates established by a separate regulatory authority (here, according to the Licensee, the FERC). Response at 4-5. Although NEP may well be correct in this respect, all it has offered us thus far are conclusions, not facts. We thus find the financial qualifications issue to meet the regulatory standards of admissibility in a Subpart M proceeding, and we set this issue for hearing.

We find particularly confusing NEP's claim that its "principal role will be the transmission of electricity (e.g., wholesale 'distribution') and those of its affiliate retail distribution, with NEP's rates regulated by the FERC." Response at 5. NEP's application and July 27th Response Brief provide insufficient information regarding what portion of NEP's business would lie within this "principal" focus, or what portion of its costs would be recovered — "either directly or indirectly" (10 C.F.R. § 50.2) — through FERC-approved rates, through rates approved by state public utility commissions ("PUCs"), and through spot market sales (the rates for which are, strictly speaking, set by neither the FERC nor the PUCs).⁷ Nor does NEP explain why interstate sales pursuant to the FERC's rate caps (which differ from the more typical cost-of-service based rates allowed by state PUCs) would provide *any* guarantee of cost recovery. We need to know the answers to these questions before determining whether NEP satisfies our "financial qualifications" requirements, unless of course NEP chooses instead to attempt a demonstration that it satisfies the financial qualifications requirements that 10 C.F.R. § 50.33(f) imposes on entities other than electric utilities.

2. *Foreign Ownership*

Petitioners offer three lines of argument challenging the proposed transaction's compliance with the foreign ownership standards set forth in both the AEA and the Commission's own regulations and guidance. First, Petitioners assert that the small percentage of NEP's ownership interest in the two facilities does not exempt it from the provisions of section 103d of AEA, 42 U.S.C. § 2133(d), prohibiting the Commission from issuing a license to any corporation owned, controlled, or dominated by a foreign entity.⁸ Petitioners stress that section 103d prohibits

⁷ See NUREG-1577, "Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance," at 9 n.8 (March 1999, Rev. 1).

⁸ This statutory section also prohibits the Commission from issuing a license to any foreign individual or entity if such issuance would "be inimical to the common defense and security or the health and safety of the public."

foreign control over “licensees,” not plants, and point out that here National Grid, indirectly, will own 100% of NEP. *See* Reply of the Connecticut Light and Power Company, Western Massachusetts Electric Company, and North Atlantic Energy Corporation to Response of New England Power Company to Requests for Hearing, dated Aug. 3, 1999, at 9-10.

Second, Petitioners assert that NEP’s negation action plan for the two facilities fails to satisfy the requirements of 10 C.F.R. § 50.38⁹ and the provisions of the Commission’s Interim “Standard Review Plan on Foreign Ownership, Control or Domination,” 64 Fed. Reg. 10,166, 10,169 (Mar. 2, 1999) (“Interim SRP”). According to Petitioners, the SRP requires all negation action plans to provide positive measures to ensure that the foreign ownership interest is denied control or domination over licensee decisions. *See* Petitions for Review at 8.

Third, Petitioners challenge the provisions of the application in which NEP reserves to its full Board of Directors the authority to cast NEP’s vote on the following three decisions: (1) whether to close or seek relicensing of either facility; (2) whether to sell, lease, or otherwise dispose of the facilities; and (3) how to comply with lawful court or agency orders. Petitioners believe that, because of the potential for foreign domination of NEP’s Board, the authority to make the above-mentioned three decisions should instead rest with NEP’s Nuclear Committee — an entity created by the negation action plan and given broad authority over nuclear matters. *See* Petitions to Intervene at 10-11.

We believe that Petitioners’ foreign ownership arguments meet the regulatory standards for raising an admissible issue in a Subpart M proceeding. We also note that, subsequent to Petitioners’ most recent filing in this proceeding, the Commission on August 31, 1999, approved a Final SRP. *See* 64 Fed. Reg. 52,355 (Sept. 28, 1999); Staff Requirements Memorandum Regarding SECY-99-165 (Aug. 31, 1999). In the final SRP, we indicated that (albeit in a different permutation), where a parent of an applicant is being acquired by a foreign entity and the applicant owns less than a 100% interest in a facility, we would consider the following factors in determining whether such an indirect license transfer is consistent with the statutory and regulatory requirements:

- (1) the extent of the proposed partial ownership of the reactor;
- (2) whether the applicant is seeking authority to operate the reactor;
- (3) whether the applicant has interlocking directors or officers and details concerning the relevant companies;
- (4) whether the applicant would

⁹This section provides, in relevant part, that “any corporation . . . owned, controlled, or dominated by a . . . foreign corporation . . . shall be ineligible to apply for and obtain a license.” Petitioners also cite 10 C.F.R. § 50.40(c) which provides that the Commission will be guided by the following considerations (among others) when determining whether to grant a license under Part 50 of the Commission’s regulations: whether “[t]he issuance of a license to the applicant will . . . be inimical to the common defense and security or to the health and safety of the public.” However, Petitioners do not offer “common defense and security” arguments to support their challenge to NEP’s application.

have any access to restricted data; and (5) details concerning ownership of the foreign parent company.

Memorandum at 5. As the parties have had no opportunity to address the extent to which the application addresses these newly stated factors, we direct them to provide us their views on the matter in their submissions during the Subpart M proceeding.

C. Procedural Matters

1. NEP's Response

We strike, as unauthorized by either Commission regulation or order, the "Response of New England Power Company," dated August 10, 1999.

2. Designation of Issues

As noted above, the hearing will be limited to the following two issues: financial qualifications and foreign ownership. The parties should be prepared to offer prefiled testimony and exhibits containing *specific* facts and/or expert opinions in support of their positions on these issues. Because the three Petitioners are taking identical positions on the two admitted issues, we require them to file consolidated pleadings, testimony, and exhibits. All parties should keep their pleadings as short, and as focused on the admitted issues, as possible. Redundant, duplicative, unreliable, or irrelevant submissions are not acceptable and will be stricken from the record. *See* 10 C.F.R. § 2.1320(a)(9). We also direct Petitioners to state explicitly what remedial measures (if any) they believe the Commission should take in addition to those specified in their intervention petitions.

3. Designation of Presiding Officer

The Commission will issue a notice designating a presiding officer after the Commission ascertains whether the parties will request a written hearing or, in any event, before any oral hearing is scheduled to begin. Until the appointment of a presiding officer, the parties should file any written submissions with the Secretary.

4. Notices of Appearance

To the extent that they have not already done so, each counsel or representative for each party shall, not later than 4:30 p.m. on November 1, 1999 (i.e., the first workday following the 10th day after the issuance date of this Order), file a notice of appearance complying with the requirements of 10 C.F.R. § 2.713(b). In each

such notice of appearance, the counsel or representative should specify his or her business address, telephone number, facsimile number, and Internet e-mail address. Any counsel or representative who has already entered an appearance but who has not provided one or more of these pieces of information should do so not later than the date and time specified above.

5. *Filing Schedule*

If the parties unanimously agree to a non-oral hearing, they must file their joint motion for a “hearing consisting of written comments” no later than 4:30 p.m. on November 5, 1999, (i.e., 15 days of the date of this Order). 10 C.F.R. § 2.1308(d)(2). No later than that same date, the parties should complete any necessary negotiations on a protective order regarding any proprietary data and should submit a joint protective order to the presiding officer. If the parties are unsuccessful in negotiating such an order, they should inform the Office of the Secretary by that date and indicate any areas in which they were able to agree. We also direct the parties to confer promptly on whether this proceeding might be settled amicably without conducting a hearing.

All initial written statements of position and written direct testimony (with any supporting affidavits) must be filed no later than 4:30 p.m. on November 22, 1999 (the first working day following the 30th day after the issuance date of this Order). 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(a), 2.1322(a)(1). All written responses to direct testimony, all rebuttal testimony (with any supporting affidavits), and all proposed questions directed to written direct testimony must be filed no later than 4:30 p.m. on December 13, 1999 (the first working day following the 20th day after the submission of written statements of position and written testimony). 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(b), 2.1322(a)(2)-(3). All proposed questions directed to written rebuttal testimony must be submitted to the Presiding Officer no later than 4:30 p.m. on December 22, 1999.¹⁰

Assuming that the parties do not unanimously seek a hearing consisting of written comments, the Presiding Officer will hold an oral hearing beginning at 9:30 a.m. on January 12, 2000, at the Commission’s headquarters in Rockville, MD. The subject of the hearing will be the issue designated above. Any party submitting prefiled direct testimony should make the sponsor of that testimony available for questioning at the hearing. Each party will be allotted 30 minutes for its oral argument on the issues specified above and 15 minutes for any rebuttal argument it wishes to offer. *See* 10 C.F.R. §§ 2.1309, 2.1310(a), 2.1322(b). The

¹⁰ *See* 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(b), 2.1322(a)(4). The 7-day filing period specified in the last two of these regulations is, pursuant to 10 C.F.R. § 2.1314(b), extended by 2 days, because the period includes a Saturday and Sunday.

hearing will not include opportunities for cross-examination, although the Presiding Officer may question any witness proffered by any party.

Finally, all written post-hearing statements of position must be filed no later than 4:30 p.m. on February 1, 2000 (20 days after the oral hearing). *See* 10 C.F.R. § 2.1322(c). The Commission expects to issue a final memorandum and order on the merits of this proceeding by April 3, 2000 (62 days after the record closes).

The Commission is confident that the proceeding can be resolved fairly and efficiently within the prescribed time schedule.

6. *Participants in the Hearing and the Proceeding; Service List*

The four participants at the hearing will be the New England Power Company, Connecticut Light and Power Company, Western Massachusetts Electric Company, and North Atlantic Energy Corporation. The recipients on the service list will be:

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Pursuant to 10 C.F.R. § 2.1316(b)-(c), the NRC Staff has indicated that it will not be a party to this proceeding. Notwithstanding this fact, the Staff is still expected both to offer into evidence its Safety Evaluation Report (“SER”) and to proffer one or more sponsoring witnesses for that document. *See* 10 C.F.R. § 2.1316(b).

7. Service Requirements

Although the parties have a number of options under 10 C.F.R. § 2.1313(c) by which to serve their filings, the preferred method of filing in this proceeding is electronic (i.e., by e-mail). Electronic copies should be in WordPerfect format (in a version at least as recent as 6.0). Service will be considered timely if sent not later than 4:30 p.m. of the due date under our Subpart M rules. However, the Commission’s electronic filing system is not yet operational and will probably not be until January 1, 2000. Therefore, until the system is operational, we will also require the parties to submit a single signed hard copy of any such filings¹¹ to the Rulemakings and Adjudications Branch, Office of the Secretary, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Room O-16-H-15, Rockville, MD 20852. As noted above, the fax number for this office is (301) 415-1101 and the e-mail address is secy@nrc.gov.

¹¹ We draw the attention to the difference between this requirement and that of Subpart G, which provides that any service whether by fax or e-mail on the Secretary should be followed with an original and two conforming copies of the service by regular mail in accordance with 10 C.F.R. § 2.708(d).

III. CONCLUSION

1. The two above-captioned proceedings are consolidated.
 2. Petitioners are granted standing.
 3. Petitioners' two issues are admitted.
 4. Those issues are set for hearing.
 5. NEP's August 10, 1999 Response Brief is stricken from the record.
- IT IS SO ORDERED.

For the Commission¹²

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of October 1999.

¹²Commissioner 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

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Peter B. Bloch, Presiding Officer
Thomas D. Murphy, Special Assistant
Robin Brett, Special Assistant

In the Matter of

Docket No. 40-8968-ML
(ASLBP No. 95-706-01-ML)
(Re: Leach Mining
and Milling License)

HYDRO RESOURCES, INC.
(2929 Coors Road, Suite 101,
Albuquerque, NM 87120)

October 19, 1999

Phase 1 of this case determined that Intervenors had not shown the overall license to mine for uranium to be invalid and which also determined that the license was valid for one of the four properties covered in the license. This decision grants Licensee's motion for abeyance on the ground that no further mining activity is planned for an indefinite time and that there is therefore no current controversy concerning further mining activity in any site other than the one already licensed. The Presiding Officer dismissed Intervenors' arguments that granting the motion for abeyance would violate the Administrative Procedure Act (APA), the Atomic Energy Act of 1954 (AEA), and the National Environmental Policy Act of 1969 (NEPA).

RULES OF PRACTICE: ATOMIC ENERGY ACT

A proceeding in which there is no current controversy may be held in abeyance for an indefinite time without violation of the Atomic Energy Act.

RULES OF PRACTICE: ADMINISTRATIVE PROCEDURE ACT

A proceeding in which there is no current controversy may be held in abeyance for an indefinite time without violation of the Administrative Procedure Act.

RULES OF PRACTICE: NATIONAL ENVIRONMENTAL POLICY ACT

Once an agency has issued a Final Environmental Impact Statement and has given Intervenor an opportunity to show that a mining license is invalid, it is permissible to hold a proceeding in abeyance without violating the National Environmental Policy Act. It is not necessary that Intervenor be afforded an opportunity to contest other specific portions of the license when there is no current controversy because Licensee does not plan any further mining activities at the present time.

RULES OF PRACTICE: DELAY IN PROCEEDINGS

Intervenor who are in a procedural posture where they can complete the proceeding prior to the commencement of a licensed activity should not lose that advantage if the proceeding is held in abeyance by motion of the Licensee. The Presiding Officer should ensure that they have enough advance warning of an intention to undertake licensed activities that Intervenor will not lose the opportunity to complete the hearing before licensed activities resume.

MEMORANDUM AND ORDER

(Motion to Hold in Abeyance)

Hydro Resources, Inc. (HRI), filed a "Motion to Place Hearing in Abeyance" (Abeyance Motion) on September 14, 1999. In its Abeyance Motion, at 2, HRI stated that "HRI does not intend to go forward with operations at Section 17, Crownpoint, and/or Unit 1 at this time." It requested that the hearing be held in abeyance, subject to an order that HRI must serve 1-month advance notice that it intends to mine at one of the listed sites. This Abeyance Motion is opposed by Marilyn Morris and Grace Sam in a response of September 7, 1999, and by Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") in a response of September 28, 1999 (Intervenor's Response). The Staff of the Commission filed its response, supporting the Abeyance Motion, on October 5, 1999.

Although Intervenor, opposing HRI's Abeyance Motion, make lengthy arguments, I consider my decision to grant the request for an abeyance to be straight-

forward. This proceeding has been “bifurcated,” meaning that the issues that have been litigated in the already-concluded phase of the proceeding were limited to (1) any issue that challenged the validity of the license issued to HRI, (2) any aspect of the license concerning operations on Church Rock Section 8, and (3) any aspect of the license concerning transportation or treatment of materials extracted from Section 8. *See* “Memorandum and Order” (Scheduling and Partial Grant of Motion for Bifurcation) (September 22, 1998, at 2-3) (unpublished) (September 22 Order).

It is important to stress that Intervenor has had the chance to raise *any* matter “that challenged the validity of the license issued to HRI.” They had this right in addition to the right to challenge the license for Church Rock Section 8. The conclusion of Phase I before the Presiding Officer marks the failure of Intervenor to demonstrate *either* the invalidity of the overall license or the invalidity of the license for Church Rock Section 8.

Now HRI approaches the Presiding Officer with a request to hold the case in abeyance. Its reason for the request is that it has no present intention to mine anywhere but Section 8. *See* LBP-99-30, 49 NRC 77, 112 (1999). For that reason, it thinks it would be a waste to litigate the validity of its license with respect to these other sections. I agree.

The principal argument of Intervenor, opposing the Abeyance Motion, is that the National Environmental Policy Act of 1969 (NEPA) “unequivocally requires that the environmental impacts of a proposed project be considered in their entirety, rather than evaluated piecemeal.” SRIC and Endaum Response at 9. However, the FEIS in this case considers the entire project. *See* NUREG-1508 (the Final Environmental Impact Statement (FEIS) for HRI’s proposed ISL mining project). In addition, Intervenor was free to challenge the validity of the entire license if there were any grounds to do that. Thus, the overall effects of this project have already been twice considered by the NRC.

ENDAUM’s and SRIC’s argument that the deferral of further adjudication (which would result if the Abeyance Motion is granted) would violate the hearing requirements of the Atomic Energy Act of 1954 (AEA) relies on *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1132 (1985), and AEA § 189(a)(1) (42 U.S.C. § 2239(a)(1)(A)). *See* SRIC’s Response Brief at 6. ENDAUM’s and SRIC’s reliance on *Union of Concerned Scientists* is misplaced, since there is in this case no denial of a right to a hearing on any material issue. Under the Order I am entering today, hearings are likely to be completed on all material issues before any licensed mining occurs. *See Union of Concerned Scientists*, 735 F.2d at 1438-39.¹

¹ *See Concerned Scientists*, 735 F.2d at 1444 n.12. *See also* LBP-98-5, 47 NRC 119, 134-35 (1998) (noting that materials licenses may be issued prior to any hearing in Subpart L proceedings, and ruling that ENDAUM and SRIC had failed to establish their right under the AEA to a preclicensing hearing).

I am not persuaded by the due process and Administrative Procedure Act arguments of the Intervenor. In *City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983), the court held that an informal hearing was adequate to fulfill the agency's obligation to hold a hearing under the AEA § 189(a). The rule applied by that court was a rule of reason. Likewise, in this case, Intervenor argues that the NRC must complete its hearing promptly in order to comply with hearing requirements. I do not consider it unreasonable to defer current litigation of matters not in current controversy.

To be sure, Intervenor has invested substantial legal and technical resources in this proceeding. Whatever is already in the record will, of course, be available for them to reference should the proceeding be resumed. In addition, they may choose to preserve testimony of their witnesses in affidavit form. These affidavits, if they choose to use them, will be available for use in future proceedings.

In addition, if the Abeyance Motion were denied, Intervenor would have an opportunity to litigate their concerns before Licensee commenced field operations under its license. It is my conclusion that Intervenor should not lose that procedural advantage because the motion for abeyance is being granted. Accordingly, I must determine how much advance notice must be given by HRI before it mines additional sections. In light of determinations that have already been made, I consider 8 months advance notice of mining activity to be adequate to permit full litigation of any issues that may be raised prior to expanding the mining operation into a new site.

ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 19th day of October 1999, ORDERED that:

1. The relief requested by Hydro Resources, Inc., in its "Motion to Place Hearing in Abeyance" (Abeyance Motion) on September 14, 1999, is *granted*, as modified in the subsequent paragraphs of this Order. Accordingly, this proceeding shall be held in abeyance but for matters covered below.
2. Hydro Resources, Inc., must file notice in this proceeding 8 months prior to the inception of mining on any property covered in its license and not yet subject to a hearing.
3. This is an interlocutory decision of the Presiding Officer.

Peter B. Bloch, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Charles Bechhoefer, Presiding Officer
Dr. Linda W. Little, Special Assistant

In the Matter of

Docket No. 030-34610-ML
(ASLBP No. 99-768-02-ML)
(M22/GID-3 Automatic
Chemical Agent
Detector/Alarm)

DEPARTMENT OF THE ARMY
(Aberdeen Proving Ground, Maryland)

October 21, 1999

In a proceeding in which the NRC Staff denied the exempt-status registration and licensing request of the Department of the Army for an Automatic Chemical Agent Detector/Alarm (ACADA), the Presiding Officer conducted a prehearing conference in which he proposed an alternative approach for the Army to follow (with which the Staff agreed) and suspended the proceeding pending efforts by the Army and Staff to implement this approach. The Presiding Officer provided for periodic reports on the progress made in this approach. The Presiding Officer also approved the method of participation in the proceeding by the manufacturer of the ACADA device (whose intervention had previously been denied for lack of standing), should its testimony be necessary.

PREHEARING CONFERENCE ORDER

This proceeding involves the request of the Department of the Army for a license authorizing an initial transfer for exempt usage, pursuant to 10 C.F.R. §§ 30.20(a) and 32.26, for a model M22/GID-3 Automatic Chemical Agent Detector/Alarm

(ACADA). The NRC Staff has denied the requested exempt-usage license. In my Memorandum and Order (Request for Hearing), dated July 12, 1999 (unpublished), I granted Army's request for a hearing.¹

Following distribution of the hearing file by the NRC Staff on September 13, 1999 (*see* 10 C.F.R. § 2.1231(a)), I conducted a prehearing conference on October 13, 1999, at the Atomic Safety and Licensing Board Hearing Room in Rockville, Maryland, to determine precise issues for litigation, to set schedules for various filings, to determine the method of participation, if any, of Graseby Dynamics, Ltd. (manufacturer of the ACADA, whose request for intervention I had denied for lack of standing²), and to hear parties' responses to requests for information that I raised in my Memorandum dated September 23, 1999 (unpublished).

Appearing at the conference, in addition to myself, as Presiding Officer, and Judge Linda W. Little, my Special Assistant, were Philip B. Hunter, Esq., on behalf of the Army, and Mitzi Young, Esq., on behalf of the NRC Staff. Several technical experts on behalf of each of the parties were also present to answer questions.

1. With respect to the manner in which Graseby may participate, both Graseby and the Army have advised that Graseby will not seek intervention but wishes to participate as a resource for the Army, to present evidence in support of the Army's case. The Staff had no objection to this approach. The Presiding Officer *approved* Graseby's participation in this manner, should testimony in this proceeding be necessary (Tr. 64-65).

2. With respect to defining issues in controversy, the Presiding Officer in his September 23, 1999 Memorandum had inquired into an apparent difference in position taken by the Staff on July 2, 1998, and May 17, 1999, concerning the permissible requirements for exempt-usage licenses. The regulatory provisions in question, 10 C.F.R. §§ 30.20(a) and 32.26, permit issuance of a license that authorizes initial distribution for usage exempt from regulatory controls by any person of products containing defined quantities of byproduct material and designed to "protect life or property from fires and airborne hazards." The term "product" is not specifically defined by NRC regulations or regulatory guides, although the Staff referred to the Statement of Considerations for 10 C.F.R. § 32.26, as well as to several writings that tended to support the current Staff definition. According to the Staff, the exempt usage applies only to "consumer products," such as smoke detectors, designed for "off-the-shelf" use (Tr. 8-9). The Staff further takes the position that a "product" cannot be separated into component parts, such as the ACADA's radioactive module and the housing containing such module (Tr. 28-29, 51). Because the ACADA's module and its housing must be separated for maintenance and servicing, the Staff takes the position both that the ACADA cannot be

¹ At the same time, I issued a Notice of Hearing. 64 Fed. Reg. 38,484 (July 16, 1999).

² *See* LBP-99-38, 50 NRC 227 (1999).

licensed for exempt usage under 10 C.F.R. §§ 30.20(a) and 32.26 and also that the module itself cannot be so licensed inasmuch as, standing alone, it cannot serve the purpose of protecting property (Tr. 28).

The Army apparently desires soldiers and other military personnel, not further identified, to be able to use the ACADA device without adhering to specific terms of the current ARMY materials licenses, such as leak testing and periodic servicing at defined locations (Tr. 18).³ The Army agrees that all personnel using the device should be trained as to proper usage and that those responsible for maintenance should also be properly trained (Tr. 21, 30-31) — requirements that would not be applicable under the exempt usage that it was seeking but would be applied to the soldiers and other military personnel that the Army wished to use the device. As emphasized by the Staff, the sought exempt-usage license, if granted, would have permitted usage by any person, not limited to the military personnel sought by the Army (Tr. 25-26, 36-37, 48-49).

Apparently members of the NRC Staff had earlier suggested that the Army seek an exempt-usage license for the device itself and, later, for only the inner module — albeit, in each case, subject to review and approval by the NRC Office of the General Counsel (Tr. 43, 49-51). Now, however, it appears that the Army was in fact being led down these garden paths and advised to seek solutions that cannot be granted. (The NRC Staff members providing such advice were not attempting to deceive the Army, however, inasmuch as the amenability of the ACADA for such exempt usage had not previously been legally determined.)

The Presiding Officer and his Special Assistant suggested that the better solution for the Army's achieving the result it seeks would be for the Army to seek an amendment to its current materials licenses (one in each NRC Region) to delete (with respect to the ACADA but not other devices covered by the licenses) terms and conditions that were not necessary to preserve the public health and safety with respect to usage of the ACADA but, if not deleted, would impede the Army in its intended usage of the ACADA. The Army did not desire, and the suggested amendments would not permit, usage by any member of the public (as would be permitted under the requested license for exempt usage). Under the amended licenses (as under the Army's existing licenses), only soldiers and other personnel who were specifically trained to use the ACADA would be permitted to do so, although they would not have to be personally identified in the licenses.

The Staff agreed that this approach would be workable (Tr. 29). The Army had no objection, although it was somewhat leery about following another uncertain regulatory path (Tr. 30). The Staff suggested that the proposed amendments, if properly supported, could be granted in a time frame of 30-90 days from application under the Staff's expedited procedures (Tr. 40, 55, 60). The Staff further offered

³The Staff, in its filing dated October 8, 1999, responding to my inquiries prior to the prehearing conference, provided me a copy of one of the Army's materials licenses (No. 12-00722-06).

to attempt to coordinate the efforts of various Regions, so that similar results could be achieved in each Region.

Based on these considerations, the Presiding Officer agreed to *defer* further actions in this case, such as formally defining issues in controversy and establishing schedules for various filings, pending the Army's attempt to proceed as indicated above. Parties are jointly to *report* periodically to the Presiding Officer, initially on November 15, 1999, on the progress made in this new approach.

IT IS SO ORDERED.

Charles Bechhoefer, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 21, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of

Docket Nos. 50-220
50-410
(License Nos. DPR-63,
NPF-69)NIAGARA MOHAWK POWER
CORPORATION
(Nine Mile Point Nuclear Station,
Units 1 and 2)

October 28, 1999

The Petitioner requests that the NRC “take immediate action to issue a Show Cause Order or Civil Penalty against Niagara Mohawk Power Corporation (NMPC) and its senior nuclear and corporate management (Enforcement Sanctions) for submitting an altered employee record, under fraudulent pretenses, to the Nuclear Regulatory Commission on May 10, 1996 and for their actions for placing confidential and fraudulent statements pertaining to [his] work performance, a false written record of what the Administrative Law Judge (ALJ) had determined in Discrimination Case 95-ERA-005 and the confidential and fraudulent 1994 employee evaluation (which the Administrative Law Judge had found to be altered) into federal custody and into public record. These actions are in clear Violation of 10 CFR 2.790(a) and 10 CFR 50.9.” The Petitioner also requests that the NRC “take immediate action and issue a Show Cause Order or Civil Penalty against Niagara Mohawk Power Corporation and its senior nuclear and corporate management (Enforcement Sanctions) for Discrimination in Violation of 10 CFR 50.7 [and] 10 CFR 2.790 . . . for their actions . . . allowing confidential, false, and fraudulent documentation that is disparaging, deleterious, and damaging to [his] goodwill, integrity, and reputation to be placed into permanent public record.” The Petitioner further requests that NRC “forward a complaint to the Office of the Inspectors [*sic*] General for an investigation of possible deliberate misconduct

or negligence on the part of members of the NRC for failing to take proper action in this discrimination case, allowing NMPC representatives to place false and fraudulent documents in NRC custody and for allowing these documents to be placed into public record.”

This Director’s Decision notes that the Staff had complied with the Petitioner’s request to forward his complaint to the NRC’s Office of the Inspector General (OIG) for an investigation of possible deliberate misconduct on the part of the NRC Staff. In a separate letter dated October 6, 1999, the NRC addressed the safety concern regarding the residual heat removal safety evaluation report independent of this Decision. Apart from its previous enforcement action in 1996, the Staff concluded in the Director’s Decision that it is unable to take additional actions on the remaining requests in the petition. With regard to the allegation on the altered employee document, the Staff found no meaningful difference between the copies used during the Department of Labor (DOL) proceeding and that used at the predecisional enforcement conference (PEC). The different handwriting observed by the ALJ and the missing name on the copy released by the NRC did not alter the substance of the documents and would not cause the Staff to reach different conclusions; therefore, the differences were determined to be of no consequence and were not deemed in violation of 10 C.F.R. § 50.5, “Deliberate misconduct,” or 10 C.F.R. § 50.9, “Completeness and accuracy of information.” The document at issue did not affect the NRC decision to issue its enforcement action against NMPC (a severity Level II Notice of Violation and an \$80,000 Civil Penalty were issued on July 24, 1996).

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

I. INTRODUCTION

By letter dated April 5, 1999 (the Petition), pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206), Mr. Robert Norway (the Petitioner) requested that the Nuclear Regulatory Commission (Commission or NRC) take action with regard to Niagara Mohawk Power Corporation (NMPC) and its senior nuclear and corporate management. Specifically, the Petitioner requested that the Commission (1) take enforcement action against NMPC and its senior nuclear and corporate management and, as a minimum, against three named individuals, for submitting an altered 1994 employee record to the NRC at a predecisional enforcement conference (PEC) on May 10, 1996; (2) take enforcement action against these same parties for presenting at this PEC a false written record of what the Administrative Law Judge (ALJ) determined in the Department of Labor (DOL) proceeding in 95-ERA-005; (3) take enforcement action against these

same parties for the placement of confidential employee information into the public record in violation of 10 C.F.R. § 2.790; and (4) take enforcement action against these same parties for an additional act of discrimination, pursuant to 10 C.F.R. § 50.7, for destroying the Petitioner's credibility and reputation in the nuclear industry. The Petitioner also requested that the NRC forward these issues to the Department of Justice for consideration of criminal prosecution.

In addition to these requests for enforcement actions, the Petitioner also requested that the following other actions be implemented: (1) that the agency perform an independent review of all of NMPC's docketed files associated with the individuals who committed the alleged fraud; (2) that the NRC forward the Petitioner's complaint to the NRC's Office of the Inspector General for an investigation of possible deliberate misconduct on the part of the NRC Staff; (3) that an independent oversight group be established to oversee the NMPC Human Resources Department and Employee Concerns Program; (4) that a public meeting be held to obtain public comments pertaining to issues of discrimination and the placement of fraudulent documentation into public records; and (5) that the NRC publicly post NMPC's Residual Heat Removal Alternate Shutdown (RHR ASD) Cooling Safety Evaluation 96-091 to make it available for public comment, or require NMPC to reperform this safety evaluation.

II. BACKGROUND

As a basis for the requests described above, the Petitioner asserted in his Petition of April 5, 1999, that NMPC deliberately created a false employee record and fraudulently submitted this record, as well as a false written record of an ALJ decision, into the public record, under false pretenses and perjury, during a 1996 PEC with the NRC.¹

Regarding the alleged false written record of an ALJ decision, Mr. James Lieberman, who was then Director of the NRC's Office of Enforcement, wrote a letter to the Petitioner on May 3, 1999. In this correspondence, Mr. Lieberman stated that the transcript of the enforcement conference was reviewed and indicated that the NRC Staff understood that the document was the position of NMPC management and not that of the ALJ.

¹ The 1996 PEC enabled the NRC Staff to reach its conclusion that NMPC terminated the Petitioner in February 1994 for raising safety concerns to his employer beginning in 1991. The NRC Staff concluded that, based upon the DOL ALJ's Recommended Decision and Order in DOL Case 95-ERA-005, dated March 15, 1996, NMPC had violated 10 C.F.R. § 50.7. A Notice of Violation and Proposed Imposition of Civil Penalty in the amount of \$80,000 was issued to NMPC on July 24, 1996 (EA 96-116). At the time of the PEC, NMPC planned to appeal the ALJ's decision, but the case was subsequently settled by agreement among the parties before the appeal. The DOL's Administrative Review Board (ARB) approved the settlement agreement and dismissed the complaint with prejudice (*see* Final Order Approving Settlement and Dismissing Complaint, ARB Case No. 97-018, dated November 22, 1996). On December 16, 1996, NMPC paid the civil penalty imposed by the NRC.

On May 10, 1999, the NRC Project Manager, Darl Hood, called to inform the Petitioner that the NRC's Petition Review Board had determined that the petition did not raise issues of an immediate nature, and that the Director's Decision would be issued in October 1999. In a letter dated June 9, 1999, Mr. Roy Zimmerman, Acting Director of the Office of Nuclear Reactor Regulation, acknowledged receipt of the petition.

In addition to the requests related to the alleged fraud, the Petitioner also submitted a technical concern over his continued efforts to address RHR ASD cooling issues. In a letter dated October 6, 1999, the NRC Staff addressed the Petitioner's technical concern independent of this Final Director's Decision.

III. DISCUSSION

1. The NRC Should Take Enforcement Action Against NMPC and Its Senior Nuclear and Corporate Management and, as a Minimum, Against Three Named Individuals, for Submitting an Altered 1994 Employee Record to the NRC at the PEC on May 10, 1996

The document at issue was related to the Petitioner's performance evaluation associated with an employee reduction (rightsizing) program that occurred at the Nine Mile Point facility in 1994. The NRC placed a redacted copy of this document into the Public Document Room as an attachment to the 1996 Notice of Violation to NMPC. The NRC Staff removed the Petitioner's name from this employee assessment, and from the other handouts given to the Staff by NMPC management at the 1996 PEC.

The DOL ALJ noted with reference to the document at issue that there were irregularities in the various handwritings on the worksheet and, therefore, had not relied upon the document at issue in his Recommended Decision and Order dated March 15, 1996. The copy of the employee evaluation that the NRC redacted and placed in the Public Document Room differs from the copy submitted to the ALJ. The copies differ in that the NRC's copy does not include the name of the Petitioner's supervisor. The supervisor's name was known to the NRC and was mentioned at the PEC (Tr. at 24). A comparison of the ALJ and NRC copies of the document (Attachments 4 and 5 to the Petition) indicates that the documents are identical except for the absence of the supervisor's name. Neither copy bears the supervisor's signature. The March 15, 1994 letter to the Petitioner from NMPC management stated that the initial evaluation made by the Petitioner's supervisor did not place the Petitioner in the list of employees to be assessed by a Review Board process for rightsizing, but that a subsequent Senior Management planning session resulted in changes that did include the Petitioner in the group to be reviewed. Based on the absence of the supervisor's signature on both copies at issue and the clarification provided in the March 15, 1994 letter, there is no

evidence that the supervisor's name was forged but rather included on the document as a statement of fact regarding the identity of the supervisor. Since there is no meaningful difference between the copies used during the DOL proceeding and that used at the PEC, the different handwriting observed by the ALJ and the missing name on the copy released by the NRC do not alter the substance of the documents and would not lead to a reviewer drawing different conclusions from the documents and, therefore, are of no consequence and are not in violation of 10 C.F.R. § 50.5, "Deliberate misconduct," or 10 C.F.R. § 50.9, "Completeness and accuracy of information." The document at issue did not affect the NRC decision to issue its enforcement action against NMPC (Severity Level II Notice of Violation and \$80,000 Civil Penalty issued on July 24, 1996), since the NRC Staff relied primarily upon the DOL ALJ decision in this case.

The Petitioner has not demonstrated that NMPC, its senior nuclear and corporate managers, or the three individuals named in the petition, deliberately submitted to the NRC information that the person submitting the information knew to be incomplete or inaccurate in some respect material to the NRC. For this reason, and the reasons stated above, the Petitioner has not offered a sufficient basis that would warrant the NRC to take enforcement action against NMPC, its senior nuclear and corporate managers, or the three named individuals.

2. The NRC Should Take Enforcement Action Against These Same Parties for Presenting at This PEC a False Written Record of What the ALJ Determined in the DOL Proceeding in 95-ERA-005

The Petitioner states that documentation was placed into federal custody and into the public record without accurately documenting the findings made by the ALJ upon these allegations. Specifically, the document, titled "Findings of the Administrative Law Judge," is allegedly inaccurate because its contents are not the findings of the ALJ (as implied by the title), but rather are the assertions of NMPC management. As mentioned previously, Mr. Lieberman stated in correspondence to the Petitioner dated May 3, 1999, that the NRC Staff had reviewed the transcript of the PEC and determined that the NRC Staff at the PEC understood that the document at issue represented the position of NMPC management and not that of the DOL ALJ. The Staff notes that the opening document for NMPC's presentation, titled "Agenda," uses a more accurate title of "Discussion of Findings of the Administrative Law Judge." The NRC Staff agrees with the Petitioner that the shortened title, "Findings of the Administrative Law Judge," does not accurately describe the document's contents, but the document's contents are clear when viewed in conjunction with the other documents that NMPC used during the PEC. In addition to NMPC's opening "Agenda," the NRC Staff understood during the PEC that NMPC's disagreements with the ALJ's decision, which are expressed in this document, were the bases for the statement in NMPC's closing document, titled

“Enforcement History,” that NMPC did “[i]ntend to appeal the ALJ’s decision in this case.” Therefore, the inaccuracy created by the shortened title was of no consequence to the NRC, and does not constitute a “false record.” When viewed in context with the other documents placed in the public record, the record is sufficiently clear that the document in question presents the views of NMPC management about the ALJ’s decision. The Staff concludes that NMPC did not submit a false written record of the ALJ’s determination in the DOL proceeding in 95-ERA-005 and, therefore, no action to correct, clarify, or otherwise alter the public record is warranted.

3. *The NRC Should Take Enforcement Action Against These Same Parties for Placing Confidential Employee Information Into the Public Record in Violation of 10 C.F.R. § 2.790*

The documentation at issue was part of the record of the PEC with NMPC in 1996. Neither NMPC nor its senior nuclear and corporate managers placed confidential employee information into the public record in violation of 10 C.F.R. § 2.790. This regulation states that subject to certain exceptions, correspondence to and from the NRC regarding a violation will be made available for inspection and copying at the NRC’s Public Document Room. While one of these exceptions relates to personnel or medical files, the release of which would constitute an unwarranted invasion of personal privacy, the documentation dealing with confidential employee information, including the Petitioner’s name, was fully redacted before being released to the Public Document Room.

As noted by Mr. Lieberman in his May 3, 1999 correspondence to the Petitioner, documents submitted by licensees are generally matters of public record and are placed in the NRC’s Public Document Room. Because the document was fully redacted, there was no basis to grant the Petitioner’s request to have this documentation removed from the Public Document Room. Equally, the Petitioner has not offered a sufficient basis that would warrant the NRC to take enforcement action against these parties for a violation of 10 C.F.R. § 2.790.

4. *The NRC Should Take Enforcement Action Against These Same Parties for an Additional Act of Discrimination, Pursuant to 10 C.F.R. § 50.7, for Destroying the Petitioner’s Credibility and Reputation in the Nuclear Industry*

The Petitioner requests that the NRC take enforcement action against NMPC and its senior nuclear and corporate management for destroying the Petitioner’s credibility and reputation in the nuclear industry. The Petitioner has not submitted any information related to an additional act of discrimination by NMPC, by its

senior nuclear and corporate managers, or by the three individuals named in the petition. In addition, the Petitioner has not presented any information that his credibility and reputation have been destroyed by any act of the parties named in the petition. For this reason, and the reasons stated above, the Petitioner has not offered a sufficient basis that would warrant the NRC to take enforcement action against NMPC, its senior nuclear and corporate managers, or the three named individuals.

5. *The NRC Should Forward These Issues to the Department of Justice for Consideration of Criminal Prosecution*

Since the NRC has determined that the Petitioner has submitted no new information that would lead the NRC Staff to conclude that a section 2.790, or an additional section 50.7, violation² had occurred, there is no basis for forwarding these issues to the Department of Justice for consideration of criminal prosecution.

6. *The NRC Should Perform an Independent Review of All of NMPC's Docketed Files Associated With the Individuals Who Committed the Alleged Fraud*

Since, as stated above, the NRC has determined that the Petitioner has submitted no new information that would lead the NRC Staff to conclude that a section 2.790, or an additional section 50.7, violation had occurred, there is no basis for performing an independent review of all of NMPC's docketed files associated with the individuals who committed the alleged fraud.

7. *The NRC Should Forward Petitioner's Complaint to the Office of the Inspector General for an Investigation of Possible Deliberate Misconduct on the Part of the NRC Staff*

The Petitioner requested that the NRC forward a complaint to the Office of the Inspector General for an investigation of possible deliberate misconduct or negligence on the part of members of the NRC for failing to take proper action in the discrimination case, for allowing NMPC representatives to place false and fraudulent documents into NRC custody, and for allowing these documents to be placed into the public record. By Memorandum dated May 17, 1999, the petition was forwarded to the Acting Assistant Inspector General for Investigations, Office of the Inspector General. Therefore, the NRC Staff has complied with this request by the Petitioner.

² An additional violation to that issued against NMPC in 1996, EA 96-116.

8. *An Independent Oversight Group Should Be Established To Oversee NMPC's Human Resources Department and Employee Concerns Program*

Since the NRC has determined that the Petitioner has submitted no new information that would lead the NRC Staff to conclude that a section 2.790, or an additional section 50.7, violation had occurred, there is not a sufficient basis for establishing an independent oversight group to monitor NMPC's Human Resources Department or its Employee Concerns Program. The need for such a group is obviated by corrective actions already taken by NMPC as a result of the NRC's enforcement action. These actions, which were discussed during the PEC and in NMPC's letter dated August 23, 1996, included and were not limited to (1) reemphasizing to management the rights and responsibilities of employees to raise safety issues; (2) reinforcing, at all levels of management, the value of reporting issues to improve performance; and (3) reemphasizing the availability of the Quality First Program (a program whereby employee concerns can be identified for further investigation in confidence, if desired, with results of the investigation provided to senior management, the offsite oversight committee, and the individual reporting the concern, and with final decisions regarding disputed results residing with the Chief Nuclear Officer). Notwithstanding NMPC's prompt and comprehensive correction actions, should the NRC obtain information in the future that an oversight group may be warranted, the NRC would consider requiring such a program at that time. There is no evidence that such a need currently exists.

9. *A Public Meeting Should Be Held To Obtain Public Comments Pertaining to a Number of Issues, Including Discrimination and the Placement of Fraudulent Documentation Into Public Records*

Since the NRC has determined that the Petitioner has submitted no new information that would lead the NRC Staff to conclude that a section 2.790, or an additional section 50.7, violation had occurred, there is not a sufficient reason to hold a public meeting to discuss discrimination, or to discuss the placement of allegedly fraudulent documents into the public record. Should a sufficient reason arise in the future, the NRC would consider holding a meeting with the public to obtain their comments on these issues at that time. There is no evidence that such a need currently exists.

10. *The NRC Should Publicly Post NMPC's RHR ASD Cooling Safety Evaluation 96-091 To Make It Available for Public Comment or Require NMPC To Reperform This Safety Evaluation*

As previously stated, by letter dated October 6, 1999, the NRC Staff addressed the Petitioner's technical concern for the RHR ASD Cooling Safety Evaluation.

The October 6, 1999 letter is publicly available through the NRC Public Document Room.

IV. CONCLUSION

For the reasons discussed above, no basis exists for taking the enforcement actions requested in the petition. Nonetheless, as previously described, the Petitioner's complaint has been forwarded to the NRC's Office of the Inspector General. The Petitioner's technical concern, as discussed above, has been addressed by the NRC independent of this Final Director's Decision. The remaining aspects of the petition are not supported.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 C.F.R. § 2.206(c). As provided for by that regulation, the Decision will constitute the final action of the Commission 25 days after the date of issuance of the Decision unless the Commission, on its own motion, institutes a 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 28th day of October 1999.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matters of

Docket Nos. 50-443-LT-2
50-423-LT
(consolidated)

NORTH ATLANTIC ENERGY
SERVICE CORPORATION
(Seabrook Station, Unit 1)

NORTHEAST NUCLEAR ENERGY
COMPANY
(Millstone Nuclear Power Station,
Unit 3)

November 19, 1999

In this Order, the Commission grants a joint motion to terminate this adjudication on the ground that termination of settled proceedings serves the public interest. The Commission also instructs the NRC Staff to consider the financial qualification and foreign ownership issues raised in CLI-99-27.

RULES OF PRACTICE: SETTLEMENTS

It has long been the Commission's policy to encourage settlements, in significant part because they save time and resources of all parties and this agency.

MEMORANDUM AND ORDER

This proceeding involves an application by the New England Power Company (“NEP”) seeking authorization for the indirect transfers of its partial ownership interests in both the Seabrook Station (Unit 1) and the Millstone Station (Unit 3) nuclear power plants. Specifically, NEP seeks the Commission’s approval of these indirect license transfers to the extent that they will be effected by a transaction under which the New England Electric System (“NEES,” of which NEP is a wholly owned subsidiary) would itself become a wholly owned subsidiary of The National Grid Group plc, a foreign company. NEP would remain a co-licensee of both plants with its rights and obligations unaltered, and with the only change being in its upstream ownership.

Three co-owners filed petitions to intervene and requests for hearing, seeking to oppose NEP’s application. The NRC Staff did not seek to become a party to the adjudication. On October 21, 1999, the Commission concluded that the co-owners had demonstrated standing and had raised two admissible issues (regarding foreign ownership and financial qualifications). We therefore set the case for hearing and established a procedural schedule. CLI-99-27, 50 NRC 257.

On November 4, 1999, the co-owners filed a notice of withdrawal of their petitions to intervene, and all parties jointly moved for termination of the proceeding on the ground that they had settled their differences.¹ More specifically, the parties informed the Commission that “NEP has provided additional information to demonstrate to the Intervenor’s satisfaction that [NEP] will be capable of meeting its financial obligations with respect to Millstone 3 and Seabrook” and further that “NEP has strengthened and clarified its negation action plan^[2] to ensure that NEP will not be foreign controlled or dominated following the National Grid acquisition of NEES.”³ NEP also commits to provide the NRC Staff with “supplemental information as needed . . . to ensure that the clarifications contained in [the] Notice of Withdrawal are adequately described in order to assist the NRC Staff in its ongoing review of the Application.” *Id.* at 4.

We have reviewed the motion to terminate this adjudication, together with the remainder of the record, and we conclude that termination would serve the public interest. *See generally Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-97-13,

¹ Also on November 4, 1999, the parties submitted a Joint Motion to Hold Proceedings in Abeyance. The Commission granted that motion on November 10th.

² A “negation action plan” is a document that a license transfer applicant submits to the Commission setting forth “positive measures to assure that a foreign ownership interest is denied control or domination over licensee decisions.” Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355, 52,359 (Sept. 28, 1999).

³ Notice of Withdrawal of Petitions for Leave to Intervene and for Hearing and Joint Motion to Terminate Proceeding, dated Nov. 4, 1999, at 3. For details of the assurances regarding financial qualifications, *see id.* at 5-8. For details of the assurances regarding foreign ownership, *see id.* at 8-12.

46 NRC 195 (1997). It has long been the Commission's policy to encourage settlements, in significant part because they save time and resources of all parties and this agency. As the parties have settled in this case, we will dismiss this proceeding. Although we have terminated this proceeding, it should be recognized that the Staff examines financial qualification and foreign ownership issues during its review of transfer applications. In the course of its ongoing review of this license transfer application, the Staff should consider the concerns relating to those matters that were raised in CLI-99-27.

The proceeding is terminated.
IT IS SO ORDERED.

For the Commission⁴

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 19th day of November 1999.

⁴Commissioners Dicus and Diaz were not available for affirmation of this Memorandum and Order. Had they been present, they would have affirmed the Memorandum and Order.

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)

November 2, 1999

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), to construct and operate an independent spent fuel storage installation (ISFSI) under 10 C.F.R. Part 72, the Board denies a PFS motion for partial summary disposition relating to three subparts of contention Utah H, Inadequate Thermal Design, concluding that material factual disputes remain regarding these matters.

RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PERSUASION; BURDEN OF PROOF)

As with the analogous Rule 56 of the Federal Rules of Civil Procedure, the movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts and any supporting materials that accompany the dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting

materials, or the movant's facts will be deemed admitted. LBP-99-31, 50 NRC 147, 152 (1999).

MEMORANDUM AND ORDER
(Rulings on Summary Disposition and Discovery Motions
Regarding Contention Utah H)

In its admitted contention Utah H, Inadequate Thermal Design, intervenor State of Utah (State) challenges the ability of the storage casks chosen by Applicant Private Fuel Storage, L.L.C. (PFS), for use in its proposed Skull Valley, Utah 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI) to protect against overheating of the reactor spent fuel located inside those casks. In a May 19, 1999 motion, PFS seeks summary disposition in its favor on three of the five subparts to this contention based on a revised thermal analysis it submitted for one of the two designated cask systems. According to PFS, as a result of this analysis, there is no longer a genuine material factual dispute with the State relative to these three points. Additionally, this PFS motion potentially could render moot a pending April 30, 1999 State request that PFS be compelled to answer certain discovery requests concerning the revised thermal analysis. The State contests the PFS assertions regarding both summary disposition and the State's motion to compel; the NRC Staff, however, agrees that summary disposition is appropriate.

For the foregoing reasons, we conclude that a material factual dispute remains relative to the three contention subparts in question, so that the PFS motion must be denied. Further, we direct the parties to take further action relative to the State's motion to compel discovery and to scheduling regarding litigation of this and other issues potentially involving the use of proprietary information, as described below.

I. BACKGROUND

A. Proposed PFS Storage System and Contention Utah H

As described in the safety analysis report (SAR) that accompanies the PFS application for authority to construct and operate its Skull Valley, Utah ISFSI facility, concrete storage casks holding metal cylinders containing multiple power reactor spent fuel assemblies will be placed on concrete pads in a two by four array. The canister-based storage systems PFS has selected for use at its site are the Holtec International, Inc. (HI), Storage and Transfer Operation Reinforced Module Cask System, also known as the HI-STORM 100, and the Sierra Nuclear Corporation TranStor Storage Cask System, referred to as TranStor. Ultimately, the PFS facility could contain up to 40,000 metric tons of United States commercial

power reactor spent fuel stored in approximately 4,000 casks. Further, as described in the SAR, the storage cask for each system is designed with a series of ducts intended to permit natural convection cooling of the metal cylinders containing the reactor spent fuel assemblies. *See* [PFS], [SAR] for [PFS] Facility at 1.2-1, 1.3-1, 1.3-3 (rev. 0 June 1997).

In LBP-98-7, 47 NRC 142, 188-89, *clarified by* LBP-98-10, 47 NRC 288, 295, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998), the Licensing Board admitted in its entirety contention Utah H, in which the State raised concerns about the thermal design of the proposed cask systems. As accepted for litigation that contention provides:

UTAH H — Inadequate Thermal Design

CONTENTION: The design of the proposed ISFSI is inadequate to protect against overheating of storage casks and of the concrete cylinders in which they are to be stored in that:

1. Storage casks used in the License Application are not analyzed for the PFS maximum site design ambient temperature of 110°F.
2. The maximum average daily ambient temperatures for unnamed cities in Utah nearest the site do not necessarily correspond to the conditions in Skull Valley; PFS should provide information on actual temperatures at the Skull Valley site.
3. PFS's projection that average daily temperatures will not exceed 100°F fails to take into account the heat stored and radiated by the concrete pad and storage cylinders.
4. In projecting ambient temperatures, PFS fails to take into consideration the heat generated by the casks themselves.
5. PFS fails to account for the impact of heating the concrete pad on the effectiveness of convection cooling.
6. PFS has not demonstrated that the concrete structure of the TranStor cask is designed to withstand the temperatures at the proposed ISFSI.
7. PFS has not demonstrated that the concrete structure of the HI-STORM cask is designed to withstand the temperatures at the proposed ISFSI.

47 NRC at 253.

B. PFS Dispositive Motion

By motion submitted May 19, 1999, accompanied by a statement of eleven material facts not in issue, PFS sought summary disposition regarding three portions of this contention. Specifically, PFS requests final merits resolution of paragraph three, regarding the impact on the projected ambient temperatures of heat stored and radiated by the concrete pad and concrete casks; paragraph four, concerning the impact on ambient temperature of the heat generated by the metal

storage cylinders inside each concrete cask; and paragraph five, which concerns the impact of pad heating on the effectiveness of convection cooling process for each storage cask. According to PFS, the concerns expressed in these three paragraphs now have been addressed in a revised thermal analysis for the HI-STORM 100 cask system that PFS supplied to the Staff in a February 1999 response to the Staff's December 1998 requests for additional information (RAI). *See* [PFS] Motion for Partial Summary Disposition of Utah Contention H — Inadequate Thermal Design (May 19, 1999) at 3-4 [hereinafter PFS Motion].

As described in the accompanying affidavit of HI principal engineer Dr. Indresh Rampall that is presented to explain and support the PFS revised thermal analysis,¹ relative to paragraph three of the contention, the revised thermal analysis now takes into account the impact the heat stored and radiated by the concrete pad and other storage casks will have on the ambient air temperature entering the cask cooling ducts. This includes the solar radiative heating on exposed cask and pad surfaces; pad/cask and pad/soil conductive heat transfer; pad/ambient air and cask/ambient air convective heat transfer; and pad/cask and pad/ambient air radiative heat exchange. *See id.* Affidavit of Indresh Rampall (May 14, 1999) at 3.

In connection with paragraph four, the Rampall affidavit describes how the revised calculation imposes a reflecting and insulated hypothetical cylindrical boundary around the cask. This reflecting boundary is considered to direct all the heat radiated from the cask surface in the lateral direction back onto the cask, which mirrors the heat produced by and radiated from adjacent storage casks from all sides toward the analyzed cask. The insulating boundary, on the other hand, is intended to model radiation blocking by the reference cask in the lateral direction by other casks in the array, so that the radiative cooling of the reference cask in the lateral direction is conservatively neglected. Dr. Rampall concludes that this insulated, reflecting cylindrical boundary model effectively takes into account the heat generated by the casks themselves. *See id.* at 3-4.

Finally, as to paragraph five, the Rampall affidavit outlines how the revised model assumes that cooler air descending between the storage casks would be heated by the concrete pad and the concrete cask surface by thermal convection and radiation before entering the cask air inlet ducts. According to Dr. Rampall, this explicit inclusion of ambient air heating by heat stored in the pad and the casks in a global model enables the impact of these factors to be fully accounted for in determining the effectiveness of cask convection cooling. *See id.* at 4.

PFS concluded that this revised thermal analysis for the HI-STORM 1000 cask, in conjunction with the fact that this HI cask fully loaded will have a higher

¹ There have been no objections by PFS, the Staff, or the State to the qualifications or expertise of the various affiants whose statements are relied upon to provide support for other parties' assertions regarding the material factual matters at issue in connection with contention Utah H.

calculated spent fuel cladding temperature than a fully loaded TranStor cask so as to make the HI cask analysis bounding, established there is no remaining material factual dispute relative to paragraphs three through five of contention Utah H and that summary disposition should be entered in favor of PFS on those matters. *See* PFS Motion at 7-8 & n.11.

In a June 25, 1999 response to the PFS motion, the Staff agreed that summary disposition should be entered in favor of PFS on these three parts of contention Utah H, albeit only as they relate to the HI-STORM 100 cask. *See* NRC Staff's Response to [PFS] Motion for Partial Summary Disposition of Utah Contention H (Inadequate Thermal Design) (June 25, 1999) at 7-9 [hereinafter Staff Response]. In support of its position, the Staff provides the affidavit of NRC senior nuclear engineer Jack Guttman. Mr. Guttman agrees with all of the PFS statement of material facts not in dispute describing how the revised thermal analysis addresses the claims in paragraphs three through five of contention Utah H, except material fact four regarding the status of the revised analysis as a bounding calculation for both the HI-STORM 100 and TranStor casks. Mr. Guttman declares that the Staff takes no position regarding this statement. *See id.* Affidavit of Jack Guttman Concerning Contention Utah H (Inadequate Thermal Design) (June 25, 1999) at 2.

The State, in contrast, maintains that summary disposition on these three parts of the contention is inappropriate. Specifically, the State disputes paragraphs five, seven, nine, and eleven of the PFS statement of material facts. It also asserts that the material provided by PFS regarding the revised thermal analysis is inadequate in that it does not include crucial information needed to evaluate the assumptions and methodology used in the model. *See* [State] Opposition to [PFS] Partial Motion for Summary Disposition of Utah Contention H — Inadequate Thermal Design (June 25, 1999) at 7-8 [hereinafter State Response].

In support of these assertions, the State provides the affidavit of Radioactive Waste Management Associates senior associate Dr. Marvin Resnikoff, who declares as an initial matter that the Holtec calculation is wrong relative to all three paragraphs because it is based on an incorrect assumption about the minimum distance between casks relative to the PFS facility. Dr. Resnikoff states that this is significant because it goes to the central State point of the failure to account for thermal interaction via radiative heat transfer, not ventilation flow restriction that seems to be the focus of the revised HI thermal analysis upon which PFS relies. Radiative heat transfer is still not accounted for, Dr. Resnikoff declares, because its effect is to raise the surface temperature of each cask, which has not been factored into the HI analysis as is indicated by the fact that under the new analysis the radiative cask surface temperature is not higher. *See* State Response, Declaration of Dr. Marvin Resnikoff Regarding Material Facts in Dispute with Respect to Contention H (June 25, 1999) at 2-4 [hereinafter Resnikoff Affidavit].

Moreover, according to Dr. Resnikoff, it is apparent with respect to paragraph three that radiative heat from the pad has not been taken into account because the canister temperature has not been raised, as one would expect because of the reduction in buoyant force. As to paragraph four, Dr. Resnikoff declares that radiative heat still has not been taken into account in that the hypothetical reflecting/insulated cylinder is the same model used by HI in its original calculations, rather than the interacting cylinder that is the focus of the State's concern, and fails to show any increase in the temperature of the reflective boundary that otherwise would be expected. And with regard to paragraph five, Dr. Resnikoff maintains that the impact of pad heating on convection cooling effectiveness has still not been accounted for given the discussion of annulus air flow and heat exchange via air cooling through heat vents does not reflect the rise in temperature on the cask that would be expected because of the smaller pressure differential between ingoing and outgoing vents as a result of pad heating. *See id.* at 4-6.

In addition to these deficiencies, Dr. Resnikoff also discusses how various PFS refusals to provide discovery information about cask surface temperatures arising under the revised HI analysis, including all input and output information and the underlying FLUENT computer source code that were used for the expanded HISTORM 100 thermal model (EHT) that forms the basis for the revised analysis, have left him with inadequate information to ascertain whether the revised analysis does account for the various radiative heat sources that are the focus of these three parts of contention Utah H. *See id.* at 5-7. These PFS discovery refusals provide an additional basis for denying summary disposition, the State argues, *see* State Response at 5-6, as does the failure of the Staff to establish that its own review of the revised HI analysis was done in an independent, rigorous manner, *see* [State] Reply to NRC Staff's Response to [PFS] Motion for Partial Summary Disposition of Utah Contention H (Inadequate Thermal Design) (July 8, 1999) at 2-4.

C. Discovery Dispute

Besides the PFS motion, there is a second matter pending with the Board regarding contention Utah H. By motion filed on April 30, 1999, the State seeks to compel a PFS response to discovery requests it propounded on April 9, 1999, regarding subparts three, four, and five of contention Utah H. Specifically, the State requested responses to three interrogatories and three document discovery requests. And in its motion, the State addressed the two objections put forth by PFS in its April 21, 1999 objections to these State discovery requests.

The State first asserts there is no merit in the PFS claim that discovery is not appropriate because the State requests are irrelevant, given these parts of the contention have been addressed by the new thermal analysis that is the basis for the PFS summary disposition motion described above. According to the State, PFS has failed to establish that the requests are burdensome or unnecessary relative to the

admitted contention, so that the discovery should be permitted. Likewise meritless, according to the State, is the additional PFS objection that the discovery is overly broad because it involves the general thermal design of the casks. In this regard, the State asserts that it is impossible to address the adequacy of the site-specific analysis for the casks without also addressing the general thermal design of the casks. *See* [State] Proprietary Motion to Compel [PFS] to Respond to State's First Set of Discovery Requests Regarding Contention H (Apr. 30, 1999) at 4-9.

In its May 7, 1999 response to the State's motion, PFS declared that it was willing to answer the State propounded interrogatories (albeit without waiving its objections). It further maintained, however, that it would not respond to the State's document requests because it still considered them overly broad and irrelevant given the Board's previous instruction that the scope of the contention is limited to site-specific issues. *See* [PFS] Response to [State] Proprietary and Non-Proprietary Motions to Compel [PFS] to Respond to State's First Set of Discovery Requests (May 7, 1999) at 8-10 [hereinafter PFS Discovery Response]. Thereafter, on May 14, 1999, PFS provided responses to the three contention Utah H-related interrogatories, *see* [PFS] Amended Proprietary Responses to State's First Requests for Discovery (May 14, 1999) at 2-9, which have not been the subject of any further State motions. Nonetheless, as was discussed in Section I.B above, the State has continued to assert it should be given access to EHT-related information, including the associated FLUENT computer code.

II. ANALYSIS

A. Summary Disposition Standards

As the Board noted in several of its recent summary disposition rulings regarding other Utah contentions:

As with the analogous Rule 56 of the Federal Rules of Civil Procedure, the movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts and any supporting materials that accompany the dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

E.g., LBP-99-31, 50 NRC 147, 152 (1999).

B. PFS Contention Utah H Partial Summary Disposition Motion

PFS has attempted to obtain a resolution of the concerns raised by the State in contention Utah H in much the same manner that it did relative to contention

Utah C, Failure to Demonstrate Compliance with the NRC Dose Limits, which was the subject of a Board summary disposition ruling favorable to PFS in LBP-99-23, 49 NRC 485 (1999). As we explain below, however, we are unable to conclude that the same result obtains here.

Relative to LBP-99-23, in response to a State contention asserting that PFS in its application inappropriately used data from two NRC reports and failed to consider certain dose pathways, PFS proffered a new dose analysis that it declared did not rely upon the disputed data in those documents and took into account the other dose pathways. The State countered by, among other things, asserting that it did not agree with the validity of the revised dose calculations. The Board concluded, however, that with respect to the existing contention, no material factual controversy existed, making summary disposition appropriate. The Board further observed that if the State wished to contest the new dose analysis, which was subsequently incorporated into the PFS application by an amendment, it should seek admission of a new, late-filed contention challenging the particulars of that analysis. *See* 49 NRC at 491-93.

In this instance, PFS has attempted to frame its new cask thermal analysis in much the same way, declaring that analysis addresses the purported deficiencies in the application as described in contention Utah H and that any State challenge to the analysis must be put forth as a late-filed contention. In disputing this assertion, however, the State has made a somewhat different argument than it did in connection with contention Utah C. To be sure, as it did with respect to the PFS revised dose analysis at issue for contention Utah C, the State indicates that it does not agree with the validity of the revised thermal analysis in many respects. The State also declares, however, that the revised analysis has a more fundamental flaw in that it still fails to address what is the crux of the State's complaint in this contention: the failure to consider cask and pad radiative heat as part of the PFS analysis supporting its application.

In support of this assertion, the State's affiant Dr. Resnikoff declares generally that although the effect of radiative heat transfer from adjacent casks is to increase each cask's surface temperature, he does not believe this was taken into account in light of the PFS refusal to provide information on cask surface temperature. He also states that adjacent cask radiative heating has not been taken into account given PFS's admission that the original calculation did not account for the thermal effects of casks on each other or of the pad on the cask and the fact that the radiative cask surface temperature in the original calculation and the revised thermal analysis are the same. In addition, relative to contention subpart three, Dr. Resnikoff declares that it is not apparent the heat stored and radiated by the concrete pad was taken into account under the revised analysis because the buoyant force has not been reduced. Further, according to Dr. Resnikoff, it is not apparent that the heat radiated by the casks themselves or by adjacent, interacting casks has been taken into account in connection with subpart four, particularly given the fact that the

temperature of the reflective boundary for the revised analysis is the same as in the original calculation. Dr. Resnikoff also declares, with respect to subpart five regarding impact of concrete pad heating on convection cooling effectiveness, that based on the information provided, it is not apparent that the revised calculation takes into account concrete pad radiative heat. *See* State Response, Resnikoff Affidavit at 3-6.

The upshot of this State showing is to establish that there remain material factual disputes about whether cask and pad radiative heat, the central concern of subparts three, four, and five of contention Utah H, have been addressed in connection with the PFS application thermal effects analysis. As a consequence, partial summary disposition on these matters cannot be entered as requested by PFS.

C. State Contention Utah H Discovery Motion

Having determined that the PFS dispositive motion should not be granted, we address the outstanding document production dispute regarding contention Utah H. In doing so, we note that our ruling above appears to eliminate a major precept of the PFS objections to this discovery, i.e., that the State's requests are not relevant in light of its pending summary disposition request and the supporting revised thermal analysis. With this in mind, as well as our previous statements regarding the site-specific nature of contention Utah H, *see* LBP-98-10, 47 NRC at 295, we think it best at this juncture that the parties reassess both the document requests and the objections thereto in an attempt to identify exactly what material remains in dispute.² If, after further discussions, the parties are still unable to agree on disclosure, PFS should file a motion for protective order that, with as much specificity as possible, identifies the material still in dispute and outlines its reasons for withholding that material. This motion should be filed on or before *Friday, November 19, 1999*, and any State response thereto should be filed on or before *Tuesday, November 30, 1999*.

D. Administrative Matters Concerning Propriety Information

In addition to these substantive rulings, we note that although contention Utah H was not originally identified as including the use of nonpublic, proprietary information, the parties' discovery and summary disposition filings make it clear that such information could be involved. As a consequence on or before *Wednesday, November 10, 1999*, the parties should advise the Board in a joint filing (1) whether they anticipate that any hearing on this contention, contention Utah GG, Failure

²In this regard, it appears that the PFS concern about the restricted availability of the FLUENT code, *see* PFS Discovery Response at 10 n.20, in and of itself, does not constitute a basis for nondisclosure but rather a circumstance that requires special arrangements between the parties so that the State can obtain access to the information.

to Demonstrate Cask-Pad Stability During Seismic Event for TranStor Casks, or any other contention will involve the use of propriety information such that the proceedings should be closed; and (2) if a closed hearing is necessary, whether proceedings on those contentions should be held in conjunction with the closed hearing on contention Security-C as outlined in the parties' November 1, 1999 joint report on scheduling for that issue, or should be conducted under another schedule, bearing in mind the Board's preference for conducting closed hearings at the Atomic Safety and Licensing Board Panel Hearing Room in Rockville, Maryland.

Finally, on or before *Wednesday, November 10, 1999*, the State, PFS, and the Staff should advise the Board in a joint filing whether they have any objection to the public release of any part of this Memorandum and Order because it would involve the disclosure of propriety information subject to nondisclosure under 10 C.F.R. § 2.790.

III. CONCLUSION

Notwithstanding the revised thermal analysis submitted by PFS relative to the HI storage system, its May 19, 1999 partial summary disposition motion must be denied because the State has established that material factual disputes still remain regarding the central assertion in subparts three, four, and five of contention Utah H that cask and pad radiative heat have not been considered in the analysis supporting the PFS application. Further, because this ruling raises significant questions about the basis for the previous PFS objections to the State's April 9, 1999 document discovery request concerning contention Utah H, the Board directs that the parties confer further on the scope of disputed discovery and establishes a schedule for additional filings regarding that discovery. Finally, the Board requests a joint report by the parties concerning proposed hearing schedules for portions of the proceeding that may involve the use of proprietary information.

For the foregoing reasons, it is, this second day of November 1999, ORDERED that:

1. The May 19, 1999 motion of Applicant PFS for partial summary disposition regarding contention Utah H is *denied*.
2. Relative to the April 30, 1999 State motion to compel a response by PFS to its April 9, 1999 request for production of documents relative to contention

Utah H, the parties should consult and make any additional filings in accordance with the schedule set forth in Section II.C above.³

3. In accordance with the schedule set forth in Section II.D above, the parties should file a joint report providing the requested information concerning the potential use of proprietary information in this proceeding.

THE ATOMIC SAFETY AND
LICENSING BOARD⁴

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 2, 1999

[Editor's Note: After receiving a November 10, 1999 filing indicating that the State, PFS, and the Staff had no objection to public issuance of this decision, on November 15, 1999, the Licensing Board made this decision publicly available. *See* Licensing Board Memorandum and Order (Making Publicly Available Decision Ruling on Motions Regarding Contention Utah H) (Nov. 15, 1999) at 2 (unpublished).]

³ If a filing permitted under this Memorandum and Order includes information the filer believes is proprietary, in accordance with the Board's December 31, 1997 directive regarding service of proprietary information, *see* Licensing Board Order (Granting Leave to File Response to Contentions and Schedule for Responses to Late-Filed Contentions) (Dec. 31, 1997) at 2-3 & n.1 (unpublished), the filing should (1) be served in the manner and on the individuals described in paragraphs I.H.1.a-b of the Board's December 17, 1997 memorandum and order, as amended, and include a cover letter or memorandum that shall be served on all other participants as described in paragraph I.H.2 of that issuance, *see* Licensing Board Memorandum and Order (Protective Order and Schedule for Filing Security Plan Contentions) (Dec. 17, 1997) at 8, 9 (unpublished); Licensing Board Memorandum and Order (Additional Amendments to Protective Order) (Dec. 23, 1997) at 2 (unpublished); and (2) be served so as to ensure receipt by the individuals described in paragraph I.H.1.a of the Board's December 17, 1997 memorandum and order by the next business day.

⁴ Copies of this Memorandum and Order were sent this date to counsel for Applicant PFS and for Intervenor State of Utah by overnight/express mail, and to Staff counsel through the agency's internal mail system (or some other method that will provide for delivery within a time frame comparable to that afforded PFS and the State). In addition, this date a memorandum was sent by e-mail to all the parties in this proceeding advising them of the issuance of this decision and the Board's determination to afford this decision confidential treatment pending a response by the State, PFS, and the Staff to the Board's inquiry under ordering paragraph three above. *See* Licensing Board Memorandum (Notice Regarding Issuance of Decision on Motion for Partial Summary Disposition of Contention Utah H) (November 2, 1999) (unpublished).

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)

November 4, 1999

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), to construct and operate an independent spent fuel storage installation (ISFSI) under 10 C.F.R. Part 72, the Licensing Board denies the request of intervenor State of Utah for the admission of late-filed amended contention Utah C, Failure to Demonstrate Compliance with the NRC Dose Limits, which was submitted in response to the Board's decision in LBP-99-23, 49 NRC 485 (1999), granting summary disposition in favor of PFS on contention Utah C.

**RULES OF PRACTICE: NONTIMELY SUBMISSION OF
CONTENTIONS**

The admission of a late-filed contention is governed by the five-factor test set forth in 10 C.F.R. § 2.714(a)(1). In seeking admission, the burden of proof is on the contention's sponsor, who must affirmatively address all five factors and demonstrate that, on balance, they warrant overlooking the lateness of the filing. *See, e.g., Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 & n.9 (1998) (citing cases), *petitions for*

review pending, National Whistleblower Center v. NRC, Nos. 99-1002 & 99-1043 (D.C. Cir. Jan. 4, 1999 & Feb. 8, 1999). Even if a late-filed contention satisfies the requirements of section 2.714(a)(1), the admissibility standards set forth in section 2.714(b)(2)(i)-(iii), (d)(2), (e) must also be satisfied in order to receive merits consideration. *See* LBP-98-29, 48 NRC 286, 291 (1998).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

The first, and most important, 10 C.F.R. § 2.714(a)(1) factor is whether the party seeking admission of the issue has demonstrated good cause for its late filing. And often crucial to that inquiry is a determination of the point from which timeliness should be calculated.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

Regarding this timing question, the Commission has stated “a petitioner has ‘an ironclad obligation’ to examine the application, and other publicly available documents, with sufficient care to uncover any information that could serve as the foundation for a contention.” *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999). Further, participants in agency proceedings have been counseled to evaluate all available information at the earliest possible time to identify the potential basis for contentions and preserve their admissibility. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1050 (1983) (intervenors expected “to raise issues as early as possible”). And along this same line, a Licensing Board previously has indicated that where “a new contention purportedly is based on information contained in a document recently made publically available, an important consideration in judging the contention’s timeliness is the extent to which the new contention could have been put forward with any degree of specificity in advance of the document’s release.” LBP-98-29, 48 NRC 286, 292 (1998).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

In making a judgment about timeliness, the emphasis is on the substance and sufficiency of the information available to the contention’s sponsor. And from a presiding officer’s perspective, making a determination on such a timeliness issue “calls for a judgment about when the matter is sufficiently facially concrete and

procedurally ripe to permit the filing of a contention.” LBP-99-21, 49 NRC 431, 437 (1999).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

In analyzing the question of factual concreteness, the presiding officer must ascertain when the party seeking admission of the late-filed contention had information sufficient to frame the contention with “reasonable specificity and basis.” *Id.* at 437.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

The fact the information asserted to have provided a basis to submit a late-filed contention was contained in an applicant response to an NRC Staff requests for additional information (RAI) rather than a license application amendment does not somehow toll the obligation of the party seeking admission of the late-filed contention to come forth with a contention based on that information. Even though this RAI response differs procedurally from an application amendment, Commission case law recognizes that such material can provide an acceptable basis for a contention. *See Ocone*, CLI-99-11, 49 NRC at 338.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

Within the context of a license application process, in reaching a determination about whether a particular applicant submission, such as an RAI response, has sufficient procedural ripeness to cause it to trigger late-filed contention timing concerns, consideration should be given to whether the included information was “put before the agency in a context that is (a) reasonably likely to have a material impact on the administrative process (e.g., will influence Staff consideration of the pending license application); and (b) is subject to consideration in the related adjudicatory proceeding.” LBP-99-21, 49 NRC at 437.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

In the absence of good cause, a late-filed contention’s sponsor must make a compelling showing that the remaining section 2.714(a)(1) factors outweigh factor one so as to favor admission. *See Commonwealth Edison Co.* (Braidwood

Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). When analyzing the remaining four factors, the Board is to afford factors two and four — availability of other means to protect the petitioner’s interest and extent of representation of petitioner’s interests by existing parties — less weight than factors three and five — assistance in developing a sound record and broadening the issues or delaying the proceeding. *See id.* at 245.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (SOUND RECORD DEVELOPMENT)

Relative to factor three — assistance in developing a sound record — parties seeking admission of a late-filed contention are required to provide a presiding officer with a “real clue about what they would say to support the contention beyond the minimal information they provide for admitting the contention.” LBP-98-7, 47 NRC at 208-09. Simply indicating the name and profession of an expert witness and asserting his or her testimony will develop a sound record without providing a real explanation about what will compose such a record lacks the specificity demanded by the Commission if this factor is to be accorded any significant weight in favor of admitting the contention. *See, e.g.*, LBP-98-29, 48 NRC at 294 & n.5.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (BROADEN OR DELAY THE PROCEEDING)

Relative to factor five — broaden or delay the proceeding — when a presiding officer has already granted summary disposition on a contention, admitting an amended version of that contention would reintroduce a subject matter previously eliminated from the proceeding, which undoubtedly would increase, at least to some degree, both the breadth and duration of the proceeding.

**MEMORANDUM AND ORDER
(Denying Request for Admission of Late-Filed Amended Contention Utah C)**

In response to the Licensing Board’s decision in LBP-99-23, 49 NRC 485 (1999), granting summary disposition in favor of Applicant Private Fuel Storage, L.L.C. (PFS), regarding contention Utah C, Failure to Demonstrate Compliance with the NRC Dose Limits, Intervenor State of Utah (State) has requested that we admit a late-filed amended contention Utah C. In its submission, the State challenges the revised dose analysis that has been incorporated into the pending

PFS application for a 10 C.F.R. Part 72 license to construct and operate an independent spent fuel storage installation (ISFSI) on the Skull Valley, Utah reservation of the Skull Valley Band of Goshute Indians. In this regard, the State claims the PFS application, even as revised, insufficiently evaluates the dose consequences of a loss-of-confinement accident and so fails to satisfy the Commission's health and safety regulations. In response to the State's request, although not in agreement on whether the amended contention has the requisite basis and specificity needed for admission, PFS and the NRC Staff both assert the contention should be rejected because the governing five-factor balancing test for late-filed issues does not support its admission.

For the reasons described below, we deny the request for admission of late-filed amended contention Utah C.

I. BACKGROUND

PFS submitted its pending proposal to construct and operate an ISFSI facility on the Skull Valley reservation in a June 1997 license application and accompanying safety analysis report (SAR). In the SAR, PFS relied upon data from the Staff-issued NUREG-1536, Standard Review Plan for Dry Cask Storage Systems (Jan. 1997), and a Sandia National Laboratory report, SAND80-2124, Transportation Accident Scenarios for Commercial Spent Fuel (Feb. 1981), to analyze the radiation dose consequences of the plan and demonstrate compliance with 10 C.F.R. § 72.106(b). *See* LBP-99-23, 49 NRC at 488. In pertinent part, that section of Part 72 directs that:

[a]ny individual located on or beyond the nearest boundary of the [ISFSI] controlled area may not receive from any design basis accident the more limiting of a total effective dose equivalent of 0.05 Sv [(sievert)] (5 rem), or the sum of the deep-dose equivalent and the committed dose equivalent to any individual organ or tissue (other than lens of the eye) of 0.5 Sv (50 rem).

10 C.F.R. § 72.106(b). In considering the original contention Utah C, in which the State argued that the PFS dose analysis calculation methods outlined in the SAR failed to comply with this safety regulation, the Board in its April 1998 initial ruling on contention admissibility found that issue statement presented a litigable contention. *See* LBP-98-7, 47 NRC 142, 185-86, *reconsideration granted in part and denied in part on other grounds*, LBP-98-10, 47 NRC 288, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998).

On December 10, 1998, the Staff submitted requests for additional information (RAI) to PFS, including RAI 7-1 that inquired about the dose analysis calculations included in the 1997 SAR. In its RAI responses submitted on February 10, 1999, PFS included a revised dose analysis calculation that, in accordance with Interim Staff Guidance-5 (Oct. 1998) (ISG-5), did not utilize NUREG-1536 or SAND80-2124. *See* LBP-99-23, 49 NRC at 489. Thereafter, PFS filed an April 21, 1999

motion asking for summary disposition in its favor on contention Utah C based upon its RAI 7-1 revised dose analysis for the ISFSI facility. Several weeks later, as part of its May 7, 1999 response to a State motion to compel discovery regarding contention Utah C, PFS expressed its intention formally to incorporate this revised calculation into its application. *See* [PFS] Response to [State] Proprietary and Non-Proprietary Motions to Compel [PFS] to Respond to State's First Set of Discovery Requests (May 7, 1999) at 6 n.12. PFS then did so on May 19, 1999, as part of its third amendment to its license application, which incorporated the revised dose analysis into chapter eight of the SAR.

In LBP-99-23, 49 NRC at 494, the Board granted summary disposition in favor of PFS on contention Utah C, ruling that contention Utah C was rendered moot by the PFS amendment incorporating the revised dose analysis. In this June 17, 1999 decision, the Board found that the PFS revisions addressed the deficiencies that composed the three admitted portions of contention Utah C. The Board explained:

As to the first two portions of the contention concerning the fission product release fraction and the respirable particulate fraction, PFS has responded to the State's concerns about its use of data from NUREG-1536 and SAND80-2124 to arrive at those fractions by eliminating those figures as a basis for its dose analysis. . . . And regarding the third segment of the contention — failure to consider dose pathways other than passing cloud inhalation, including direct radiation and food and water ingestion pathways — the new dose analysis does consider other pathways

Id. at 491-92.

Within a week, the State filed the pending motion requesting admission of a late-filed amended contention Utah C. This version of contention Utah C, like its predecessor, challenges the adequacy of the PFS dose analysis calculations. The State asserts that the requirements of 10 C.F.R. §§ 72.24(m), 72.106(b), and 72.126(b) still are not satisfied because the new analysis does not demonstrate that offsite doses can be contained within acceptable limits. Late-filed amended contention Utah C, as submitted by the State, reads:

The Applicant has failed to demonstrate a reasonable assurance that the dose limits specified in 10 CFR § 72.106(b) can and will be complied with, in the following respects:

1. The Applicant relies on cask designs that have not been approved by the NRC.
2. The Applicant has not demonstrated that the accident evaluated is a design basis or bounding event.
3. The Applicant makes unreasonable assumptions about the duration of the radiation dose.
4. The Applicant makes unreasonable assumptions about the length of time that a person outside the controlled area will be exposed.
5. The Applicant does not adequately evaluate the ingestion pathway dose.

[State] Request for Admission of Late-Filed Amended Utah Contention C (June 23, 1999) at 3 (footnote omitted) [hereinafter State Request].

In supporting the admission of this amended contention, the State argues that (1) a balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) that govern the admission of a late-filed contention establishes the contention should be admitted, *see* State Request at 14-20; and (2) the information it has provided in support of the contention is sufficient to establish the requisite basis and specificity to gain its admission under the requirements of 10 C.F.R. § 2.714(b)(2), (d)(2), (e), *see* State Request at 7-14. PFS, on the other hand, argues that the State's request should be denied because it has failed to satisfy the section 2.714(a)(1) late-filed contention test, in particular the requirement to show good cause for its late filing, and its contention lacks an adequate basis under section 2.714(b)(2). *See* [PFS] Response to [State] Request for Admission of Late-Filed Amended Utah Contention C (July 7, 1999) at 3-20 [hereinafter PFS Response]. The Staff, while agreeing with PFS that the contention should be dismissed because of the State's failure to prevail under a balancing of the five late-filing factors, nonetheless declares that all or portions of paragraphs two, three, four, and five of the amended contention have a basis sufficient to warrant admission under the standards in section 2.714. *See* NRC Staff's Response to [State] Request for Admission of Late-Filed Amended Utah Contention C (July 7, 1999) at 4-12 [hereinafter Staff Response].

II. ANALYSIS

As we have previously explained in this proceeding, *see, e.g.*, LBP-98-7, 47 NRC at 182-83, the admission of a late-filed contention, such as amended contention Utah C, is governed by the five-factor test set forth in 10 C.F.R. § 2.714(a)(1). In seeking admission, the burden of proof is on the petitioner, who must affirmatively address all five factors and demonstrate that on balance they warrant overlooking the lateness of the filing. *See, e.g., Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 & n.9 (1998) (citing cases), *petitions for review pending, National Whistleblower Center v. NRC*, Nos. 99-1002 & 99-1043 (D.C. Cir. Jan. 4, 1999 & Feb. 8, 1999). Even if a late-filed contention meets the requirements of section 2.714(a)(1), however, it also must satisfy the admissibility standards set forth in section 2.714(b)(2)(i)-(iii), (d)(2), (e), in order to receive merits consideration. *See* LBP-98-29, 48 NRC 286, 291 (1998).

The first, and most important, section 2.714(a)(1) element is whether the party seeking admission of the issue has demonstrated good cause for its late filing. And crucial to that inquiry in this instance is a determination of the point from which timeliness should be calculated. Although all of the parties involved concede the

State received the applicable PFS RAI responses in February 1999,¹ they disagree as to whether this is the date from which any timeliness determination should be calculated. The State declares the RAI responses were merely provisional and argues timeliness must be computed from the date PFS formally incorporated the new, revised dose analysis into its license application, which was less than 30 days from the date of the State's late-filed contention request. *See* State Request at 15-17. PFS and the Staff, on the other hand, argue that the proper point for beginning the timeliness calculation is the date the State received the PFS RAI-7 response, some 4 months before the State's late-filed contention was submitted. *See* PFS Response at 3; Staff Response at 5. This, these parties claim, puts the State's present request for the admission of late-filed amended contention Utah C far beyond even the 45 days the Board previously described as "approaching the outer boundary of 'good cause.'" LBP-99-3, 49 NRC 40, 47, *aff'd*, CLI-99-10, 49 NRC 318 (1999).

Relative to this timing question, the Commission has stated "a petitioner has 'an ironclad obligation' to examine the application, and other publicly available documents, with sufficient care to uncover any information that could serve as the foundation for a contention." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999). Further, participants in agency proceedings have been counseled to evaluate all available information at the earliest possible time to identify the potential basis for contentions and preserve their admissibility. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1050 (1983) (intervenors expected "to raise issues as early as possible"). And along this same line, the Board previously has indicated that where "a new contention purportedly is based on information contained in a document recently made publically available, an important consideration in judging the contention's timeliness is the extent to which the new contention could have been put forward with any degree of specificity in advance of the document's release." LBP-98-29, 48 NRC 286, 292 (1998).

As these decisions suggest, in making a judgment about timeliness, the emphasis is on the substance and sufficiency of the information available to the contention's sponsor. And from the Board's perspective, as we explained earlier in this proceeding, making a determination on such a timeliness issue "calls for a judgment about when the matter is sufficiently facially concrete and procedurally ripe to permit the filing of a contention." LBP-99-21, 49 NRC 431, 437 (1999).

In analyzing the question of factual concreteness in this instance, we must ascertain when the State had information sufficient to frame the contention with "reasonable specificity and basis." *Id.* at 437. Although the State sees the filing of the May 1999 license application amendment as the defining moment in

¹The State has not contested the PFS assertion that its RAI 7-1 response and the supporting calculations and backup information were provided to the State in mid-February 1999. *See* PFS Response at 2 & n.1.

this instance, PFS and the Staff argue the State had the information necessary to formulate amended contention Utah C upon receipt of the PFS RAI 7-1 response in February 1999. These parties maintain that on its face the RAI 7-1 response makes it clear the revised dose analysis both addressed the substantive concerns previously raised by the Staff and the State and would replace the earlier dose analysis calculations that had been questioned. For instance, in its response to RAI 7-1, PFS stated, “[t]he calculation of the impacts . . . has been revised in accordance with [ISG-5] to show compliance with the accident dose limits in 10 [C.F.R. §] 72.106(b).” [PFS] Motion for Summary Disposition of Utah Contention C — Failure to Demonstrate Compliance with NRC Dose Limits (Apr. 21, 1999), Affidavit of William Hennessy, exh. 2, at 1 of 4.

We agree that the revised technical information contained within the February 1999 PFS response to RAI 7-1 in fact provided an adequate basis, i.e., the requisite factual concreteness, for the formulation of an updated contention. The RAI response contained information with a degree of specificity sufficient to provide the State with the basis for formulating amended contention Utah C. Nor, as the State asserts, does the fact the information was contained in an RAI response rather than a license application amendment somehow toll its obligation to come forth with a contention based on that information. Even though this RAI response differs procedurally from an application amendment, Commission case law recognizes that such material can provide an acceptable basis for a contention. *See Ocone*, CLI-99-11, 49 NRC at 338.

That this is the case is not surprising. As we have noted previously, within the context of a license application process, in reaching a determination about whether a particular applicant submission, such as the instant RAI response, has sufficient procedural ripeness to cause it to trigger late-filed contention timing concerns, consideration should be given to whether the included information was “put before the agency in a context that is (a) reasonably likely to have a material impact on the administrative process (e.g., will influence Staff consideration of the pending license application); and (b) is subject to consideration in the related adjudicatory proceeding.” LBP-99-21, 49 NRC at 437. We have little trouble in concluding that the State reasonably should have known that upon submission, the information contained in the RAI response was likely materially to impact the Staff’s consideration of the PFS application.² Within the context of its submission, the response to RAI-7 directly addressed Staff and State concerns over the

²By way of contrast within this proceeding, the PFS RAI response at issue differs markedly from other information sources previously considered by the Board both in terms of its specificity and likely administrative process impact. *See* LBP-99-21, 49 NRC at 437-38 (applicant request for exemption is atypical and its “likely impact on the administrative process” uncertain as compared to license application in which an applicant seeks to demonstrate compliance with agency requirements); LBP-98-29, 48 NRC 286, 293 n.4 (notwithstanding early July 1998 letter to docket announcing intent to amend application with proposal to build Low Junction rail spur, *see* LBP-99-3, 49 NRC at 47, finding regarding untimeliness of late-filed contentions not based on lack of good cause for filing contentions within 30 days of August 1998 application amendment detailing rail spur proposal).

methodology used by PFS in its initial dose analysis and evidenced an intention that the new calculation should constitute the basis upon which the Staff should make a judgment about the sufficiency of its application. Therefore, the RAI response containing the analysis that now constitutes a central basis for amended contention Utah C was “procedurally ripe” such that the time at which the State received that response was an appropriate point from which “good cause” considerations began to accrue.

Having failed to demonstrate that the information made available to it in February 1999 as a result of the PFS RAI response was inadequate to provide a basis for formulating its amended contention Utah C, we conclude the State did not have good cause for waiting until June 1999 to file that contention.

In the absence of good cause, the State must make a compelling showing that the remaining four section 2.714(a)(1) factors outweigh factor one so as to favor admission. *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). Additionally, when analyzing the remaining four factors, the Board is to afford factors two and four — availability of other means to protect the petitioner’s interest and extent of representation of petitioner’s interests by existing parties — less weight than factors three and five — assistance in developing a sound record and broadening the issues/delaying the proceeding. *See id.* at 245.

We find factors two and four weigh in favor of the State, given it is unlikely that another means is available to the State to raise this dose analysis matter or that the State’s interests will be represented by another party to the proceeding. However, factors two and four must still be evaluated along with factors three and five to see whether their overall balance is sufficient to outweigh the lack of good cause. With regard to factor three, the State fails to make a compelling showing that admission of the contention will assist in developing a sound record. Petitioners are required to provide the Board with a “real clue about what they would say to support the contention beyond the minimal information they provide for admitting the contention.” LBP-98-7, 47 NRC at 208-09. Here, the State simply indicates the name and profession of its expert witness and asserts that his testimony will develop a sound record without providing a real explanation as to what will compose such a record, the type of proffer we previously have found lacks the specificity demanded by the Commission if this factor is to be accorded any significant weight in favor of admitting the contention. *See, e.g.,* LBP-98-29, 48 NRC at 294 & n.5.

Similarly, the State fails to make a convincing argument that admission will not broaden or delay the proceeding as required under factor five. The Board has already granted summary disposition on the original contention Utah C because the RAI 7-1 revised analysis, which has now been formally incorporated into the SAR, effectively mooted the State’s challenge to this part of the PFS plan. *See* LBP-99-23, 49 NRC at 494. Admitting the amended contention thus would reintroduce a

subject matter previously eliminated from this proceeding. Additionally, paragraph one of amended contention Utah C is identical to paragraph one the Board rejected in admitting the original contention Utah C as “impermissibly challeng[ing] the Commission’s regulatory scheme, provisions, or rulemaking-associated generic determinations.” LBP-98-7, 47 NRC at 186. Thus, at this juncture, the admission of amended contention Utah C undoubtedly would increase, at least to some degree, both the breadth and duration of this proceeding.

In sum, notwithstanding the fact section 2.714(a)(1) factors two and four support the admission of amended contention Utah C, a balancing of all four criteria does not establish the requisite compelling showing needed to overcome the lack of good cause under factor one.³ As a consequence, amended contention Utah C cannot be admitted.

III. CONCLUSION

In seeking admission of its late-filed amended contention Utah C contesting PFS’s compliance with agency dose limits in connection with operation of its proposed Skull Valley ISFSI, in accordance with the section 2.714(a)(1) five-factor balancing test governing the admission of late-filed contentions, the State has failed to establish under factor one that good cause existed for filing the contention in June 1999 when the dose analysis it challenges was made available to the State in February 1999 as part of a PFS response to a December 1998 Staff RAI. In the absence of good cause, and the State having failed to show that a balancing of the remaining four factors strongly favors admission of amended contention Utah C, we deny the State’s request for admission of that contention.

³ While our ruling on the late-filing criteria means we need not reach the question of the contention’s admissibility under the section 2.714 criteria, based on our review of the parties’ filings, we would have admitted paragraphs two, three, four, and five of the contention, excluding the asserted bases for paragraph two relating to (1) the need for offsite emergency planning, which constitutes an inadequately supported request for a rule waiver, *see* 10 C.F.R. § 2.758; and (2) accidents caused by sabotage, which seeks to challenge Commission regulations or rulemaking-associated generic determinations. Consistent with our ruling in LBP-98-7, 47 NRC at 186, we also would have denied admission of paragraph one for the reasons given in rejecting the same issue relative to the State’s original contention Utah C.

For the foregoing reasons, it is, this fourth day of November 1999, ORDERED that the State's June 23, 1999 request for admission of late-filed amended contention Utah C is *denied*.

THE ATOMIC SAFETY AND
LICENSING BOARD⁴

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 4, 1999

⁴Copies 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

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of

Docket No. 50-220
(License No. DPR-63)NIAGARA MOHAWK POWER
CORPORATION
(Nine Mile Point Nuclear Station,
Unit 1)

November 29, 1999

The Petitioners requested that NRC suspend Niagara Mohawk Power Corporation's (NMPC) operating license for Nine Mile Point Nuclear Station, Unit 1 (NMP1) by postponing the scheduled restart date until (1) NMPC releases the most recent inspection data on the plant's core shroud, (2) a public meeting can be held in Oswego County to review these inspection data and the repair design to core shroud welds V9 and V10, and (3) an adequate public review of the safety of the plant's continued operation is accomplished. This request was based upon the assertions of "new and unreviewed" information and "safety concerns."

The Director of the Office of Nuclear Reactor Regulation issued a Director's Decision on November 29, 1999, and the actions requested in the petition were not granted. The NRC Staff's subsequent review of the 1999 shroud reinspection results supports NMPC's conclusion, reached before restart, that the structural integrity of the core shroud will be maintained during at least the current operating cycle in its present configuration. The additional issues raised by the Petitioner in the supplement to the petition were previously known and addressed by the NRC. These issues were resolved consistent with approved BWRVIP programs, codes and standards, plant technical specifications, and the Commission's regulations. The crack growth rate for weld V10 did not exceed the NRC Staff's accepted limit and its repair has eliminated concern for its current and future behavior. As discussed in the Decision, the issues raised in the petition did not represent a significant safety issue.

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

I. INTRODUCTION

By letter dated May 24, 1999 (the petition), pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206), Mr. Tim Judson (the Petitioner) of the Syracuse Peace Council requested, on behalf of himself and others,¹ that the U.S. Nuclear Regulatory Commission (Commission or NRC) suspend the operating license issued to Niagara Mohawk Power Corporation (NMPC or Licensee) for Nine Mile Point Nuclear Station, Unit 1 (NMP1) until (1) NMPC releases the most recent inspection data on the plant's core shroud; (2) a public meeting can be held in Oswego County, New York, to review these inspection data and the repair design to core shroud vertical welds V9 and V10; and (3) an adequate public review of the safety of the plant's continued operation is accomplished.

In a letter dated June 11, 1999, the Director of the Office of Nuclear Reactor Regulation acknowledged receipt of the Petition of May 24, 1999, and addressed the actions under 10 C.F.R. § 2.206 that Petitioner requested to be taken before restart of NMP1 from its 1999 refueling outage (RFO-15). In the letter of June 11, 1999, the Staff explained that the issues and concerns addressed in the petition do not warrant deferring restart of NMP1 and that a meeting to provide for public review of the shroud reinspection results need not be held before restart.

In a supplemental letter dated August 10, 1999, Petitioner reiterated the request for the meeting to provide for public review of the shroud reinspection data and repair, even though it would be held after restart, and raised additional issues regarding cracks identified in the main drain line and control rod stub tubes during the hydrostatic testing of the reactor vessel. Petitioner also expressed concern, based on the reported 1999 core shroud inspection results, that shroud vertical weld V10 was exceeding the NRC's accepted crack growth rate limit.

II. BACKGROUND

As a basis for the requests in the initial Petition of May 24, 1999, the Petitioner asserted that —

¹The others are Citizens Awareness Network, Coalition on West Valley Nuclear Waste, Environmental Advocates, Greens of Greater Syracuse, Nuclear Information and Resource Service, Oswego Valley Peace and Justice, Sierra Club (Iroquois Group), Student Environmental Action Coalition (SU/SUNY-ESF), Syracuse Anti-Nuclear Effort, and Dr. Steven Penn, Ph.D. In July 1999, Mr. Judson left his position with the Syracuse Peace Council to assume a position with the Central New York Chapter of Citizens Awareness Network.

1. Petitioner believes that the public cannot rely upon NMPC to accurately perform the data analysis necessary to calculate the extent and rate of cracking in the core shroud because of problems with NMPC's previous testing and analyses that were identified in letters to the NRC from Dr. Penn. Petitioner states that the NRC has not responded to Dr. Penn's letters, and, therefore, Petitioner believes Dr. Penn's expressed concerns constitute unreviewed safety issues.
2. NMPC and NRC reported during the May 1999 inspection that cap screws in the bow spring mechanisms of the shroud tie rod assemblies were found to have suffered intergranular stress-corrosion cracking, resulting in the fracture of one of the cap screws. Petitioner states that this problem, and the tie rod problem corrected during the 1997 outage, indicates that NMPC's designs warrant in-depth review by the public and closer implementation scrutiny. Petitioner believes that NMPC's prior selection of poor cap screw material and the NRC Staff's acceptance of it raises questions about the credibility of the NRC's approval of the vertical weld repair design and, thus, necessitates a public review of the level of safety before plant restart.
3. Data from the May 1999 inspection of the NMP1 core shroud are new and the NRC Staff's review of the data will not be completed before plant restart. Petitioner states that previous NRC Staff safety evaluations required future evaluations. Petitioner believes that subsequent NRC approval of an "unprecedented and unproven" repair design for vertical welds, issued before the inspection, does not preempt the previously determined need to assess the actual extent of cracking in the vertical welds and the structural integrity of the core shroud.
4. NMPC has informed the NRC that supporting a meeting for public review of the core shroud inspection data during this refueling outage would place an undue regulatory burden on NMPC's manpower resources, and this burden could possibly compromise safety at NMP1. Petitioner considers inadequate Licensee resources to be new information and an unreviewed safety issue. Petitioner contends that violations and a civil penalty issued against NMPC on November 6, 1997, involving inadequate management oversight and failure to monitor the effectiveness of maintenance activities are "directly pertinent to the failure of the tie rod installation (1995), faulty design of the bow spring modification (1997), flawed studies on core shroud boat samples (1998), postponement of mid-cycle inspection (1998), and miscalibration of instruments for vertical weld inspection (May 1999)." Petitioner believes that because the degree of cracking in the NMP1 shroud is precedent-setting, the question of regulatory burden is not relevant, as the NMP1 shroud requires the strictest regulatory oversight and a full public review. Petitioner states that postponing restart would

eliminate this regulatory burden and ensure that outage work is properly reviewed.

In a supplemental letter dated August 10, 1999, Petitioner reiterated the request for the meeting to provide for public review of the shroud reinspection data and repair, even though the meeting would take place after restart. Petitioner stated that the need for the meeting had increased because cracks were identified in the main drain line and control rod stub tubes during the hydrostatic testing of the reactor vessel during RFO-15. Petitioner stated that these cracks from the hydrostatic tests raise two concerns: (1) that the NRC's "leak-before-break" model for assessing the safety of aging reactors is inadequate and (2) that the problem of cracking is not confined to the core shroud, but may be spreading throughout the reactor internals, pipes, and other systems, representing an unanalyzed condition that is only being identified piecemeal through certain incidental cases that, together, reveal a pattern of degradation of reactor components and systems and overall embrittlement of the reactor. Petitioner also expressed concern in the letter of August 10, 1999, that the core shroud inspection during RFO-15 indicated that shroud vertical weld V10 is growing at a rate in excess of the NRC's accepted crack growth rate limit of 22 microinch/hr, whereas he believes the measured rate should be at least 2 sigma below the limit.

III. DISCUSSION

1. The NRC should suspend the NMP1 operating license until (1) NMPC releases the most recent inspection data on the plant's core shroud; (2) a public meeting can be held in Oswego County, New York, to review these inspection data and the repair design to core shroud vertical welds V9 and V10; and (3) an adequate public review of the safety of the plant's continued operation is accomplished.

As stated in the letter of June 11, 1999, the NRC's Petition Review Board (PRB) determined that the petition meets the criteria for a request under 10 C.F.R. § 2.206 and that the NRC Staff would inform the Petitioner within a reasonable time of the action to be taken on his requests. The letter stated that the PRB had also determined that the issues and concerns addressed in the petition did not warrant deferring restart of NMP1 and that a public meeting on the core shroud reinspection results need not be held before restart. In reaching this determination, the PRB had considered the following:

1. By letter dated May 28, 1999, the NRC Staff responded to Dr. Penn's letters dated December 3, 1998; March 25, 1999; and April 15, 1999. In a letter dated April 30, 1999, NMPC had also responded to relevant concerns in Dr. Penn's letter of March 25, 1999. The responses indicate that testing and evaluations of the core shroud by NMPC and its contractors can be

- relied upon by the NRC with reasonable assurance as to their accuracy. Therefore, the issues in Dr. Penn's letters do not provide a sufficient basis to warrant suspension of the NMP1 operating license.
2. The bow spring modification to each of the four tie rod assemblies replaced the design function of the failed cap screw and other cap screws that had the potential for future failure. By letter dated May 28, 1999, NMPC confirmed that no additional modifications were needed other than the bow spring modification addressed in NMPC's letter of May 21, 1999. The tie rod bow spring does not affect the tie rod's function of maintaining a predetermined compressive force ("preload") on the shroud during power operation. In response to NMPC's letter dated May 21, 1999, the NRC Staff had reviewed and, by letter dated June 7, 1999, approved the modifications as an alternative repair pursuant to 10 C.F.R. § 50.55a(3)(i). NMPC implemented these modifications. With the NRC Staff's review and approval of this modification, the NRC Staff found no basis for considering enforcement action to suspend the operating license.
 3. During the 1999 refueling outage, NMPC implemented preemptive repairs of shroud vertical welds V9 and V10, as approved by the NRC Staff in a letter dated April 30, 1999. These repairs mechanically restored the vertical welds. NMPC had also verbally informed the NRC that the 1997 modifications to the tie rod assemblies had performed satisfactorily and that the tie rod assemblies had applied the appropriate preload on the shroud throughout the previous operating cycle. Since vertical welds V9 and V10 were restored and the tie rods are satisfactorily performing their preload function, the need for NRC Staff review of reinspection data before restart was obviated.
 4. In accordance with the approved Boiling Water Reactor Vessel and Internals Project's report BWRVIP-01, "BWR Core Shroud Inspection and Flaw Evaluation Guidelines," NMPC would provide reinspection results and analyses to disposition these reinspection findings to the NRC within 30 days of completing the reinspection. Noting the results of inspections at that time, the resource impact upon the Licensee, and that NMPC had followed the BWRVIP generic criteria for inspection, evaluation, and repair, the NRC Staff concluded that a public meeting was not warranted before restart. However, because it recognizes the value of public meetings, the NRC Staff stated in its letter of June 11, 1999, that a routinely scheduled meeting to discuss recent plant performance at the NMP site was planned. At the time of the letter, the meeting was expected to be held in August 1999 but was actually held on October 22, 1999, at the NMP Nuclear Training Center. In this meeting, participants discussed a variety of topics related to Licensee performance. A brief discussion on the NMP1 core shroud activities was one of the agenda topics.

The NRC Staff has now received and reviewed NMPC's letter dated July 9, 1999, forwarding a report summarizing the horizontal and vertical shroud weld inspections performed during the 1999 refueling outage. Copies of this letter and report were forwarded to the Petitioner by the NRC Staff's letter dated July 26, 1999. The report confirms that NMPC's 1999 core shroud reinspections were performed consistent with the Staff-approved guidelines in BWRVIP-07, "BWR Vessel and Internals Project Guidelines for Reinspection of BWR Core Shrouds," and exceeded the approved scope of the reinspection plan to which NMPC had committed in a letter dated December 30, 1998. The 1999 reinspection included the additional inspection of the core shroud base metal adjacent to vertical welds V9 and V10 and selected areas at five horizontal welds (H1, H2, H4, H5, and H6b) adjacent to the intersections of the vertical welds. Because the vertical welds V9 and V10 were preemptively repaired and the minor intergranular stress-corrosion cracking (IGSCC) observed at other vertical welds did not show significant changes in size, NMPC did not need to perform any additional detailed vertical weld flaw evaluation to ensure structural integrity of the core shroud; the potential crack growth of these welds in the current fuel cycle is bounded by the flaw evaluations performed previously for vertical welds V9 and V10.

The NRC Staff has also received and reviewed NMPC's letter dated July 12, 1999, that presents a final root-cause evaluation of the cap screw that was discovered during the 1999 refueling outage to have failed in the upper spring assembly of the shroud tie rod. A copy of this report was also forwarded to the Petitioner by letter dated July 26, 1999. The NRC Staff's review included NMPC's letter dated May 21, 1999, forwarding a report summarizing NMPC's 1999 findings from the visual examination of the four tie rods and reporting observations and the preliminary root cause of the failed cap screw. These reports confirm NMPC's prior verbal statement to the NRC that the tightness inspections had demonstrated that the tie rods had maintained sufficient preload on the core shroud during the previous operating cycle. These reports also confirmed NMPC's earlier preliminary root-cause evaluation. In its final root-cause evaluation, NMPC concluded that the cap screw failed as a result of IGSCC in the alloy X-750 cap screw material due to large sustained stresses from differential thermal expansion of dissimilar materials fastened by the cap screw. The NRC Staff agrees that the condition that existed of high stresses and the environment are sufficient to cause IGSCC failure in the cap screw. The modification to the upper spring assemblies that NMPC implemented for each of the four tie rods before restart, replacing the design function of the failed cap screw and the other cap screws that had the potential for future failure, was designed to address this source of stress, as well as the other potential sources of stress on the cap screws identified in the preliminary root-cause evaluation. By addressing the various potential sources of stress, NMPC ensured that the modification, implemented in advance of the final root-cause evaluation, would be acceptable once that final determination was

reached. Consequently, it was unnecessary to defer restart of NMP1 until the final root cause of the cap screw failure had been determined.

On the basis of its review, the NRC Staff concludes that the structural integrity of the core shroud will be maintained during the current operating cycle in its present configuration. The Licensee will reinspect the core shroud during NMP1's next refueling outage using the reinspection criteria in BWRVIP-07. The Licensee will inform the NRC of the reinspection scope at least 3 months before the start of that outage.

2. Hydrostatic testing of the NMP1 reactor pressure vessel identified cracks in the main drain line (MDL) and in control rod stub tubes.

In his letter of August 10, 1999, Petitioner states that "the MDL leak is particularly troubling. As a small-diameter pipe, the MDL is only scheduled for inspection once every eight years. The leak, which was detected by visual inspection and not remote sensing, was fortunately discovered before restart. Had the MDL burst during operation there would be no way to stop the draining of the reactor vessel."

The NMP1 reactor vessel bottom head MDL is a type-316L stainless steel line with a 2-inch diameter. It is inspected to a schedule consistent with Generic Letter 88-01, "NRC Position on IGSCC in BWR Austenitic Stainless Steel Piping," which is based upon NUREG-0313, Revision 2, "Technical Report on Material Selection and Process Guidelines for BWR Coolant Pressure Boundary Piping." NMPC identified a leak in the MDL on June 6, 1999, during the vessel hydrostatic test. The leak was from a crack downstream of the manual isolation valve. Upon identifying the crack, NMPC secured the hydrostatic test, depressurized the plant, installed freeze seals, and replaced the affected section of pipe. The cause was determined to be thermal stress induced fatigue that was caused by a system valve packing leak onto the adjacent downstream piping. NMPC performed a walkdown inspection of the remaining section of the drain line piping, which identified no discrepancies. NMPC also installed a modification to shield the new piping from possible future packing leakage from the adjacent valve. An NRC inspector performed a partial system walkdown inspection, discussed the leakage with NMPC personnel, and reviewed the corrective actions. The NRC found NMPC's corrective actions to be acceptable.

The normal reactor coolant makeup systems have sufficient capacity to maintain water level in the vessel in the event of a break of the MDL. A leak in the MDL while the plant is at power would be detected as unidentified leakage by the floor drain sump alarm in the control room and by the daily trending of the pumpout of the drywell floor drain tank. The NRC agrees with the Petitioner that a catastrophic break in the MDL while the plant is at power would be a safety concern in that efforts to isolate the postulated pipe break may be difficult because

the only isolation valve upstream of the postulated break is manually operated. Absent a means to isolate the break, long-term reactor water inventory control would be achieved by flooding the primary containment in accordance with the plant's emergency operating procedures. An MDL break is bounded by the loss-of-coolant accident described in the final safety analysis report and is well within the long-term core cooling capabilities of the emergency core cooling systems. Thus, while this postulated event is of concern to the NRC Staff, adequate protection is provided through existing safety systems and procedures.

Limited leakage from control rod drive (CRD) penetrations does not represent a significant adverse safety consideration. In a letter dated March 25, 1987, the NRC Staff approved allowable leakage rates from CRD penetrations at NMP1. As stated in that letter, the allowable leakage rate for a previously rolled CRD penetration under hydrostatic pressure (900-1200 psig) is 5 drops/second, and while depressurized is 1 drop/second. During the 1999 hydrostatic test of the NMP1 vessel, leakage of 1 drop/second was observed in a previously rolled CRD penetration that was not repaired by further rolling. Monitoring during the subsequent plant heatup revealed no leakage. The amount of allowable leakage from stub tube penetrations is within the capacity of the normal make-up systems. As noted in the NRC Staff's letter of March 25, 1987, a change in leakage would be detected by using one of three drywell unidentified leakage measuring systems: (1) the level rate of rise in the drywell floor drain tank, (2) the pump-out timer, or (3) the monitoring of integrated flow of waste disposal. By the end of 1999, the NRC Staff will complete its review of BWRVIP-58, "CRD Internal Access Weld Repair," which provides a method of performing weld repair to such cracks in stub tubes for CRD penetrations in the bottom head of the reactor vessel.

3. The NRC's "leak-before-break" model for assessing the safety of aging reactors is inadequate.

The NRC Staff does not rely upon a leak-before-break model to assess the safety of aging reactors or reactor system components. The Commission's regulations, 10 C.F.R. § 50.55a, regarding integrity of structures, systems, and components rely upon established codes and standards, such as those specified by the American Society of Mechanical Engineers Boiler and Pressure Vessel Code (ASME Code), Section XI. Degradation of such components is assessed by inspections and fracture mechanics techniques that determine suitability for continued service for a specified period.

The NMP1 MDL and stub tubes have not been evaluated or accepted on the basis of leak-before-break methodology. The NRC's leak-before-break model can only be applied to piping not susceptible to failure from various degradation mechanisms in service. For those cases where the model is applicable, the methodology demonstrates that a pipe would experience a small, through-wall leak

before catastrophic failure of the pipe would occur. Thus, if a leak were detected in a pipe subject to the leak-before-break model, this would confirm the validity of the methodology.

4. The problem of cracking is spreading throughout the reactor internals, pipes, and other systems, representing an unanalyzed condition being identified piecemeal through incidental cases that, together, reveal a pattern of degradation of reactor components and systems and overall embrittlement of the reactor.

In the August 10, 1999 letter, Petitioner states that —

The problem of cracking in pipes and internals is not confined to the core shroud, but may be spreading throughout the reactor internals, pipes, and other systems. The latter represents an unanalyzed condition which is only being identified piecemeal, through incidental cases: the core shroud (1995-present), emergency core coolant condensers (1997), main drain line, and control rod stub tubes (1999). Together, however, they reveal a pattern of degradation of reactor components and systems and suggest overall embrittlement of the reactor. The condition of the core shroud, the most robust internal component, is a bellwether for the status of other reactor components and systems.

The flaw indicators and cracks that have been discovered were evaluated in accordance with the BWRVIP program. The NRC has reviewed and approved 60 BWRVIP reports pertaining to this program. The BWRVIP reports establish a comprehensive program to address IGSCC in BWR internals. These reports describe inspection techniques and schedules, as well as flaw evaluation methodology and repair. The NRC Staff reviewed the reports using criteria in current codes and standards and the Commission's regulations. The Licensee inspects piping and supports in accordance with established Inservice Inspection Program Plans, and inspects pumps and valves against criteria in established Inservice Testing Program Plans pursuant to ASME Code requirements. The cases Petitioner cites of the core shroud (1995-present), emergency core coolant condensers (1997), main drain line, and control rod stub tubes (1999) were the subjects of previous inspection reports and have been satisfactorily resolved.

Regarding Petitioner's concern for reactor embrittlement, all licensees of light-water nuclear power reactors are required to comply with 10 C.F.R. Part 50, Appendix G, which specifies fracture toughness requirements for ferritic materials of pressure-retaining components of the reactor coolant pressure boundary to provide adequate margins of safety during any condition of normal operation, including anticipated operational occurrences and system hydrostatic tests, to which the pressure boundary may be subjected over its service lifetime. A major component of interest with respect to embrittlement is the reactor vessel. In accordance with 10 C.F.R. Part 50, Appendix H, licensees monitor changes in the fracture toughness properties of ferritic materials in the reactor vessel beltline region that result from exposure of these materials to neutron irradiation and the

thermal environment. Under this program, fracture toughness test data are obtained from material specimens exposed in surveillance capsules, which are withdrawn periodically from the reactor vessel. The reported results of the Appendix G and Appendix H programs at the Nine Mile Point facility do not support Petitioner's concern of excessive or overall embrittlement of the reactor. Similarly, the NRC Staff's recent review of predicted crack growth for the NMP1 core shroud, which included the effects of environmental factors such as neutron fluence, did not find excessive embrittlement of the core shroud. The Licensee inspects and evaluates the full scope of reactor internals and the reactor coolant system as part of a comprehensive, integrated program. Therefore, the NRC Staff does not agree with Petitioner's view that the NMP1 cracks represent an unanalyzed condition that is being identified piecemeal through incidental cases.

5. Recent inspection results indicate that one core shroud weld, V10, is experiencing a crack growth rate greater than the limit in the NRC's November 1998 safety evaluation and the rate predicted by General Electric. The measured rate should be at least 2 sigma below the limit.

In a letter dated July 9, 1999, NMPC submitted a report summarizing the NMP1 core shroud inspections performed during RFO-15. The report included tables comparing the RFO-14 and RFO-15 inspection results for shroud vertical welds V9 and V10. The results showed that V9 indications remained essentially unchanged but the V10 indications showed evidence of a change in crack depth. In these tables, the change in depth was converted directly to an assumed crack growth rate based on about 14,000 hours of operation.

As shown in NMPC's letter of July 9, 1999, the average crack growth rate for the right side of shroud vertical weld V10 was 1.54×10^{-5} inch/hour, which is less than the limit of 2.2×10^{-5} inch/hour (1.55×10^{-8} centimeter/second) that the NRC approved based upon BWRVIP-14, "Evaluation of Crack Growth in BWR Stainless Steel RPV Internals." For load limit analyses performed to determine the integrity of a weld, the parameter of interest is the average crack growth rate for the length of the weld, not the rate within increments of the weld length. The fact that the crack growth rates in two increments of the weld length exceeded 2.2×10^{-5} inch/hour by a small amount does not affect the overall load limit analysis results and does not mean that the NRC's approved limit of 2.2×10^{-5} inch/hour was exceeded. NMPC's load limit analyses of V10 showed that structural margins in the ASME Code would be maintained for at least an additional operating cycle. Nevertheless, NMPC opted to implement a preemptive repair of V10 (and V9) before the 1999 restart. Because weld V10 has been repaired, the cracks in weld V10 do not represent a safety concern to current or future operating cycles.

6. We reiterate our request for a public review of the 1999 core shroud inspection and the safety status of NMP1, separate from the meeting to review plant performance at Nine Mile Point.

As discussed in Section III.1 of this Decision, the NRC Staff advised the Petitioner by letter dated June 11, 1999, that a meeting for public review of the NMP1 shroud reinspection results was not warranted before restart and explained the basis for that conclusion (Sections III.1.1-4 above). The NRC Staff's subsequent review of the 1999 shroud reinspection results support NMPC's conclusion, reached before restart, that the structural integrity of the core shroud will be maintained during at least the current operating cycle in its present configuration. The additional issues raised by Petitioner in the supplement to the petition were previously known and addressed by the NRC. These issues were resolved consistent with approved BWRVIP programs, codes and standards, plant technical specifications, and the Commission's regulations. The crack growth rate for weld V10 did not exceed the NRC Staff's accepted limit and its repair has eliminated concern for its current and future behavior. Some of the issues of concern to the Petitioner were discussed during the Plant Performance Meeting at the NMP site on October 22, 1999, and the NRC Staff remained in the area after the meeting to discuss issues of interest with the public and the local press. For these reasons, the NRC Staff concludes the additional meeting requested by the Petitioner is not warranted.

IV. CONCLUSION

For the reasons discussed above, the NRC Staff concludes that the issues raised in the petition do not represent a significant safety issue and do not warrant any NRC Staff action to modify, suspend, or revoke operation of NMP1. The NRC Staff also concludes that a meeting with the public to discuss the issues raised in the petition is not warranted. Therefore, the petition is not granted.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 C.F.R. § 2.206(c). As provided for by that regulation, the Decision will constitute the final action of the Commission

25 days after the date of issuance of the Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Brian W. Sheron, Acting Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this 29th day of November 1999.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 50-219-OLA-2

GPU NUCLEAR CORPORATION
(Oyster Creek Nuclear Generating
Station)

December 22, 1999

The Commission vacates LBP-99-45, 50 NRC 384 (1999), grants GPU's request to withdraw without prejudice its license amendment application, and terminates the proceeding.

RULES OF PRACTICE: WITHDRAWAL

If a licensing board has not yet issued a Notice of Hearing in a proceeding pursuant to 10 C.F.R. § 2.105(e)(2), the authority to approve a withdrawal of the application resides in the Commission rather than the Board. *See* 10 C.F.R. § 2.107(a); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-93-20, 38 NRC 83 (1993). *Cf.* 10 C.F.R. § 2.717(a).

MEMORANDUM AND ORDER

On December 9, 1999, GPU Nuclear Corporation ("GPU") submitted a request for Commission approval to withdraw without prejudice GPU's license amendment request in this docket. Neither the NRC Staff nor the Nuclear Information Resource Service (which petitioned to intervene) has objected to the proposed

withdrawal. On December 15, 1999, the Licensing Board issued an order granting the withdrawal and terminating the proceeding without prejudice. LBP-99-45, 50 NRC 384.

However, at the time it issued LBP-99-45, the Licensing Board had not yet issued a Notice of Hearing in this proceeding pursuant to 10 C.F.R. § 2.105(e)(2). Consequently, the authority to approve the withdrawal resides in the Commission rather than the Board. *See* 10 C.F.R. § 2.107(a); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-93-20, 38 NRC 83 (1993). *Cf.* 10 C.F.R. § 2.717(a) (a presiding officer's jurisdiction to conduct a hearing in a Subpart G proceeding "is deemed to commence when a notice of hearing . . . is issued"). For this reason, we find it necessary to vacate LBP-99-45. Notwithstanding the Board's lack of authority, we nevertheless agree with its rulings and adopt them as our own.

IT IS SO ORDERED.

For the Commission¹

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 22d day of December 1999.

¹Commissioner Diaz was not available for the 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:

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

In the Matter of

Docket Nos. 50-220
50-410
(License Nos. DPR-63,
NPF-69)

NIAGARA MOHAWK POWER
CORPORATION,
NEW YORK STATE ELECTRIC & GAS
CORPORATION, and
AMERGEN ENERGY COMPANY, LLC
(Nine Mile Point Nuclear Station,
Units 1 and 2)

December 22, 1999

The Commission grants standing to three co-owners of Nine Mile Point, Unit 2; permits the New York Attorney General to participate in a manner analogous to a participating government under 10 C.F.R. § 2.715(c); grants in part the co-owners' request to suspend this proceeding; and denies the co-owners' "suggestion" that the Commission use Subpart G procedures.

RULES OF PRACTICE: INTERVENTION; REACTOR LICENSE
TRANSFER PROCEEDINGS

To intervene as of right in any Commission licensing proceeding, a petitioner must demonstrate that its "interest may be affected by the proceeding," i.e., it must demonstrate "standing." See AEA § 189a, 42 U.S.C. § 2239(a). The Commission's rules also require that a petition to intervene raise at least one

admissible contention or issue. The standards for meeting these two requirements in reactor license transfer cases come both from our Subpart M procedural regulations and from judicial cases on standing (to which we look for guidance).

RULES OF PRACTICE: INTERVENTION (STANDING); REACTOR LICENSE TRANSFER PROCEEDING

To show standing in a reactor license transfer proceeding, a petitioner must

- (1) identify an interest in the proceeding by
 - (a) alleging a concrete and particularized injury (actual or threatened) that
 - (b) is fairly traceable to, and may be affected by, the challenged action (the grant of an application), and
 - (c) is likely to be redressed by a favorable decision, and
 - (d) lies arguably within the “zone of interests” protected by the governing statute(s).
- (2) specify the facts pertaining to that interest.

See 10 C.F.R. § 2.1308; *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1) and *Northeast Nuclear Energy Co.* (Millstone Station, Unit 3), CLI-99-27, 50 NRC 257, 262 (1999); *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 214-15 (1999). *See generally* *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 194-96 (1998).

RULES OF PRACTICE: INTERVENTION (STANDING); REACTOR LICENSE TRANSFER PROCEEDING

“It is hard to conceive of an entity more entitled to claim standing in a license transfer case than a co-licensee whose costs may rise . . . as a result of an ill-funded license transfer. This kind of situation justifies standing based on ‘real-world consequences that conceivably could harm Petitioners and entitle them to a hearing.’” *Seabrook*, CLI-99-6, 49 NRC at 215, quoting *Yankee Nuclear*, CLI-98-21, 48 NRC at 205; *Seabrook and Millstone*, CLI-99-27, 50 NRC at 262-63.

RULES OF PRACTICE: INTERVENTION (STANDING); REACTOR LICENSE TRANSFER PROCEEDING

In a reactor license transfer proceeding, the threatened injury (i.e., the grant of the license transfer application) is fairly traceable to the challenged action because the alleged increase in risk associated with AmerGen taking over a majority interest in Unit 2 could not occur without Commission approval of the application. Similarly, this threatened injury can be redressed by a favorable decision because the Commission’s denial of the application would prevent the indirect transfer of

interest. *Seabrook and Millstone*, CLI-99-27, 50 NRC at 263. Cf. *Seabrook*, CLI-99-6, 49 NRC at 215.

RULES OF PRACTICE: INTERVENTION (STANDING); REACTOR LICENSE TRANSFER PROCEEDINGS

The risks to Petitioners' ownership interest in the Nine Mile Point units are among the interests protected by the AEA. "[T]he AEA protects not only human health and safety from radiologically caused injury, but also the owners' property interests in their facility. . . . Persons or entities who own (or co-own) an NRC-licensed facility plainly have an AEA-protected interest in licensing proceedings involving their facility." *Seabrook and Millstone*, CLI-99-27, 50 NRC at 263; *Seabrook*, CLI-99-6, 49 NRC at 216 (and cited authority).

RULES OF PRACTICE: INTERVENTION (CONTENTIONS; ADMISSIBILITY OF ISSUES); REACTOR LICENSE TRANSFER PROCEEDING

To show admissible issues in a reactor license transfer proceeding, a petitioner must

- (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those issues fall within the scope of the proceeding,
- (3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant regarding the issues, and
- (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. § 2.1308; *Seabrook and Millstone*, CLI-99-27, 50 NRC at 263; *Seabrook*, CLI-99-6, 49 NRC at 215. *See generally* *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348-49 (1998).

RULES OF PRACTICE: SUSPENSION; REACTOR LICENSE TRANSFER PROCEEDINGS

The Commission does not view a temporary suspension of this proceeding as contravening the Commission's stated policy of expedition in Subpart M proceedings. *See* Final Rule, "Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 66,721, 66,722 (Dec. 3, 1998) (Subpart M "procedures are designed to provide for public participation . . . while at the same

time providing an efficient process that recognizes the time-sensitivity normally present in transfer cases’’). The Commission believes it would not be sensible to require the expenditure of both public and co-owner funds on a proceeding, part or all of which may well be rendered moot in the immediate future.

**RULES OF PRACTICE: SUSPENSION; REACTOR LICENSE
TRANSFER PROCEEDINGS**

The Commission declines to adopt the co-owners’ suggestion that it further suspend this proceeding until conclusion of the proceeding currently pending before the New York Public Service Commission. In support of this suggestion, the co-owners allege that simultaneous litigation in multiple forums imposes a “tremendous burden” on all parties. *See* Co-owners’ Petition at 5. The Commission fails to see how the burden on the co-owners is any greater than that placed on numerous other parties in our proceedings — parties who are regularly participants in proceedings concurrently conducted by other state and federal agencies. This multiforum situation is especially common in license transfer proceedings involving nuclear power plants. In these cases, the transfer is often the subject of simultaneous regulatory proceedings before one or more appropriate state public utility commissions, the FERC, the Securities and Exchange Commission, the Internal Revenue Service, the Department of Justice and/or Federal Trade Commission, and the NRC — in addition to which the parties to those proceedings may be involved in court litigation with plant co-owners.

**RULES OF PRACTICE: SUSPENSION; REACTOR LICENSE
TRANSFER PROCEEDINGS**

The Commission also rejects co-owners’ suspension request on the ground that they have not explained why suspension of this proceeding pending completion of the New York Public Service Commission’s case would reduce the financial burden that this litigation places on the parties. The burden would appear the same, whether incurred simultaneously or sequentially. Moreover, to the extent the two commissions are considering the same issues, the New York Public Service Commission is reviewing the transfer under a different statutory mandate than that of the NRC, *see* New York Public Service Law § 70, and its conclusions would therefore not be dispositive of the issues before the NRC. *A fortiori*, to the extent the two commissions are considering different issues, suspension would serve no purpose whatever.

RULES OF PRACTICE: PARTICIPATION BY GOVERNMENT BODIES; INTERVENTION (STANDING; ADMISSIBILITY OF ISSUES); REACTOR LICENSE TRANSFER PROCEEDINGS

The Commission need not reach the issue of whether the Attorney General has established standing in this proceeding, because he has clearly raised no issues with the level of specificity required under Subpart M. *See* 10 C.F.R. § 2.1306(b)(2)(iv) (requiring a petitioner to “provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact”). He alludes in the most general terms to the adequacy of funding for the operation and decommissioning of the units and to AmerGen’s qualifications to operate the plant, and indicates merely that he wishes to intervene in order “to review the evidence and to develop recommendations.” However, the Commission has long recognized the benefits of participation in our proceedings by representatives of interested states, counties, municipalities, etc. The Commission believes that the Attorney General’s involvement in the New York Public Service Commission’s proceeding may provide him with insights that may be useful to this Commission. The Commission therefore permits him to participate in a manner analogous to a participating government under 10 C.F.R. § 2.715(c), should a hearing be granted in this proceeding.

RULES OF PRACTICE: REACTOR LICENSE TRANSFER PROCEEDINGS

The Commission denies co-owners’ “suggestion” that we substitute formal trial-type Subpart G procedures for those of Subpart M. The Commission’s regulations make quite clear that “[n]either the Commission nor the Presiding Officer will entertain motions from the parties that request . . . formal hearings.” 10 C.F.R. § 2.1322(d). The Commission considers co-owners’ “suggestion” as a poorly disguised effort to sidestep the above regulatory prohibition. The Commission’s rules specify only one ground on which a party may seek waiver of any (or all) of Subpart M’s regulations — “because of special circumstances concerning the subject of the hearing, application of a rule or regulation would not serve the purposes for which it was adopted.” 10 C.F.R. § 2.1329(b). Co-owners fail even to cite this standard, much less satisfy it. Their only proffered justification is the claim that Subpart M did not contemplate the issues raised in this proceeding. The Commission disagrees. When promulgating Subpart M, the Commission was well aware that most license transfer issues would be, like co-owners’ issues, financial in nature. At this early stage of the proceeding, it is by no means clear that the informal Subpart M process will not suffice to resolve any issues that require litigation.

MEMORANDUM AND ORDER

This proceeding involves a September 10, 1999 license transfer application by AmerGen Energy Company (“AmerGen”),¹ Niagara Mohawk Power Corporation (Niagara Mohawk), and the New York State Electric and Gas Corporation (“New York Electric”) regarding Units 1 and 2 of the Nine Mile Point nuclear generating facility in Oswego County, NY. Specifically, Niagara Mohawk and New York Electric (“the Applicants”) seek the Commission’s authorization to sell AmerGen their 41% and 18% ownership interest (respectively) in Unit 2, and also for Niagara Mohawk to sell AmerGen its 100% ownership interest in Unit 1. Under the proposed transfers, AmerGen would also become the operator of both units. Commission authorization is required under section 184 of the Atomic Energy Act of 1954 (“AEA”)² and 10 C.F.R. § 50.80 of our regulations.³

The Applicants also seek conforming license amendments reflecting AmerGen’s new ownership interest and adding license conditions that would (1) give AmerGen decisionmaking authority over safety issues, (2) limit the foreign membership of AmerGen’s Management Committee, (3) assign to AmerGen’s Chief Executive Officer and Chief Nuclear Officer the responsibility and authority for ensuring that AmerGen’s business activities with respect to Units 1 and 2 are conducted consistent with the protection of the public health and safety and the common defense and security of the United States, and (4) require AmerGen to report to the Commission the filing of any Schedules 13D or 13G with the United States Securities and Exchange Commission that disclose beneficial ownership of a registered class of Philadelphia Electric Energy Company stock.

I. BACKGROUND

The Commission published the notice of this application on September 30, 1999, in the *Federal Register*, and invited interested parties either to seek intervention and a hearing or to file comments that the NRC Staff would consider outside the context of any hearing. 64 Fed. Reg. 52,798. In response to the *Federal Register* notice, the Commission received two petitions to intervene and three comments.

¹ AmerGen is “owned by PECO Energy Company (‘PECO’) and British Energy, Inc. (‘BE Inc.’), a wholly owned subsidiary of British Energy plc. (‘British Energy’). PECO and BE Inc. each hold a 50 percent ownership interest in AmerGen.” Answer of AmerGen to Co-owners’ Petition to Intervene, dated Nov. 1, 1999, at 2 n.1.

² 42 U.S.C. § 2234 (precluding the transfer of any NRC license unless the Commission both finds the transfer in accordance with the AEA and gives its consent in writing).

³ This regulation reiterates the requirements of AEA § 184, sets forth the filing requirements for a license transfer application, and establishes the following test for approval of such an application: (1) the proposed transferee is qualified to hold the license and (2) the transfer is otherwise consistent with law, regulations, and Commission orders.

The NRC Staff, as is its usual practice in license transfer cases, chose not to participate as a party in the adjudicatory portion of the proceeding.

The three remaining co-owners of Unit 2 (Long Island Lighting Company, Rochester Gas and Electric Company, and Central Hudson Gas and Electric Company — collectively “co-owners”) seek to intervene in opposition to the application. Co-owners initially suggest that the instant hearing be deferred pending completion of an ongoing hearing in which the New York State Public Service Commission is currently considering whether the proposed transfer is in the public interest. *See* Co-owners’ Petition to Intervene, dated Oct. 20, 1999 (“Co-owners’ Petition”), at 2-5.⁴ According to co-owners, the Public Service Commission is currently considering many of the same issues that the instant proceeding will present to the Nuclear Regulatory Commission — e.g., adequacy of decommissioning funding, adequacy of AmerGen’s financial resources to operate the plant and meet its other responsibilities, the qualifications of AmerGen to operate the plant, and the existence of an operating agreement that would offer sufficient protection of the co-owners’ and customers’ rights if the plant is transferred to a nonutility, majority owner-operator. *Id.* at 4.

Co-owners also offer a second justification for a deferral: they have a right of first refusal under which they are entitled to make “a preemptive offer to purchase [Applicants’] shares of [Unit 2] upon terms at least as favorable as those contained in [AmerGen’s] offer.” *Id.* at 4-5. According to co-owners, these rights of first refusal have not yet expired. *Id.*

In addition, co-owners request the Commission to establish a full evidentiary hearing rather than use the procedures provided in 10 C.F.R. Part 2, Subpart M. Co-owners suggest that the Commission either add procedures allowing direct and cross-examination or convene a formal hearing before the Licensing Board pursuant to Subpart G. *Id.* at 5-6. According to co-owners, Subpart M did not contemplate the issues raised in this proceeding — in particular, issues associated with the creation of a new majority interest in Unit 2 and the replacement of Unit 2’s operator.

Co-owners raise three general issues: (1) the impact on co-owners (particularly in the event of AmerGen’s default) of designating as the licensed facility operator a limited liability company with few tangible assets of its own, (2) the change in management of a co-owned facility when minority interests are shifted to create a new majority owner/operator and the consequent need for a new operating agreement, and (3) public policy and decisionmaking in collateral state [and federal] proceedings. *Id.* at 2-3. They also raise more specific questions concerning

⁴The Applicants must also obtain a ruling from the Federal Energy Regulatory Commission (“FERC”) that the transfer is in the public interest. *See id.* at 3, 5, citing Application at 4. However, AmerGen claims that the FERC has already completed that proceeding. *See* Answer of AmerGen to Co-owners’ Petition to Intervene, dated Nov. 1, 1999, at 6 n.4.

both AmerGen's financial qualifications to operate the plant and AmerGen's ability to maintain safety in the event of an extended shutdown of the plant. Co-owners claim that "[t]hese questions require an examination of AmerGen's initial capitalization, its policy for the distribution of profits to its parent companies, and the precise terms of the parent company guarantees being offered." *Id.* at 7.

In addition, the Attorney General for the State of New York ("New York Attorney General") seeks intervention to "review the evidence and to develop recommendations to the NRC" regarding issues such as the sufficiency of AmerGen's funds to pay for operation and maintenance expenses during a simultaneous 6-month outage at both plants, the sufficiency of AmerGen's decommissioning funding mechanism, and AmerGen's qualifications to operate the plants. The New York Attorney General asserts that his interest in this proceeding arises from his office's investigatory and enforcement responsibilities regarding various federal and state environmental, public health, antitrust, and consumer protection laws, as well as his office's responsibility to represent the people of New York in matters concerning the provision of public utility services. *See* New York Attorney General's Petition to Intervene, dated Oct. 20, 1999 ("New York Attorney General's Petition"), at 2-3.

II. DISCUSSION

To intervene as of right in any Commission licensing proceeding, a petitioner must demonstrate that its "interest may be affected by the proceeding," i.e., it must demonstrate "standing." *See* AEA § 189a, 42 U.S.C. § 2239(a). The Commission's rules also require that a petition to intervene raise at least one admissible contention or issue. The standards for meeting these two requirements in license transfer cases come both from our Subpart M procedural regulations and from judicial cases on standing (to which we look for guidance).

A. Co-owners' Standing

To show standing in a license transfer proceeding, a petitioner must

- (1) identify an interest in the proceeding by
 - (a) alleging a concrete and particularized injury (actual or threatened) that
 - (b) is fairly traceable to, and may be affected by, the challenged action (the grant of an application), and
 - (c) is likely to be redressed by a favorable decision, and

- (d) lies arguably within the “zone of interests” protected by the governing statute(s).
(2) specify the facts pertaining to that interest.⁵

Co-owners claim that they may suffer financial harm and harm to their property if AmerGen provides insufficient financial resources to support safe and efficient operation and eventual decommissioning of the plant. *See* Co-owners’ Petition to Intervene at 8-10. None of the Applicants contests Petitioners’ standing. *See* Niagara Mohawk and New York Electric’s Answer to Petition for Review of Central Hudson . . . , dated Nov. 1, 1999 (“Niagara Mohawk’s Answer to Co-owners”), at 4 n.2; AmerGen’s Answer to Petition for Review of Central Hudson, dated Nov. 1, 1999, at 9 n.6.

Co-owners advance an injury claim similar to that which we accepted in two other license transfer proceedings, i.e., “the potential that NRC approval of the license transfer would put in place a financially incapable co-licensee, thereby increasing . . . [their] risk of . . . being forced to assume a greater-than-expected share of Seabrook’s [and Millstone-3’s] operating and decommissioning costs.” *Seabrook*, CLI-99-6, 49 NRC at 215. *See also Seabrook and Millstone*, CLI-99-27, 50 NRC at 262. As we stated in *Seabrook*,

it is hard to conceive of an entity more entitled to claim standing in a license transfer case than a co-licensee whose costs may rise . . . as a result of an ill-funded license transfer. This kind of situation justifies standing based on “real-world consequences that conceivably could harm Petitioners and entitle them to a hearing.”

CLI-99-6, 49 NRC at 215, quoting *Yankee Nuclear*, CLI-98-21, 48 NRC at 205; *Seabrook and Millstone*, CLI-99-27, 50 NRC at 262-63.

Co-owners’ allegations regarding increased risk are supported by affidavit and are sufficiently concrete and particularized to pass muster for standing. The threatened injury is fairly traceable to the challenged action (here, the grant of the license transfer application) because the alleged increase in risk associated with AmerGen taking over a majority interest in Unit 2 could not occur without Commission approval of the application. Similarly, the threatened injury can be redressed by a favorable decision because the Commission’s denial of the application would prevent the indirect transfer of interest. *Seabrook and Millstone*, CLI-99-27, 50 NRC at 263. *Cf. Seabrook*, CLI-99-6, 49 NRC at 215.

Likewise, the risks to Petitioners’ ownership interest in the Nine Mile Point units are among the interests protected by the AEA. “[T]he AEA protects not only human health and safety from radiologically caused injury, but also the

⁵ *See* 10 C.F.R. §§ 2.1306, 2.1308; *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1) and *Northeast Nuclear Energy Co.* (Millstone Station, Unit 3), CLI-99-27, 50 NRC 257, 262 (1999); *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 214-15 (1999). *See generally Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 194-96 (1998).

owners' property interests in their facility. . . . Persons or entities who own (or co-own) an NRC-licensed facility plainly have an AEA-protected interest in licensing proceedings involving their facility.' *Seabrook and Millstone*, CLI-99-27, 50 NRC at 263; *Seabrook*, CLI-99-6, 49 NRC at 216 (and cited authority). For all these reasons, we conclude that the co-owners have standing to intervene in this proceeding.

B. Admissibility of Co-owners' Issues

To show admissible issues, a petitioner must

- (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those issues fall within the scope of the proceeding,
- (3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant regarding the issues, and
- (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. § 2.1308; *Seabrook and Millstone*, CLI-99-27, 50 NRC at 263; *Seabrook*, CLI-99-6, 49 NRC at 215. *See generally* *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348-49 (1998).

Co-owners raise numerous issues involving the application's sufficiency (Petition at 13-16), financial qualifications for operation (*id.* at 16-25), decommissioning funding assurance (*id.* at 26-30), technical qualifications (*id.* at 30-33), and provision of offsite power (*id.* at 33-34).⁶ Many of the arguments focus on the ramifications of AmerGen's impending majority interest in Unit 2.

We conclude that it is premature to address the admissibility of issues proffered by the co-owners. If any or all of the co-owners exercise their asserted right of first refusal under the Basic Agreement to buy Niagara Mohawk's and New York Electric interest in Unit 2, some or all issues would be rendered moot. *See* §§ 13.04, 13.05 of Basic Agreement (Sept. 25, 1975), appended as Exhibit B to Co-owners' Petition; Reply of Co-owners to Answers of AmerGen, Niagara Mohawk, and New York Electric, dated Nov. 8, 1999, at 4 ("While no decision has been reached, the exercise of the right of first refusal remains a viable option"). For instance, if one or more of the co-owners purchase collectively an additional 9% interest in Unit 2, AmerGen could not hold the majority interest in that unit.

⁶ We note that the commenters raised many of the same issues, especially concerning AmerGen's financial assurances for the continued operation and decommissioning. *See* Comments of Multiple Intervenors [*sic*], dated Nov. 1, 1999, at 4-7; Comments of New York Public Service Commission, dated Nov. 1, 1999, at 2-4; Comments of Oswego County and the Oswego City School District, dated Nov. 1, 1999, at 4-7.

We therefore suspend this proceeding pending the co-owners' determination whether to avail themselves of their purchase rights under the operating agreement. We instruct the co-owners to inform us, within 5 working days of the issuance date of this Order, of (1) the deadline by which each of them must decide whether to exercise this right of first refusal and (2) whether any of them has declined to exercise its right of first refusal.⁷ We further instruct each co-owner to notify us of its decision within 2 working days of the date on which it is made.

We do not view a temporary suspension of this proceeding as contravening our stated policy of expedition in Subpart M proceedings. *See* Final Rule, "Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 66,721, 66,722 (Dec. 3, 1998) (Subpart M "procedures are designed to provide for public participation . . . while at the same time providing an efficient process that recognizes the time-sensitivity normally present in transfer cases"). We believe it would not be sensible of us to require the expenditure of both public and co-owner funds on a proceeding, part or all of which may well be rendered moot in the immediate future.⁸

However, we decline to adopt the co-owners' suggestion that we further suspend this proceeding until conclusion of the proceeding currently pending before the New York Public Service Commission. In support of this suggestion, the co-owners allege that simultaneous litigation in multiple forums imposes a "tremendous burden" on all parties. *See* Co-owners' Petition at 5. We fail to see how the burden on the co-owners is any greater than that placed on numerous other parties in our proceedings — parties who are regularly participants in proceedings concurrently conducted by other state and federal agencies.

This multiforum situation is especially common in license transfer proceedings involving nuclear power plants. In these cases, the transfer is often the subject of simultaneous regulatory proceedings before one or more appropriate state public utility commissions, the FERC, the Securities and Exchange Commission, the Internal Revenue Service, the Department of Justice and/or Federal Trade Commission, and the NRC — in addition to which the parties to those proceedings may be involved in court litigation with plant co-owners. As we stated many years ago:

⁷Co-owners indicated in their petition that the deadline for Rochester Gas and Electric Corporation expires "January 4, 2000 at the earliest." *See* Reply of Co-owners to Answers of AmerGen, Niagara Mohawk, and New York Electric, dated Nov. 8, 1999, at 4. However, it is not clear why the precise deadline is ambiguous, and whether this deadline applies to AmerGen's purchase offers to New York Electric, to Niagara Mohawk, or to both. Nor did co-owners specify the deadlines for Central Hudson Gas and Electric Corporation and Long Island Lighting Company. We expect that co-owners' responses will resolve these questions.

⁸Earlier today, Rochester Gas and Electric Company issued a press release indicating that it was exercising its right of first refusal. We recognize that this may render the proceeding moot. However, until we hear from the co-owners regarding the implications of this recent information, this proceeding will remain active and we expect the participants to follow the procedures outlined in this Order.

[E]ven assuming that the City [of Chicago] can properly exercise . . . licensing authority over Kerr-McGee, the potential for an action by a state or local regulatory authority that will affect a facility seeking an NRC license normally is not sufficient reason for this agency to stay its licensing action pending the outcome of any proceeding to impose additional requirements. . . . Rather, it is the prerogative of the other governmental entity asserting jurisdiction to take whatever action it deems appropriate to enforce its regulatory authority.

Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 269 (1982) (footnote and citations omitted), *aff'd*, *City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983). *See also Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-171, 7 AEC 37, 39 (1974) (“it would be productive of little more than untoward delay were each regulatory agency to stay its hand simply because of the contingency that one of the others might eventually choose to withhold a necessary permit or approval”).

Finally, co-owners have not explained why suspension of our proceeding pending completion of the New York Public Service Commission’s case would reduce the financial burden that this litigation places on the parties. The burden would appear the same, whether incurred simultaneously or sequentially. Moreover, to the extent the two commissions are considering the same issues, the New York Public Service Commission is reviewing the transfer under a different statutory mandate than ours, *see* New York Public Service Law § 70, and its conclusions would therefore not be dispositive of the issues before us. *A fortiori*, to the extent the two commissions are considering different issues, suspension would serve no purpose whatever.

For all these reasons, we deny co-owners’ request that we suspend this proceeding pending conclusion of the New York Public Service Commission’s proceeding.

C. Status of the New York Attorney General

We do not need to reach the issue of whether the Attorney General has established standing in this proceeding, because he has clearly raised no issues with the level of specificity required under Subpart M. *See* 10 C.F.R. § 2.1306(b)(2)(iv) (requiring a petitioner to “provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact”). He alludes in the most general terms to the adequacy of funding for the operation and decommissioning of the units and to AmerGen’s qualifications to operate the plant, and indicates merely that he wishes to intervene in order “to review the evidence and to develop recommendations.” However, the Commission has long recognized the benefits of participation in our proceedings by representatives of interested states, counties, municipalities, etc. We believe that the Attorney General’s involvement in the New York Public Service Commission’s proceeding

may provide him with insights that may be useful to us. We therefore permit him to participate in a manner analogous to a participating government under 10 C.F.R. § 2.715(c), should a hearing be granted in this proceeding.

D. Other Procedural Matters

1. Co-owners' "Suggestion" to Use Subpart G Procedures

We deny co-owners' "suggestion" that we substitute formal trial-type Subpart G procedures for those of Subpart M. Our regulations make quite clear that "[n]either the Commission nor the Presiding Officer will entertain motions from the parties that request . . . formal hearings." 10 C.F.R. § 2.1322(d). We consider co-owners' "suggestion" as a poorly disguised effort to sidestep the above regulatory prohibition. Our rules specify only one ground on which a party may seek waiver of any (or all) of Subpart M's regulations — "because of special circumstances concerning the subject of the hearing, application of a rule or regulation would not serve the purposes for which it was adopted." 10 C.F.R. § 2.1329(b). Co-owners fail even to cite this standard, much less satisfy it. Their only proffered justification is the claim that Subpart M did not contemplate the issues raised in this proceeding. We disagree. When promulgating Subpart M, we were well aware that most license transfer issues would be, like co-owners' issues, financial in nature. At this early stage of the proceeding, it is by no means clear that the informal Subpart M process will not suffice to resolve any issues that require litigation.

2. Filing Requirements

Although the participants have a number of options under 10 C.F.R. § 2.1313(c) by which to serve their filings, the preferred method of filing in this proceeding is electronic (i.e., by e-mail). Filing by e-mail will be considered timely if sent not later than 4:30 p.m. on the due date under our Subpart M rules. Filings served by other means must be received no later than 4:30 p.m. on the due date. We will also require the parties to submit a single signed hard copy of any such filings⁹ to the Rulemakings and Adjudications Branch, Office of the Secretary, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Room O-16-H-15, Rockville, MD 20852. The e-mail address for this office is *SECY@nrc.gov*.

⁹ We draw the attention to the difference between this requirement and that of Subpart G, which provides that any service whether by fax or e-mail on the Secretary should be followed with an original and two conforming copies of the service by regular mail in accordance with 10 C.F.R. § 2.708(d).

III. CONCLUSION

1. Co-owners are granted standing.
2. The New York Attorney General may participate in a manner analogous to a participating government under 10 C.F.R. § 2.715(c), if a hearing is granted in this proceeding.
3. Co-owners' request to suspend this proceeding is granted in part.
4. Co-owners' "suggestion" that the Commission use Subpart G procedures is denied.

IT IS SO ORDERED.

For the Commission¹⁰

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 22d day of December 1999.

¹⁰Commissioner Diaz was not available for the 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

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Presiding Officer
Dr. Charles N. Kelber, Special Assistant

In the Matter of

Docket No. 55-32443-SP
(ASLBP No. 99-755-01-SP)

MICHEL A. PHILIPPON
(Denial of Senior Operator License
Application)

December 9, 1999

**SENIOR REACTOR OPERATOR LICENSE: EXAMINER
GUIDELINES**

As stated in *Frank J. Calabrese Jr.* (Denial of Senior Reactor Operator License), LBP-97-16, 46 NRC 66, 86 (1997), “a presiding officer properly can look to NUREG-1021 as an important source in assessing whether the Staff has strayed too far afield of the stated twin goals of ‘equitable and consistent’ examination administration.”

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.72(b)(1)(i)(A))

By using the words “initiation of any nuclear plant shutdown required by the plant’s Technical Specifications,” the regulation definitionally limits the reporting requirement to a single 1-hour report per technical specification shutdown.

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.72(b)(1)(i)(A))

Although subsequent events involving the plant’s technical specifications may occur during the shutdown process, those later events do not “initiate” the

shutdown and 10 C.F.R. § 50.72(b)(1)(i)(A) does not require a 1-hour report to the NRC for them.

INITIAL DECISION

Pursuant to 10 C.F.R. § 2.103(b)(2), Michel A. Philippon timely requested a hearing on the NRC Staff's denial of his application for a senior reactor operator (SRO) license based on his failure to achieve a passing grade on the SRO license examination. In this 10 C.F.R. Part 2, Subpart L informal adjudication, Mr. Philippon levels four challenges to the Staff's grading of his performance on the simulator portion of the operating test that resulted in his failing grade. For the reasons detailed below, the Presiding Officer concludes that Mr. Philippon has met his burden under 10 C.F.R. § 2.1237(b) that the Staff erred in scoring two subgrades of the operating portion of his SRO examination. Accordingly, under the Staff's scoring guidelines, its determination that Mr. Philippon failed the operating portion of the examination cannot be sustained. Therefore, the Staff is authorized to grant Mr. Philippon's application for an SRO license.

I. BACKGROUND

A. The Operator Licensing Examination

At the time of his SRO license application, Mr. Philippon held a bachelor's degree in electrical engineering and was employed by the Detroit Edison Company as a staff engineer at the Enrico Fermi Atomic Power Plant, Unit 2, a General Electric Mark II Boiling Water Reactor. Hearing File Correspondence Item 12 [hereinafter HFC #]. Mr. Philippon applied directly for an SRO license without first having held a reactor operator license. NRC Staff's Response to Written Presentation by Michel A. Philippon, Affidavit of Hironori Peterson (Feb. 11, 1999) at 2 [hereinafter First Peterson Affidavit]. According to Hironori Peterson, the Region III reactor engineer who was the chief examiner in charge of the licensing examinations at Fermi and who administered the operating test to Mr. Philippon, the SRO licensing examination given to Mr. Philippon was prepared in accordance with the NRC's operator licensing examiner standards manual, NUREG-1021, "Operator Licensing Examination Standards for Power Reactors" (Interim Rev. 8, Jan. 1997) [hereinafter NUREG-1021]. The examination included a 100-question written examination and an operating test consisting of three parts — categories A, B, and C. Category A of the operating test evaluates the applicant's proficiency in administrative topics while category B evaluates proficiency in control room systems and includes a facility walk-through. Finally, category C evaluates the

applicant's proficiency in integrated plant operations using a dynamic simulator. In order to receive an SRO license, an applicant is required to pass the written examination and all three parts of the operating test. First Peterson Affidavit at 2-3.

The written and operating portions of the licensing examination given to Mr. Philippon and the other license applicants were prepared by Detroit Edison and reviewed by the NRC Staff. All of the reactor operator (RO) and SRO license applicants sat for the written portion of the examination on April 6, 1998. The examination was administered and proctored by the utility. The category A and B portions of the operating test were given to the license applicants over the course of 6 days during April 7-10 and 13-14, 1998, and the simulator portion of the operating test was administered to Mr. Philippon on April 15 and 16, 1998. *Id.* at 3 n.1, 4, and 5.

The simulator part of the operating test given to Mr. Philippon consisted of three scenarios, each including between five and nine events to which the operating shift crew, comprised of one SRO and two RO applicants, were required to respond. At Fermi, the position description for the SRO is referred to as the Nuclear Assistant Shift Supervisor (NASS). The two RO positions are called the P603 operator and the Control Room Nuclear Supervising Operator (CRNSO), which for purposes of the operating examination is called the balance of plant (BOP) operator. Each operator license applicant on the shift crew is individually graded by a separate NRC license examiner as the crew contends with the various test scenarios. *Id.* at 5-6, 28.

As an SRO applicant, Mr. Philippon was evaluated on eight competency areas during the three scenarios with their corresponding events for the simulator portion of the operating examination. In turn, each of the eight competency areas for the category C portion of the test are further divided into three or four additional individual competency rating factors that define the acceptable performance for that competency. Each individual competency rating factor has an associated weighting factor that is used by the examiner to obtain a numerical measure of the SRO applicant's performance. The sum of the individual rating factors results in the overall grade for that competency area. *Id.* at 6-7. Specifically, NUREG-1021, ES-303, section D.2.c, directs the NRC license examiners to use Form ES-303-4, "SRO Competency Grading Worksheets for Integrated Plant Operations," to evaluate any deficiencies noted in the applicant's performance for the category C portion of the operating test. Hearing File Reference Item 59, at 6, 21-28 [hereinafter HFR #]. On the competency worksheet, the examiner assigns a rating value from 1 through 3 (with 1 describing poor performance and 3 the best performance) corresponding to the behavioral anchor set out in the worksheet for that individual competency rating factor that most accurately reflects the SRO applicant's performance. *Id.* at 6, 13. Finally, to arrive at the SRO applicant's total grade, NUREG-1021 states that "[i]f the 'total' grade for all competencies

is greater than 1.8, the applicant's performance is generally satisfactory. . . . If the 'total' grade for Competency 6 [Communications and Crew Interactions] is 1.0, or the 'total' grade for any other competency is 1.8 or less, the applicant's performance is unsatisfactory.' *Id.* at 6-7.

B. Mr. Philippon's Grade

Upon the initial grading of his examination, Mr. Philippon passed the written portion of the SRO licensing test. HFR #10, at 1. He also received a satisfactory grade on category A of the operating test even though his performance on one administrative topic was found to be unsatisfactory. First Peterson Affidavit at 7-8. In such circumstances, NUREG-1021, ES-303, section D.2.a, permits, but does not mandate, the examiner to fail the applicant depending upon the importance of the identified deficiency. *Id.*; see HFR #59, at 4. Mr. Philippon, however, failed to achieve a satisfactory grade on both category B and C of the operating test, resulting in an overall unsatisfactory grade on his operating examination. First Peterson Affidavit at 7. With respect to category B dealing with control room systems and the facility walk-through, Mr. Philippon received an unsatisfactory grade on three out of ten system job performance measures. First Peterson Affidavit at 7; HFC #10, at 2. With respect to category C, Mr. Philippon received an unsatisfactory grade in three competency areas. First Peterson Affidavit at 7; HFC #10, at 1, 3.

After receiving the agency's notification that the Staff proposed to deny his SRO license application, Mr. Philippon exercised his right to an informal Staff review, arguing that a number of items on the examination were graded incorrectly or too severely. HFC #9, 7. Upon considering the information supplied by Mr. Philippon, the Staff of Region III that conducted the informal review pursuant to NUREG-1021, ES-502, section D.1 and 2, determined that his grade for competency area C.8 should be raised from 1.4 to 1.8. This regrading still left Mr. Philippon's overall unsatisfactory grade unchanged for categories B and C of the operating test. First Peterson Affidavit at 9. See HFR #60, at 3. Thereafter, pursuant to NUREG-1021, ES-502, section D.2.d, a three-person appeal board drawn from qualified agency personnel outside Region III was selected to consider Mr. Philippon's challenge to the grading of his SRO examination. HFR #60, at 4.

With respect to category A of the operating test, the appeal board recommended sustaining Mr. Peterson's grading determination that Mr. Philippon's performance on one administrative topic was unsatisfactory, even though he received a satisfactory grade overall for this category. First Peterson Affidavit at 10; HFC #5, at 1. Of the two category B systems job performance measures (out of the three found unsatisfactory on the initial grading) that Mr. Philippon challenged on the informal Staff review, the appeal board agreed with Mr. Peterson's grading on one and disagreed with Mr. Peterson's grading on a second. Thus, the appeal board recommended that Mr. Philippon's overall unsatisfactory grade for category B be

revised to an overall grade of satisfactory. First Peterson Affidavit at 10-11; HFR #5, at 2-5. With respect to category C of the operating test, the appeal board disagreed with Mr. Peterson's grading for five competency areas and recommended five increases in Mr. Philippon's score. Specifically, it recommended that his competency area scores be increased for C.2 from 2.75 to 3.00; for C.3 from 2.55 to 3.00; for C.4 from 1.50 to 1.75; for C.7 from 1.80 to 3.00; and for C.8 from 1.40 to 1.80. Even with these score increases, however, Mr. Philippon still failed to achieve a score above 1.80 in competency areas C.4 and C.8 so his overall grade for category C of the operating test remained unsatisfactory. First Peterson Affidavit at 10-11; HFC #5, at 5-18. Therefore, the appeal board recommended to the Chief of the Operator Licensing Branch, Division of Reactor Controls and Human Factors, Office of Nuclear Reactor Regulation, that Mr. Philippon's SRO license application be denied. First Peterson Affidavit at 11; HFC #5 (cover letter), at 18-19, 21-22. The appeal board's grading recommendations were accepted¹ and, on October 4, 1998, the Staff informed Mr. Philippon of the denial of his SRO license application and advised him of his right to request a hearing pursuant to 10 C.F.R. § 2.103(b)(2). First Peterson Affidavit at 11-12; HFC #4.

C. Mr. Philippon's Hearing Request

On October 16, 1998, Mr. Philippon filed a timely request for a hearing on the Staff's denial of his SRO license application. HFC #2. The hearing request was assigned to the Presiding Officer on October 28, 1998. In its answer to the hearing request, the NRC Staff did not oppose Mr. Philippon's hearing petition and, on November 13, 1998, the Presiding Officer granted the hearing request. *See* 63 Fed. Reg. 64,531 (1998). Pursuant to the Presiding Officer's order, the Staff filed the hearing file consisting of approximately 900 pages relating to its actions on Mr. Philippon's application. Thereafter, both Mr. Philippon and the Staff filed written presentations, with additional exhibits, setting forth their respective positions on Mr. Philippon's challenges to the Staff's grading of the SRO examination. *See* Affidavit of Michel A. Philippon (Dec. 30, 1998) [hereinafter First Philippon Affidavit]; First Peterson Affidavit. In accordance with the Presiding Officer's order, Mr. Philippon also filed a response to the Staff's written presentation. *See* Affidavit of Michel A. Philippon (Mar. 4, 1999) [hereinafter Second Philippon Affidavit].

Finally, pursuant to 10 C.F.R. § 2.1233(a) the Presiding Officer directed the parties to answer an initial series of questions and, depending on the party, one

¹With one minor exception noted subsequently (*see infra* p. 363), the appeal board's pertinent recommendations were accepted without substantive change by the Chief of the Operator Licensing Branch. For ease of reference, therefore, the Staff's final determination of Mr. Philippon's informal appeal will hereinafter be referred to as the appeal board's findings, conclusions, or determinations.

or two additional rounds of follow-up questions. *See* Order of March 19, 1999; Order of June 16, 1999; and Order of July 30, 1999. The parties filed answers to the Presiding Officer's questions along with substantial additional exhibits and, for each round of questions, each party was given the opportunity to respond to the other party's answers, although the Staff declined to respond to Mr. Philippon's answers to the Presiding Officer's questions. *See* Affidavit of Michel A. Philippon (Mar. 29, 1999) [hereinafter Third Philippon Affidavit]; NRC Staff Response to Questions by the Presiding Officer in the Form of an Affidavit by Hironori Peterson (Apr. 16, 1999) [hereinafter Second Peterson Affidavit]; Response Affidavit of Michel A. Philippon (Apr. 20, 1999) [hereinafter Fourth Philippon Affidavit]; NRC Staff Response to Additional Questions by the Presiding Officer in the Form of an Affidavit by Hironori Peterson (July 6, 1999) [hereinafter Third Peterson Affidavit]; Response Affidavit of Michel A. Philippon (July 19, 1999) [hereinafter Fifth Philippon Affidavit]; Affidavit of Michel A. Philippon (Aug. 5, 1999) [hereinafter Sixth Philippon Affidavit]; NRC Staff Response to July 30, 1999, Questions by the Presiding Officer in the Form of an Affidavit by Hironori Peterson (Aug. 11, 1999) [hereinafter Fourth Peterson Affidavit]; Response Affidavit of Michel A. Philippon (Aug. 16, 1999) [hereinafter Seventh Philippon Affidavit]. The hearing file submitted by the NRC Staff pursuant to 10 C.F.R. § 2.1231(a) and the various filings described above constitute the record in this informal adjudication upon which the Presiding Officer's decision is based.

II. ANALYSIS

Mr. Philippon challenges four of the scores the NRC Staff accorded him on his performance involving competencies C.4 and C.8 out of the ten competencies tested on the category C portion of the operating examination. Specifically, Mr. Philippon challenges the Staff's grading of his performance on rating factors C.4.b, C.4.c, C.8.a, and C.8.c involving two simulator scenarios and their corresponding events. As set forth in NUREG-1021, Appendix D, section E.2.d, competency C.4 is entitled "Comply With and Use Procedures" and "involves the ability to refer to and comply with normal, abnormal, emergency, and administrative procedures in a timely manner (i.e., in sufficient time to avoid adverse impacts on plant status). It includes the ability to use procedures correctly and ensure correct implementation by the crew." HFR #61, at 20. Similarly, competency C.8 is entitled "Comply With and Use Technical Specifications" and "involves the ability to recognize when conditions are covered by technical specifications. It includes the ability to locate the appropriate technical specification and ensure correct compliance with any limiting conditions for operation and action statements." *Id.* at 21. Each of Mr. Philippon's four challenges to the Staff's grading of his performance will be addressed.

A. Competency C.4.b

Mr. Philippon first challenges the Staff’s scoring of his performance on competency C.4, rating factor b, involving simulator scenario 2-3, event 5 (one safety relief valve (SRV) fails open 100%) and event 6 (all control rods stuck). In this scenario, safety relief valve “B” fails completely open, allowing steam to escape from the primary system. Plant procedures require the manual initiation of a reactor scram if the SRV cannot be closed in 2 minutes. A further condition of the scenario calls for the control rods to fail to insert. This condition is known as an anticipated transient without scram (ATWS) and requires driving the control rods in using an emergency procedure while maintaining reactor parameters within safe bounds with respect to power, pressure, temperature, and water level. The objective in responding to this scenario is to bring the reactor to a safe condition without uncovering the top of the active fuel. *See* HFC #10, at 19-20.

As set out in NUREG-1021, Form ES-303-4, “SRO Competency Grading Worksheets for Integrated Plant Operations,” the rating factors and the corresponding behavioral anchors for competency C.4, “COMPLIANCE WITH AND USE OF PROCEDURES,” and rating factor b, state:

DID THE APPLICANT:

. . . .

(b) USE PROCEDURES CORRECTLY, including following procedural steps in correct sequence, abiding by procedural cautions and limitations, selecting correct paths on decision blocks, and correctly transitioning between procedures?

3	2	1
Accurately and promptly executed procedural steps	Minor errors, but made necessary corrections in a timely fashion	Significant errors impeded or slowed recovery or degraded plant unnecessarily

HFR #59, at 24.

1. Expected Response to Scenario 2-3, Events 5 and 6

The stuck-open safety relief valve in event 5 requires the SRO to use a Fermi abnormal operating procedure (AOP) to attempt to close the valve while continuing to operate the reactor. Therefore, the SRO first should enter AOP 20.000.25, “Failed Safety Relief Valve” (HFR #18), and direct the BOP operator to attempt to close the failed valve. Before reaching the 2-minute time limit imposed by the AOP 20.000.25 for this action, the SRO should direct the RO to place the mode switch in shutdown, thereby causing a reactor scram. Pursuant to the set conditions of the scenario, however, the scram does not occur. Thus, this occurrence requires

the SRO to use a Fermi emergency operating procedure (EOP) to bring the plant to a safe shutdown condition. *See* HFC #10, at 19.

To do this the SRO enters EOP 29.100.01 Sheet 1, “RPV [Reactor Pressure Vessel] Control” (HFR #24), and, because there has been no control rod insertion despite the requirement to scram, the SRO should recognize the ATWS condition. The SRO should then change to EOP 29.100.01 Sheet 1A, “RPV Control-ATWS” (HFR #25), and direct the RO to perform 29.ESP.03 (emergency support procedure), the alternate rod procedure. Within EOP 29.100.01 Sheet 1A, the SRO should then start at step W, “Terminate and Prevent,” and direct RO actions in accordance with FSL-OR2, “ATWS Power Level Control,” which requires terminating all injection of water into the reactor pressure vessel except for the boron system and the control rod drive cooling water (CRD). Under the conditions of the scenario, the boron system fails, leaving only the CRD. When reactor power is less than 3%, or RPV level reaches 0 inches, or drywell pressure is less than 1.68 psig, and all SRVs are closed under step FSL-23, EOP step FSL-24 requires recording the RPV level. Pursuant to EOP step FSL-25, the SRO should then direct the BOP operator to maintain RPV level in the range between the level recorded and –24 inches using the available systems listed in Table 9 of the EOP Sheet 1A. These sources include the condensate/feedwater system, the standby feedwater system, the CRD, the reactor core isolation cooling system (RCIC), the high pressure coolant injection system (HPCI), and the low pressure coolant injection system (LPCI). The characteristic of all of the sources included in Table 9 is that the water is injected outside the core shroud so that water entering the core region is well mixed and the danger of a reactivity excursion caused by injecting cold, unborated water into the core is minimized. *See* HFC #10, at 19-20.

Stated otherwise and reducing the expected response to scenario 2-3, events 5 and 6, to its simplest form, the failed-open SRV caused a continuing loss of mass in the form of steam out of the open SRV that, as a practical matter, required a greater supply of makeup water than could be furnished by most of the sources listed in the emergency operating procedure. In these circumstances, the most suitable water sources are the HPCI system and the RCIC system. And, very shortly after tripping the RCIC system as required by the emergency operating procedure, the need would arise to restart it and/or the HPCI system or else the water level in the reactor pressure vessel would continue to drop and uncover the top of the active fuel.

2. Conclusions of Mr. Peterson and the Appeal Board on Competency C.4.b

In his Operator License Examination Report, Mr. Peterson found that Mr. Philippon failed to correctly follow emergency operating procedure steps for using outside shroud injection sources to maintain reactor water level following the

terminate and prevent stage of the ATWS procedure, which caused the water level in the reactor pressure vessel to drop below the prescribed -24 inches and required an emergency depressurization (ED). Mr. Peterson found this error resulted in a degraded condition of the reactor and impeded a modulated water level control during and after the ATWS condition. HFC #10, at 20. Because of these actions, Mr. Peterson found Mr. Philippon's performance on competency C.4.b met the anchor description for a rating of 1. *Id.* at 3; First Peterson Affidavit at 26.

Upon Mr. Philippon's informal appeal, the appeal board concurred in Mr. Peterson's award of a grade of 1 for competency C.4.b. It found in pertinent part that:

Although the candidate directed the operators to maintain the reactor water level within the band required in Step FSL-3, he failed to abide by the continuous use procedure policy by not reading the Table 9, "Outside Shroud Injection Systems" so that the operators could have utilized the systems to control the reactor water level. This fundamental flaw contributed to the inability to maintain and control the reactor level band established by the EOP. The candidate as SRO relied upon the RO [P603] and the BOP to know what the Table 9 sources were. Furthermore, the candidate failed to ensure that Step FLS-10 or FSL-11 of the EOP was performed as written (i.e., that the operator slowly raise injection to restore RPV level using Table 9 sources). As a result, EOP Precaution No. 5 was not adhered to as evidenced by a rapid rise in reactor water level from the injection flow and the large power spike indicated on the Average Power Range Monitors (APRMs). The candidate's error was very significant and unnecessarily challenged the integrity of the reactor core because of [*sic*] the induced large power excursion could have resulted in substantial core damage.

HFC #5, at 10.

3. *The Parties' Positions*

In challenging the score of 1 he received on competency C.4.b and arguing that it should be raised to 3, Mr. Philippon essentially claims that the NRC Staff examiners and reviewers do not understand the sequence of the scenario events or the proper use of override branching statements in the Fermi EOPs. First Philippon Affidavit at 4. Stripped of all peripheral matters, however, the crux of the dispute between Mr. Philippon and the Staff appears to be EOP 29.100.01 Sheet 1A, steps FSL-23, -24, and -25. Starting with the previous step, Mr. Philippon asserts that step FSL-22 required terminating and preventing all injection into the RPV, with the exception of the boron and CRD systems, and this action, in turn, required, *inter alia*, tripping the RCIC turbine. Next, he states that, when the conditions of step FSL-23 were met, the RPV level was recorded at +5 inches in accordance with step FSL-24. Mr. Philippon then asserts that:

Step FSL-25 required maintaining water level within the band of -24" to the level recorded in the FSL-24 (+5"). The control room operator was attempting to maintain this narrow level

band and had not yet recovered the tripped RCIC turbine since reactor water level was high in the band. It would have been inappropriate for me to direct injection with additional Table 9 sources (as suggested by the reviewer) as reactor water level was high in the band. . . . When RPV level turned and started dropping rapidly, the control room operator informed me and began to restart the tripped RCIC turbine (again conflicting with the staff reviewers conclusion that the operator was unaware of what Table 9 systems were available for injection). He quickly realized that he would be unable to stop RPV level from going below -24", and he informed me. I agreed with his analysis and directed an Emergency Depressurization.

Id. at 5.

Further, in responding to the Staff's assessment that he lost control of the reactor water level, permitted it to drop below -24 inches, and allowed the top of the core to become uncovered, Mr. Philippon argues that:

The fact that water level dropped below -24" is not disputed. The important point was not that the RO lacked proficiency in water level control, but rather that the appropriate actions were taken when this situation occurred. I, as SRO, am required to recognize and respond to the critical decision steps of the EOPs. I correctly directed the required compensatory actions (i.e., emergency depressurization).

Second Philippon Affidavit at 1-2. Finally, following depressurization, with all control rods inserted and RPV water level below the top of the active fuel, Mr. Philippon claims he acted in accord with the emergency operating procedure to recover water aggressively to a level above the top of the active fuel. *Id.* at 3.

For its part, the Staff agrees with Mr. Philippon's description of the sequence of events up to EOP step FSL-23. Peterson Affidavit at 17-18. From that point on, the Staff disagrees with Mr. Philippon's assessment, actions, and explanations. Relying on the reactor wide range and core level computer graphs (First Peterson Affidavit Exh. 4, at 3, 4), the Staff states that "[a]lthough some level oscillation did occur, the RPV level steadily decreased following termination of injection of Step FSL-22." First Peterson Affidavit at 19. The Staff explains that at the time of termination of injection the main turbine was still on and one SRV was open so RPV inventory was dropping. At that point, injection with the CRD system alone was insufficient to maintain water level. According to the Staff, a water level oscillation occurred when the main turbine tripped, resulting in termination of steam flow demand, thereby causing a slight fluxuation in water level. With the SRV still open, however, the indicated level continued to decrease. Even with water level correction based on lower reactor pressure, the RPV level was not high enough in the band to warrant not using other Table 9 injection sources to maintain and control the water level above -24 inches. Use of other injection sources would have provided extra time to restart the RCIC, even though some of the Table 9 sources might not have been sufficient for the longer term. *Id.* at 19-21.

The Staff argues that, as SRO, Mr. Philippon failed to direct the RO to use other injection sources and not just concentrate on the RCIC. The RPV level

decrease from +5 inches to –24 inches over a period of approximately 5 minutes provided ample time to restore injection, which was the expected response for this scenario. Indeed, the Staff points out that the propriety of the expected response was validated and verified during the examination validation and review process and further verified when another applicant crew successfully maintained RPV water level above –24 inches. *Id.* at 20-22.

Further, the Staff notes that Student Text ST-OP-802-3003-001 states that “[t]he time during which RPV water level decreases to the Minimum Steam Cooling RPV Water Level can best be used to line up and start pumps in additional injection systems, listed at the beginning of these steps, which might not yet have been placed in service.” First Peterson Affidavit, Exh. 5, at 45. And, had Mr. Philippon directed injection with other available Table 9 sources, RPV emergency depressurization would have been avoided. First Peterson Affidavit at 21. Finally, with respect to Mr. Philippon’s responsibilities as an SRO, the Staff, relying on both the Fermi Operations Department Instruction on command and control and the student text on shift team responsibilities, points out that it is the responsibility of the SRO to monitor and direct the shift crew’s actions to ensure that all plant procedures are followed and that appropriate mitigating actions are performed to place the plant in a safe condition during abnormal or emergency conditions. First Peterson Affidavit at 22-23; HFR #41, at 1; HFR #62, at 10.

Finally, the Staff disagrees with Mr. Philippon’s actions once emergency depressurization occurred. According to the Staff, after emergency depressurization, Mr. Philippon directed the use of the HPCI, RCIC, and LPCI systems to restore water level. The reactor was then overfed and the water level was pegged high on the wide range level recorder. HFC #10, at 20. The Staff argues that the appropriate emergency procedures require that the water level should have been slowly raised in order to reestablish water level control in contrast to Mr. Philippon’s overly aggressive actions. First Philippon Affidavit at 23-24. The Staff notes that the student text defines the applicable override statement and states that:

The steps which follow specify the use of various systems to control RPV water level. If Emergency Depressurization of the RPV is required, these systems must be operated so as to minimize the potential for rapid injection of large amounts of cold, unborated water into the core region as RPV pressure decreases below pump shutoff head. Step FSL-7 provides appropriate instructions for controlling injection systems consistent with this objective.

First Peterson Affidavit Exh. 5, at 42. The Staff argues that Mr. Philippon made significant errors in using plant procedures, thus slowing plant recovery and unnecessarily degrading the plant. Therefore, the Staff contends that Mr. Philippon’s grade for competency C.4.b meets the rating description of 1 and that his score should remain 1. First Philippon Affidavit at 26.

4. Findings and Conclusions

As the above description of competency C.4.b, scenario 2-3, events 5 and 6, the expected response to the scenario, and the arguments of the parties make clear, the dispute between Mr. Philippon and the Staff comes down to the question whether Mr. Philippon has met his burden of establishing that the Staff's scoring of his performance on competency C.4.b as set forth in NUREG-1021, Form ES-303-4, was inappropriate or unjustified. Competency rating factor b requires using procedures correctly "including following procedural steps in correct sequence, abiding by procedural cautions and limitations, selecting correct paths on decision blocks, and correctly transitioning between procedures[.]" HFR #59, at 24. And, the associated behavioral anchor for the grade of 1 that the Staff found applicable indicates that Mr. Philippon committed "[s]ignificant errors [that] impeded or slowed recovery or degraded plant unnecessarily." *Id.* Although NUREG-1021, "Operator Licensing Examination Standards for Power Reactors," is not an agency regulation, it "establishes the policies, procedures, and practices for examining . . . applicants for reactor operator and senior reactor operator licenses." HFR #53, at iii. In turn, "[t]he standards also ensure the equitable and consistent administration of examinations for all applicants." *Id.* Thus, although the standards and guidance in NUREG-1021 are not substitutes for the regulatory requirements spelled out in 10 C.F.R. § 55.45(a) that each applicant must meet, they are grounded in the regulations. Accordingly, as stated in *Frank J. Calabrese Jr.* (Denial of Senior Reactor Operator License), LBP-97-16, 46 NRC 66, 86 (1997), "a presiding officer properly can look to NUREG-1021 as an important source in assessing whether the Staff has strayed too far afield of the stated twin goals of 'equitable and consistent' examination administration." Here, in looking to the guidance in NUREG-1021 relating to competency C.4, rating factor b, the record establishes, contrary to Mr. Philippon's assertions, that the Staff's grading of his performance was fully justified and that Mr. Philippon has failed to meet his burden that the Staff was not justified in finding his performance warranted only a score of 1.

Specifically, as both Mr. Peterson and the appeal board found, Mr. Philippon failed to ensure that EOP 29.100.01 Sheet 1A step FSL-25 was correctly executed by the RO by using Table 9 outside shroud injection sources to maintain reactor water level between +5 inches and -24 inches following the terminate and prevent stage of the ATWS procedure. Contrary to Mr. Philippon's assertions that it would have been inappropriate to direct injection with additional Table 9 sources because the reactor water level was high in the band, the reactor wide range and core level computer graphs show that, as the Staff maintains, in the circumstances of a still-open SRV, the RPV level was at no point high enough in the band to warrant not using any other Table 9 injection sources to maintain and control the water level above -24 inches. First Peterson Affidavit Exh. 4, at 3, 4. Thus, as SRO, the

correct action for Mr. Philippon to take in directing the execution of step FSL-25 of the EOP was to instruct the RO not to just concentrate on restarting the RCIC but to use the HPCI system or other appropriate Table 9 injection sources to maintain water level above -24 inches. Yet he failed to give these directions. As both the Fermi Operations Department Instruction on command and control (HFR #41, at 1) and the student text on shift team responsibilities (HFR #62, at 10) teach, it is the responsibility of the SRO to monitor and direct — not just order and forget — the shift crew's actions to ensure that all plant procedures are followed correctly.²

Mr. Philippon claims that the important point is not that the water level dropped below -24 inches or that the RO lacked proficiency in water level control under step FSL-25 of the EOP, but that, as SRO, he directed the appropriate actions once the water level could no longer be maintained within the band. Second Philippon Affidavit at 1-2. Contrary to his assertion, however, the important point in these circumstances is that had he appropriately directed execution of step FSL-25 and ordered injection with other Table 9 sources, the emergency depressurization that followed could have been avoided. As the Staff points out, there was a period of approximately 5 minutes when the RPV level decreased from +5 inches to -24 inches that provided ample time to restore injection using Table 9 sources. Indeed, the student text indicates that the most efficacious use of the reactor operator's time while water level decreases in this situation is to line up and start pumps in additional Table 9 injection systems. *See* First Peterson Affidavit Exh. 5, at 45.

After having failed to ensure the proper execution of step FSL-25, the continued loss of water from the RPV due to the open SRV led to the water level falling below -24 inches and Mr. Philippon directed an emergency depressurization in accordance with step FSL-26. The emergency depressurization procedure is conducted in accordance with EOP 29.100.01 Sheet 3A (HFR #28). In general, there are two ways to exit this procedure. One, used when water level in the RPV cannot be determined, leads to a reactor flooding procedure. *See* HFR #28, at FSED-7 and E and FSRF-OR1; HFR #25, at FSL-OR1. The second, used when water level can be determined, leads back to step FSP-9 of EOP 29.100.01 Sheet 1A. *See* HFR #28, at FSED-8; HFR #25, at FSL-OR1 and X. Although neither the explanation of Mr. Peterson nor of Mr. Philippon is easily followed, it suffices to note that Mr. Philippon directed aggressive flooding, resulting in the reactor being overfed and the water level pegged high on the wide range level recorder. First

²As Mr. Philippon notes (First Philippon Affidavit at 3; Second Philippon Affidavit at 3) and as the Staff now concedes (First Peterson Affidavit at 23), there is no specific requirement that the SRO read aloud the Table 9 sources as part of step FSL-25 as the appeal board indicated in its decision. *See* HFC #5, at 10. This part of the appeal board's conclusion, however, is essentially irrelevant to its overall determination that Mr. Philippon failed to ensure that the RO correctly executed the emergency procedure by using the Table 9 sources to maintain RPV water level above -24 inches.

Peterson Affidavit at 23-25; HFC #10, at 20; *see* First Philippon Affidavit at 6-7; Second Philippon Affidavit at 3; Third Philippon Affidavit at 1-2.³

In contrast to Mr. Philippon's aggressive flooding actions in which he failed to control RPV water level, the correct procedure, in circumstances where, as here, the water level was known, requires the water level to be slowly raised in order to control the water level and thereby avoid overfeeding the reactor, which poses potential physical problems to the reactor vessel. First Peterson Affidavit at 25. As the student text states:

Maintaining RPV water level below the high end of the identified control band preserves the availability of steam-driven equipment (HPCI, RCIC, feedwater, etc.) for use in providing makeup to the RPV and for pressure control/heat sink considerations in degraded plant situations. The potential for further plant damage or degradation during a transient/accident condition due to RPV overfill is a significant concern in the following areas:

- 1) SRV damage due to the hydrodynamic effects of water or two-phase flow being discharged through the SRVs
- 2) stressing of the vessel, steam line nozzles, steam line snubbers, pipe supports etc., as a result of thermal transient loads caused by water flow in the steam lines
- 3) potential MSIV closure failure if steam lines are filled with water

First Peterson Affidavit Exh. 5, at 17. In a real case, Mr. Philippon's actions would have needlessly endangered plant integrity. This situation would not have occurred had he correctly followed the appropriate steps of the emergency procedure.

These two significant errors by Mr. Philippon, as SRO, clearly demonstrate that the Staff's scoring of his performance on competency C.4.b was in full accord with the behavior anchor for a rating of 1. Accordingly, the Staff's grade was fully justified.

B. Competency C.8.c

Mr. Philippon also challenges the Staff's scoring of his performance on the simulator portion of the operating test for competency C.8, rating factor c, involving scenario 2-2, event 3 (spurious initiation of RCIC). This scenario simulates an in-progress plant shutdown to enter a scheduled mid-cycle outage with certain designated equipment out of service. As a result of the equipment loss, the facility technical specifications, specifically TS 3.8.3.1, require the plant to be placed in a

³The appeal board found that Mr. Philippon's aggressive flooding actions resulted in a large power spike. HFC #5, at 10. Mr. Philippon contends the appeal board is simply wrong in finding that the recorded power spike occurred because of his water injection actions. First Philippon Affidavit at 3-4, 7. The Staff now concedes that the power spike was not caused by excessive water injection. First Peterson Affidavit at 17-18. This appeal board finding, however, was not essential to its overall determination that Mr. Philippon failed to ensure, as required by the emergency operating procedure, that the water level was slowly raised in order to control it.

hot shutdown condition within 12 hours. Under the scenario script, the shutdown had already been started at least 4 hours earlier, and perhaps as many as 5 or 6 hours earlier, by the previous operating shift crew, which then turned the plant over to Mr. Philippon's incoming shift crew. HFC #10, at 11, and Appendix D at 1. During the course of the scenario, a number of mostly abnormal events occur. Specifically, following a decrease of reactor power using control rods, there is a failure of the control rod drive flow transmitter and a failure of the source range monitor/intermediate range monitor detector drive motor, followed by a spurious initiation of the RCIC. Under the conditions of the scenario, the HPCI system is also inoperable. With both the RCIC and HPCI inoperable, the objective in responding to the events is to determine what technical specifications are applicable.

As set out in NUREG-1021, Form ES-303-4, the rating factor and the corresponding behavioral anchor for competency C.8, "COMPLY WITH AND USE TECHNICAL SPECIFICATIONS," and rating factor c, state:

DID THE APPLICANT:

. . . .

(c) Ensure correct COMPLIANCE with TS and LCO [Limiting Condition for Operation] action statements?

3	2	1
Directives were based on correct understanding of TS action statements	Needed some assistance from crew to ensure compliance	Applied correct TS to situation; allowed crew to violate TS

HFR #59, at 28.

1. Expected Response to Scenario 2-2, Event 3

For scenario 2-2, event 3, the Staff expected the SRO to recognize the spurious initiation of the RCIC and, after determining that the RCIC is not needed, direct the BOP to trip the RCIC turbine. Next, under the Staff expectations for the event, the SRO is to declare the RCIC inoperable and examine relevant specifications TS 3.3.5, TS 3.5.1, and TS 3.7.4 and then determine if TS 3.0.3 is relevant. HFC #10, at 11.

Technical Specification 3.0.3, "Applicability," is an overarching specification applicable when a limiting condition for operation is not met and requires that action be initiated within 1 hour to place the plant in a condition in which the relevant specification does not apply. In full, TS 3.0.3 states:

When a Limiting Condition for Operation is not met, except as provided in the associated ACTION requirements, within one hour action shall be initiated to place the unit in an

OPERATIONAL CONDITION in which the Specification does not apply by placing it, as applicable, in:

1. At least STARTUP within the next 6 hours,
2. At least HOT SHUTDOWN within the following 6 hours, and
3. At least COLD SHUTDOWN within the subsequent 24 hours.

Where corrective measures are completed that permit operation under the ACTION requirements, the ACTION may be taken in accordance with the specified time limits as measured from the time of failure to meet the Limiting Condition for Operation. Exceptions to these requirements are stated in the individual Specifications.

HFR #47.

In brief, Technical Specification 3.3.5, “Reactor Core Isolation Cooling System Actuation Instrumentation,” establishes an LCO for the instrument channels used by the RCIC system. The action statements provide various requirements for restoring channels to operability or else require declaring the RCIC inoperable. HFR #46. Technical Specification 3.5.1, “Emergency Core Cooling Systems (ECCS) — Operating,” establishes an LCO for the ECCS and requires hot shutdown in 12 hours unless certain systems can be returned to operability. Further, the TS requires that, if the ECCS is actuated and water is injected into the reactor coolant system, a special report to the NRC is required. HFR #49. Technical Specification 3.7.4, “Plant Systems — Reactor Core Isolation Cooling System,” establishes an LCO for the RCIC and requires hot shutdown in 12 hours when both the RCIC system and the HPCI system are inoperable unless operability of the RCIC can be restored within 14 days. HFR #50.

Finally, it should be noted that the Commission’s regulations, 10 C.F.R. § 50.72(b)(1)(i)(A), require the licensee to “notify the NRC as soon as practical and in all cases within one hour of the occurrence of . . . [t]he initiation of any nuclear plant shutdown required by the plant’s Technical Specifications.”

2. Conclusions of Mr. Peterson and the Appeal Board on Competency C.8.c

In grading his performance as SRO for scenario 2-2, event 3, Mr. Peterson found that Mr. Philippon’s “failure to correctly assess the overall plant condition (HPCI inoperable) and correctly apply the TS actions would have led to continued plant operation outside the 1 hour requirement.” HFC #10, at 11. According to Mr. Peterson, Mr. Philippon incorrectly applied TS 3.7.4 with the HPCI inoperable and failed to “comprehend or apply TS 3.0.3.” *Id.* In his Operator License Examination Report, Mr. Peterson then stated that “[a]lthough the scenario was a plant shutdown for an outage, in any other circumstances, the applicant would have allowed a violation of TS requirements by not recognizing and implementing TS

3.0.3 action statement.” *Id.* Finally, Mr. Peterson concluded that Mr. Philippon “applied incorrect TS to the multiple system inoperability situation and potentially allowed the crew to violate TS.” *Id.* Because of these actions, Mr. Peterson found Mr. Philippon’s performance on competency C.8.c met the behavioral anchor description for a rating of 1. *Id.* at 3.

On appeal, the appeal board essentially found that the spurious initiation of the RCIC did not preclude the automatic operation of the RCIC to perform its design function and that Mr. Philippon erred in declaring the RCIC inoperable when the system could have been returned to standby readiness in accordance with system operating procedures. According to the appeal board, Mr. Philippon did not follow the plant procedure for verification of system operability “nor was it considered in the evaluation criteria of the candidate’s performance in declaring the RCIC system inoperable.” HRC #5, at 18. Thus, the appeal board determined that “[c]ontrary to established procedures, the candidate as SRO who reports to the NSS [Nuclear Shift Supervisor], declared the RCIC System inoperable without any operability review being performed and any feedback from the NSS as to a determination.” *Id.* It concluded, therefore, that “[t]he candidate incorrectly declared the RCIC system inoperable without following established procedures.” *Id.* Nevertheless, the appeal board recommended a rating of 2 instead of Mr. Peterson’s rating of 1 on competency C.8.c “because there was no consequence for declaring the RCIC systems inoperable from an administrative view point.” *Id.* In accepting the appeal board’s recommendation on the scoring of Mr. Philippon’s performance on competency C.8.c, the Director, Division of Reactor Controls and Human Factors, Office of Nuclear Reactor Regulation, changed the final portion of the last sentence in the appeal board’s recommendation assigning a rating of 2 to read “because the candidate needed some assistance from the crew to ensure compliance with the Technical Specifications.” HFC #4, at 16.

3. *The Parties’ Positions*

In claiming that the score for his performance on competency C.8.c should be changed from 2 to 3, Mr. Philippon raises several challenges to the Staff’s basic conclusion that he failed to comply with TS 3.0.3 following his declaration that the RCIC system was inoperable with the HPCI system already out of service. Because the appeal board’s determination and supporting reasoning on competency C.8.c. was markedly different from Mr. Peterson’s in the Operator License Examination Report, and Mr. Philippon’s appeal before the Presiding Officer focuses on the appeal board’s reasoning and conclusion, the most cogent expression of his position is found in Mr. Philippon’s informal appeal filing before the Staff. *See* HFC #7, section C.8.c.

In his informal appeal, Mr. Philippon asserts that, following the spurious initiation of the Reactor Core Isolation Cooling (RCIC) system, he ordered the

RCIC tripped and declared it inoperable. Next, he states that he read to the crew an action statement from applicable Technical Specification 3.7.4. According to Mr. Philippon, he read aloud the action statement that required the reactor to be in hot shutdown within the next 12 hours and the steam dome pressure to be reduced to less than 150 psig within the following 24 hours because nothing beyond hot shutdown had been discussed in earlier crew briefings. Further, he asserts that it was his understanding from the scenario script that the crew was aware that the HPCI system was already inoperable and that multiple technical specifications were applicable. Mr. Philippon claims that he then reviewed additional Technical Specifications 3.3.5, 3.0.3, 3.5.1, and 3.3.7.4 and concluded that, other than notification, no additional actions were required beyond what was already being done. Further, he concluded that the shutdown requirements of TS 3.0.3 were less limiting than the time requirements of TS 3.8.3.1, which was counting down from the previous shift and required the plant to be in hot shutdown in about 5 hours. *Id.*

Contrary to Mr. Peterson's statement in the Operator License Examination Report that Mr. Philippon did not identify the applicability of TS 3.0.3 until approximately 1½ hours after declaring the RCIC inoperable when the RO indicated in a crew brief that the HPCI system was also inoperable so TS 3.0.3 applied, Mr. Philippon asserts in his informal appeal that "[t]he RO mentioned during a crew brief that we could not pause indefinitely during the shutdown due to the fact that we were in Tech. Spec. 3.0.3." *Id.* Mr. Philippon states, however, that "I then reminded him that we were also in the more limiting Tech. Spec. 3.8.3.1 and that we were going to satisfy the more limiting requirement." *Id.* Additionally, in his informal appeal, Mr. Philippon contends that when he notified the NSS (one of the simulator operators) that he declared the RCIC inoperable he also requested that the NSS notify appropriate plant management and that this event was reportable to the NRC. He points out that a RCIC spurious initiation and "inoperability determination is, in and of itself, not an immediately reportable item, yet an entry into TS 3.0.3 is reportable. *Id.* Finally, Mr. Philippon states in his informal appeal that Mr. Peterson did not ask any followup questions at the conclusion of the scenario event so that Mr. Peterson could have been assured that Mr. Philippon was aware of all applicable technical specifications. In conclusion, he asserts that he performed all actions required by the technical specifications and that no technical specifications were violated. *Id.*

In his initial hearing presentation, Mr. Philippon disputes the appeal board's determination that he acted contrary to procedures in declaring the RCIC system inoperable without an operability review and seeking assistance from the NSS so that this performance met the behavioral anchor for a rating of 2 for needing assistance from the crew to ensure compliance with technical specifications. In a nutshell, Mr. Philippon argues that the NSS was not a participating member of the crew so any assistance from the NSS was inappropriate and, in any

event, it was his duty, as SRO, to make the operability determination. He also argues that for competency C.8.c he was being evaluated for compliance with technical specifications and because the issue raised by the appeal board involves plant procedures, it therefore is irrelevant to technical specification compliance. Additionally, he asserts that, in declaring the RCIC inoperable, he precisely met the expected response for the examination scenario, which called for the SRO to declare the RCIC system inoperable. First Philippon Affidavit at 14-16.

In his initial hearing presentation as well as in responding to the Staff's hearing presentation, Mr. Philippon reiterates that all technical specifications were complied with and no action required by any technical specification was missed. *Id.* at 15; Second Philippon Affidavit at 7. Specifically, he asserts that the requirements of TS 3.0.3 were satisfied. Moreover, and contrary to Mr. Peterson's claim that he failed to comply with TS 3.0.3 because he did not make a 1-hour report to the NRC, Mr. Philippon again points out that rating factor c, for competency C.8, evaluates correct compliance with technical specifications while the notification requirement he allegedly did not meet is mandated by the Commission's regulations, 10 C.F.R. § 50.72(b)(1)(i)(A), not TS 3.0.3, so any lack of notification is immaterial to the grading of his performance for this competency. Second Philippon Affidavit at 7-8. Further, he argues that, contrary to Mr. Peterson's assertions, TS 3.0.3 is less limiting than TS 3.8.3.1 that initiated the plant shutdown, so he fully complied with TS 3.0.3. *Id.* at 8-9. *See* Fourth Philippon Affidavit at 10; Fifth Philippon Affidavit at 1-3, 5. In this regard, Mr. Philippon, in responding to the Presiding Officer's question about the RO's recollection of events, refutes Mr. Peterson's conclusion that the RO had to inform him of the applicability of TS 3.0.3 with the response of the P603 operator. He reports that the P603 operator stated:

I remember that I did mention the applicability of TS 3.0.3 during a crew brief, but it was within a few minutes of declaring RCIC inoperable, not 1 1/2 hours after RCIC was declared inoperable. I remember that we discussed that TS 3.8.3.1 was more limiting, and since we were already in a plant shutdown we were already complying with TS 3.0.3 anyway.

Third Philippon Affidavit at 8. Finally, in further refuting Mr. Peterson's determination that he failed to comply with TS 3.0.3 because, as SRO, he failed to make the 1-hour notification to the NRC, Mr. Philippon points out that pursuant to scenario 2-2, event 3, the plant was several hours into a shutdown required by the plant's technical specifications so that the 1-hour report required by 10 C.F.R. § 50.72 upon initiation of a shutdown required by the technical specifications already would have been made hours earlier by the prior shift. Fifth Philippon Affidavit at 4-5.

In response to Mr. Philippon's arguments, the Staff first concedes, somewhat grudgingly and contrary to the appeal board's finding, that Mr. Philippon's action in declaring the RCIC system inoperable was appropriate. First Peterson Affidavit at

36. Thus, the Staff confesses error with respect to this appeal board determination. The Staff argues, however, that, after declaring the RCIC system inoperable, that declaration required Mr. Philippon “to identify and take actions in accordance with TS 3.0.3” and that “[h]e failed to identify and take such action.” *Id.*

The Staff asserts that following the spurious initiation of the RCIC system, Mr. Philippon reviewed the technical specifications and conducted a shift briefing to inform and discuss with the crew his findings concerning the applicable technical specifications. According to the Staff, Mr. Philippon only specifically identified and discussed TS 3.5.1, “ECCS-Operating,” and TS 3.7.4, “Reactor Core Isolation Cooling System,” and he did not identify TS 3.0.3 to the crew. Next, it asserts that, with both the RCIC system and, pursuant to the scenario script, the HPCI system already inoperable, entry into TS 3.0.3 was required because technical specification LCO action statement 3.5.1.c could not be met. *Id.* at 37. Upon entry into TS 3.0.3, the Staff claims that a 1-hour non-emergency report to the NRC is required pursuant to 10 C.F.R. § 50.72(b)(1)(i)(A) and that Mr. Philippon never made that notification. *Id.* at 38. In this regard, the Staff points to the student text stating that “[a] LER [Licensee Event Report] is required whenever plant conditions require entry into TS 3.0.3 even if the condition is corrected before a plant shutdown is initiated.” *Id.* Exh. 7, at 18. Thus, contrary to Mr. Philippon’s claims that he complied with all technical specifications, the Staff concludes that “[a]lthough plant shutdown was already in progress, Mr. Philippon failed to identify and take the required action to notify the NRC of the TS 3.0.3 condition.” *Id.* at 39. Further, the Staff states that “[i]n fact, Mr. Philippon was informed that TS 3.0.3 applied when he was corrected by the RO, approximately 1.5 hours later during another shift brief” and “[e]ven after being prompted by the RO, he still did not make the necessary NRC notification within 1 hour.” *Id.* Finally, the Staff also disputes Mr. Philippon’s assertion that TS 3.8.3.1 was more limiting than TS 3.0.3. *Id.* at 39-41; Second Peterson Affidavit at 37-38; Third Peterson Affidavit at 2-7; Fourth Peterson Affidavit at 3-4. The Staff argues, therefore, that Mr. Philippon’s performance meets the competency rating factor of 2.

4. Findings and Conclusions

The guidance in NUREG-1021, Form ES-303-4 for competency C.8., “COMPLY WITH AND USE TECHNICAL SPECIFICATIONS,” and rating factor c, asks “DID THE APPLICANT . . . (c) Ensure correct COMPLIANCE with TS and LCO action statements?” HFR #59, at 28. Initially, it should be emphasized that rating factors a (did the applicant recognize when conditions were covered by technical specifications?) and b (did the applicant locate the appropriate TS quickly and efficiently?) are not involved in the grading of Mr. Philippon’s performance on scenario 2-2, event 3. That fact, however, is not apparent from the

Staff's explanation of its scoring and its grading of Mr. Philippon's performance on competency C.8.c. It should also be noted that competency C.8.c involved only scenario 2-2, event 3, and not some other hypothetical scenario and event, although this fact is again not always apparent from the Staff's scoring of Mr. Philippon's performance on this competency and its explanation of that grade. It bears repeating, therefore, that under the script for scenario 2-2, event 3, the plant is required by TS 3.8.3.1 to shut down so that it is in hot shutdown within 12 hours of the occurrence of the LCO. The technical specification shutdown was begun by the previous shift operating crew and already had been in progress for a number of hours when the plant was turned over to Mr. Philippon's shift operating crew.

In looking to the guidance in NUREG-1021 relating to competency C.8, rating factor c, to determine whether the Staff's grading of Mr. Philippon's performance was justified and appropriate in light of the evidence presented, the record establishes that the Staff's grading has "strayed too far afield of the stated twin goals of 'equitable and consistent' examination administration" to be sustained. *Calabrese*, LBP-97-16, 46 NRC at 86. The record shows that the Staff erred in scoring Mr. Philippon's performance on competency C.8.c by grading him for matters other than those involved with rating factor c. Further, instead of scoring his performance solely on the script for simulator scenario 2-2, event 3, the Staff graded Mr. Philippon on events other than those called for under scenario 2-2, event 3. Thus, Mr. Philippon has met his burden that the Staff's grading of competency C.8.c is inappropriate and unjustified.

The gravamen of the Staff's position is that, upon declaring the RCIC system inoperable with the HPCI already out of service, he failed "to identify and take actions in accordance with TS 3.0.3," First Peterson Affidavit at 36, by not filing a 1-hour non-emergency report with the NRC. *Id.* at 38. The Staff claims that the filing of such a report is required upon entry into that technical specification. *Id.* at 37. Because under the scripted circumstances of scenario 2-2, event 3, no other overt action involving TS 3.0.3 was required that was not already being taken with regard to the plant shutdown already in progress initiated by TS 3.8.3.1, the Staff asserts that Mr. Philippon's failure to file the report demonstrates that Mr. Philippon did not comply with TS 3.0.3. Accordingly, the Staff concludes that "the weakness demonstrated by Mr. Philippon in the failure to identify and comply with TS 3.0.3 would have resulted in a technical specification violation if the plant shutdown was already not in progress." *Id.* at 41-42.

The Staff's position simply cannot withstand analysis. According to the Staff, the notification that is required upon entry into TS 3.0.3 is a 1-hour non-emergency report to the NRC. *Id.* at 38. But TS 3.0.3 nowhere contains any notification requirements within its text, action statements, or even its bases. *See* HFR #48 (as supplemented by NRC Staff's Response to Order dated March 1, 1999). Therefore, in grading Mr. Philippon's performance on rating factor c concerning his compliance with technical specifications, the Staff cannot properly conclude

that he did not comply with TS 3.0.3 by failing to file a 1-hour report when the technical specification contains no such reporting requirement.

The Staff essentially concedes that TS 3.0.3 contains no reporting requirement but nevertheless argues that the applicable notification is required by the Commission's regulations, 10 C.F.R. § 50.72(b)(1)(i)(A), and in effect claims that compliance with the regulation demonstrates compliance with the technical specification. First Peterson Affidavit at 38. In pertinent part, that regulation states that "the licensee shall notify the NRC . . . within one hour of . . . [t]he initiation of any nuclear plant shutdown required by the plant's Technical Specifications." Here, again, rating factor c of competency C.8 does not concern compliance with the Commission's regulations, only compliance with technical specifications. This being so, the Staff cannot properly use Mr. Philippon's purported lack of compliance with a Commission regulation as the basis for concluding he did not comply with a technical specification. Indeed, it should be noted that none of the eight competencies set forth in NUREG-1021, Form ES-303-4, upon which SRO candidates are tested in the operating portion of the licensing examination deal with the recognition of, or compliance with, agency regulations.

Most importantly, however, as Mr. Philippon points out, under scenario 2-2, event 3, the 1-hour notification the Staff claims is required pursuant to 10 C.F.R. § 50.72(b)(1)(i)(A) was made, or should have been made, hours earlier by the previous shift operating crew when, pursuant to the scenario script, the plant shutdown was initiated due to the requirements of TS 3.8.3.1. Nothing in the scenario script or the informal adjudicatory record indicates that the 1-hour notification was not made by the previous shift operating crew or that Mr. Philippon was to assume the notification had not been properly made. Moreover, there is nothing in the regulation suggesting that multiple notifications are required for ongoing events such as shift changes. By using the words "initiation of any nuclear plant shutdown required by the plant's Technical Specification," the regulation definitionally limits the reporting requirement to a single 1-hour report per technical specification shutdown. In other words, by definition, there can only be one initiation of each shutdown. Although subsequent events involving the plant's technical specifications may occur during the shutdown process, those later events do not "initiate" the shutdown and 10 C.F.R. § 50.72(b)(1)(i)(A) does not require a 1-hour report to the NRC for them.⁴ In the circumstances presented by scenario 2-2, event 3, the regulation is not applicable and the Staff's reliance upon it is misplaced. Therefore, contrary to the Staff's claim, Mr. Philippon's failure to

⁴ Interestingly, there are applicable plant procedures at Fermi requiring a 1-hour notification to the NRC upon the initiation of a plant shutdown required by the technical specifications. Third Peterson Affidavit, Attachment 13, Part 2, at 2. For scenario 2-2, event 3, however, Mr. Philippon was being graded on competency C.8, rating factor c, dealing with his compliance with technical specifications, not competency C.4, rating factor c, dealing with his compliance with plant procedures.

make a 1-hour report when no such report is required, cannot be used as evidence to support the notion that he did not comply with TS 3.0.3.⁵

For the same reason, the Staff's argument that Mr. Philippon failed to comply with TS 6.9.1 also fails. Third Peterson Affidavit at 13-14. In answering the Presiding Officer's question whether there were any other technical specifications dealing with general reporting requirements, the Staff responded that TS 6.9.1 incorporates Title 10 of the *Code of Federal Regulations* so Mr. Philippon failed to comply with that technical specification when he did not make the 1-hour report to the NRC. Contrary to the Staff's argument, however, TS 6.9.1 can stand on no better footing than the inapplicable regulation it incorporates.

In the conclusion of its initial hearing presentation, the Staff seemingly recognizes the incongruity of its position on competency C.8.c when it states that Mr. Philippon's "failure to identify and comply with TS 3.0.3 [i.e., file a 1-hour report to comply with TS 3.0.3] would have resulted in a technical specification violation if the plant shutdown was not already in progress." First Peterson Affidavit at 41-42. But pursuant to scenario 2-2, event 3, the shutdown required by the plant's technical specifications already was in progress and had been for many hours. Therefore, the 1-hour report required by the Commission's regulations already had been made, or should have been made, hours before by the previous operating shift crew and 10 C.F.R. § 50.72(b)(1)(i)(A) was no longer applicable. It was this set of facts and only this set of facts, against which Mr. Philippon's performance for scenario 2-2, event 3, could be judged. Thus, the Staff was obligated to grade Mr. Philippon on the scenario he faced, not some other hypothetical set of facts in which the shutdown required by the plant's technical specifications was not already in progress. Indeed, it should be noted that the Staff reviewed and approved the simulator scenario for competency C.8, rating factor c, that was intended to test the SRO candidate's compliance with technical specifications. But the approved scenario did not require any actions other than those a properly performing crew already would be taking that would objectively indicate whether the SRO had complied with TS 3.0.3. This inadequacy in the scenario cannot properly be corrected by changing the scenario while grading Mr. Philippon's performance on competency C.8.c. For the foregoing reasons, the Staff's position that Mr. Philippon did not comply with TS 3.0.3 cannot be sustained.

In scoring Mr. Philippon's performance, the Staff concluded that behavioral anchor 2 most closely fit his actions, i.e., "[n]eeded some assistance from crew to

⁵In arguing that 10 C.F.R. § 50.72(b)(1)(i)(A) is applicable, the Staff also relies upon Student Text, ST-OP-804-0001-01. First Peterson Affidavit at 38. That text states: "a LER [License Event Report] is required whenever plant conditions require entry into TS 3.0.3 even if the condition is corrected before the plant shutdown is initiated." First Peterson Affidavit, Exh. 7, at 18. But the requirements for Licensee Event Reports are governed by 10 C.F.R. § 50.73, not section 50.72(b)(1)(i)(A), and section 50.73, when applicable, requires the filing of a 30-day written report, not the 1-hour report the Staff argues is applicable here. Moreover, even if section 50.73 is applicable in the circumstances presented, the Staff, as previously indicated, cannot properly use Mr. Philippon's purported lack of compliance with a Commission regulation as the basis for concluding he did not comply with a technical specification.

ensure compliance.” HFR #59, at 28; First Peterson Affidavit at 41. Rather, in the circumstances, the correct behavioral anchor description is that for a score of 3, i.e., “[d]irectives were based on a correct understanding of TS action statements.” HFR #59, at 28. Accordingly, Mr. Philippon’s grade on competency C rating factor 8.c should be changed to 3.

Two other issues, neither of which is necessary to the resolution of Mr. Philippon’s challenge to the Staff’s grading of his performance on competency C.8.c, deserve brief mention. First, even though competency C.8.c deals exclusively with compliance with technical specifications, the Staff consistently linked its argument that Mr. Philippon failed to comply with TS 3.0.3 with his failure to identify or recognize when conditions were covered by TS 3.0.3 — a matter covered by rating factor a, of competency C.8. Here again, however, the competency Mr. Philippon was graded on with respect to scenario 2-2, event 3, only involved rating factor c of competency C.8, not rating factor a. Thus, in spite of the obvious logic of not separating those elements, given the structure of Mr. Philippon’s examination, rating factor a, of competency C.8, cannot now be added to the matters evaluated under scenario 2-2, event 3, in grading Mr. Philippon’s performance. Moreover, when all of the record evidence is objectively considered, it is consistent with Mr. Philippon’s assertion that he recognized the need to consider the applicability of TS 3.0.3. The facts in the record, in contrast to the conclusions drawn from those facts by the Staff, are fully consistent with Mr. Philippon’s position. For example, the Staff relies upon Mr. Peterson’s notes from the simulator test indicating that, after the spurious initiation of the RCIC, Mr. Philippon recited aloud to the operating crew two technical specifications, but he did not mention TS 3.0.3. First Peterson Affidavit at 37-39. Mr. Peterson’s notes then state his conclusion that Mr. Philippon did not recognize TS 3.0.3. Third Peterson Affidavit, Exh. 1, at 1. But Mr. Philippon asserts that he reviewed the applicable technical specifications, including TS 3.0.3, determined no additional actions were required, and that TS 3.8.3.1 was more limiting than TS 3.0.3. HFC #7, section C.8.c. This position is not inconsistent with not mentioning TS 3.0.3 aloud to the operating crew. Indeed, it is fully consistent with the notes taken by a second examiner at approximately the same time as Mr. Peterson’s entry, indicating that Mr. Philippon stated “[w]e are already in a TS shutdown, and we will continue the shutdown.” Third Peterson Affidavit, Exh. 2, at 1. Equally consistent with Mr. Philippon’s position is the recollection of one of the reactor operators who indicated that, shortly after declaring the RCIC inoperable, the crew discussed that TS 3.8.3.1 was more limiting than TS 3.0.3 and, because the plant already was being shut down, the crew was necessarily complying with TS 3.0.3. Third Philippon Affidavit at 8. Thus, the record evidence supports Mr. Philippon’s assertion that he recognized the need to consider the applicability of TS 3.0.3. It obviously would have been better if Mr. Philippon had announced aloud his recognition of TS 3.0.3. There is, however, no specific requirement that directs SRO candidates to do so in these circumstances.

By the same token, Mr. Peterson, as the examiner, was free to ask Mr. Philippon questions at the end of the scenario to clear up any doubts.

Second, the Staff claims that TS 3.0.3 was more limiting than TS 3.8.3.1, while Mr. Philippon asserts the reverse. A meticulous review of the parties' many filings and arguments on this issue is only slightly less taxing and time-consuming than solving Rubik's cube. In any event, it should be noted that a definitive answer to this issue is dependent upon a precise time line of events that begins with the entrance into TS 3.8.3.1 during the prior shift. Somewhat surprisingly, all that is known is that sometime during the turnover crew briefing, in response to Mr. Philippon's question, the new shift operating crew was informed that hot shutdown had to be reached in 8 hours. The starting time for that 8 hours is unknown, as is the length of time of the crew briefing or even the actual shift starting time. Additionally, it appears that the scenario was conducted with little regard for keeping an accurate time line of events. Moreover, a simulator breakdown during the scenario only added to the imprecision of an already imprecise time line.

Further, it suffices to note that a determinative component of the Staff's argument and, hence its time line, is that the 1-hour grace period provided by TS 3.0.3 is inapplicable under these circumstances. First Peterson Affidavit at 39-40. The language of TS 3.0.3, however, does not support the Staff's interpretation. Moreover, as Mr. Philippon points out, the recently adopted improved technical specifications for the facility support Mr. Philippon's reading of TS 3.0.3 in effect at the time of the SRO examination. Fifth Philippon Affidavit at 3; *id.* Attach. 2. Finally, it is undisputed that the plant was, in fact, in shutdown operational mode 3 within the time frame of the scenario and, at that time, the plant met the shutdown requirements of all applicable technical specifications including those of TS 3.0.3. Thus, in light of these critical factors and on the current record, the Staff's argument does not demonstrate that TS 3.0.3 was universally more limiting than TS 3.8.3.1.

C. Competency C.4.c

Mr. Philippon next challenges the Staff's grading of his performance on competency C.4, rating factor c, involving scenario 2-2, event 8 (residual heat removal (RHR) suction line break) and event 9 (loss of offsite power; emergency diesel generator auto start failure). Under the script for this scenario, the plant is being shut down to enter a mid-cycle outage and because some equipment is out of service plant shutdown is required by Technical Specification 3.8.3.1. The two events that are the focus of this evaluation occur at the end of the scenario. HFC #10, Appendix D at 1.

Pursuant to the scenario, a leak in the residual heat removal suction line causes the water level in the torus to drop. Plant procedures require the operating crew to isolate the leak. According to the scenario script and unbeknownst to the

operating crew, the leak cannot be isolated and thereby stopped. If the leak cannot be stopped, the procedure requires the crew to initiate a scram and depressurize the system before the torus water level reaches –38 inches. Shortly after the leak occurs, the plant also experiences a loss of offsite power and emergency diesel generator (EDG) 12 fails to start automatically. Although the facility has a total of four emergency diesel generators, number 12 supplies the electrical power for the main turbine bypass valves. The plant procedure for restoring emergency power includes starting the gas combustion turbine generator (CTG-11) and sending a crew member to start the emergency diesel generator manually. These tasks require the attention of at least one crew member so these matters divert a crew member from the task of attempting to isolate the torus leak. HFC #10, at 16.

The objective of the exercise is to deploy the crew efficiently to identify the reason for the decrease in torus water level and, if possible, stop it while also coping with the loss of offsite power. If the torus water level cannot be kept high enough there will be insufficient capacity for the torus water to absorb heat to serve its purpose as a suppression pool; hence, the reactor must be scrammed and an emergency depressurization is required.

As set out in NUREG-1021, Form ES-303-4, the rating factors and the corresponding behavioral anchors for competency C.4, “COMPLIANCE AND USE OF PROCEDURES,” and rating factor c, ask:

DID THE APPLICANT:

. . . .

(c) Ensure the safe, efficient IMPLEMENTATION of procedures BY THE CREW?

3	2	1
Kept crew informed of procedural status; got acknowledgment from crew when reading procedures	Crew occasionally had to question SRO regarding status; allowed lapses in implementation by crew	Read procedures to him/herself; failed to coordinate or verify crew’s use of procedures

HFR #59, at 24.

1. Expected Response to Scenario 2-2, Events 8 and 9

After being alerted to the drop in the torus water level, the operators will enter EOP 29.100.01 Sheet 5, “Secondary Containment and Radiation Release” (HFR #30), and EOP 29.100.01 Sheet 2, “Primary Containment Control” (HFR #26), when the secondary sump level increases and torus level decreases to –2 inches, respectively. The SRO should then direct the BOP operator to raise the torus water level using the torus water management system, overriding interlocks as necessary.

At this point, the operators should investigate and attempt to identify the source of the decrease in the torus water level. *See* HFC #10, at 16.

When the BOP operator cannot keep the torus water level above –38 inches, the SRO should enter EOP 29.100.01 Sheet 1, ‘RPV Control’ (HFR #24), and prepare for emergency depressurization of the reactor vessel in accordance with EOP 29.100.01 Sheet 3, ‘Emergency Depressurization’ (HFR #27). Next, when the loss of offsite power occurs, the SRO should enter AOP 20.300.03, ‘Loss of Offsite Power’ (HFR #21). The SRO should then direct actions to restore power.⁶ The SRO’s actions should include directing the start of the gas combustion turbine generator, CTG-11, to power the standby feedwater pump and restore power to additional equipment to facilitate rejection of heat to alternate heat sinks. *See id.*

2. Conclusions of Mr. Peterson and the Appeal Board on Competency C.4.c

In his Operator License Examination Report, Mr. Peterson found that Mr. Philippon adequately responded to the lowering torus water level, entered the appropriate emergency operating procedures, and started to mitigate the torus problem when the loss of offsite power occurred. According to Mr. Peterson, Mr. Philippon directed the BOP to perform the abnormal operating procedure for loss of offsite power. The operator started and completed this procedure up to step 3 when he informed Mr. Philippon that the procedure was too long and cumbersome to complete in a timely manner. In his report, Mr. Peterson then stated that Mr. Philippon

was preoccupied with the torus level problem, that he did not adequately prioritize needed actions to restore power to essential plant equipment, e.g. standby feedwater pumps and secondary plant equipment to assist in controlled plant depressurization. Rather than directing the BOP to expedite and perform the loss of offsite power procedure, the SRO told the BOP to forget the procedure and monitor the torus water level.

HFC #10, at 16. Mr. Peterson concluded, therefore, that Mr. Philippon ‘‘effectively lost the use of one operator to perform important restoration steps for restoring electrical power to assist in mitigating the plant emergency’’ and that ‘‘[h]e failed to ensure safe and efficient implementation’’ of the loss of offsite power procedure. *Id.* at 17.

Upon consideration of Mr. Philippon’s informal appeal, the appeal board recommended increasing Mr. Peterson’s rating of 1 to 2 for rating factor c, of competency C.4. The appeal board found that although the loss of offsite power abnormal operating procedure is a continuous use procedure, the action note for

⁶ It should be noted that the appeal board did not share this expectation for the SRO.

the procedure specifically allows the SRO discretion to perform the steps of the procedure simultaneously. It stated that, although Mr. Philippon directed the BOP to forgo the procedure and monitor the torus water level, subsequent actions of the procedure should have been carried out as required and as time and circumstances permitted. HFC #5, at 12. In this regard, the appeal board determined that “[d]irecting the actions of EOP 29.100.01 (Primary Containment Control, and Secondary Containment and Rad Release) regarding the decreasing torus water level and the increasing reactor building sump levels were very important.” *Id.* The appeal board concluded, therefore, that:

it appears that candidate, as SRO, failed to maintain command and control of the actions of the BOP to ensure implementation of a plant procedure that had been directed to be performed. Management Procedure MGA03, Enclosure A, Step A.2, states, “When one of the exit conditions specified in the EOP flowchart is satisfied or it is determined that an emergency no longer exists, the operator exits the EOP flowchart and returns to non-emergency procedures.” For the given plant conditions, EOP 29.100.01 was in effect and had not been exited at the time of the loss of offsite power event. The subsequent actions of AOP 20.300.03, Loss of Offsite Power, were not immediate; and there were no immediate actions to be performed by the operators.

In summary, the NRC assigns a rating of 2 (0.50 weight factor) instead of 1.0 (0.25 weight factor) for Competency C.4.c due to the candidate allowing a lapse in implementation of a procedure.

Id.

3. Parties’ Positions

In asserting that the grading of his performance on competency C.4.c was incorrect and that his grade on rating factor c should be raised to 3 from 2, Mr. Philippon argues that the appeal board erred in concluding that a lapse occurred in performing the torus low-level portion of emergency operating procedure, EOP 29.100.01. He asserts that, although the appeal board indicated that because the EOP had not been exited at the time of the loss of offsite power event any actions performed outside the EOP resulted in a lapse, the appeal board failed to point out any procedural action that was performed late or any other consequences of the purported lapse. According to Mr. Philippon, there was, contrary to the appeal board’s conclusion, no lapse in any required procedural step. In arguing that no lapse occurred, Mr. Philippon details his actions with respect to the steps of the EOP and notes the fact that he adhered to the procedure in ordering emergency depressurization prior to exceeding the water level limits. He further argues that there were no adverse consequences as a result of his initial investigation and attempt to mitigate the loss of offsite power event. First Philippon Affidavit at 11-14.

In response to Mr. Philippon's initial hearing presentation before the Presiding Officer, the Staff does not respond to Mr. Philippon's challenge to the appeal board's conclusion explaining how it scored his performance a 2 for competency C.4.c. The appeal board concluded that Mr. Philippon allowed a lapse to occur in performing the EOP. Stated otherwise, the Staff does not defend the appeal board's conclusion, which is the Staff's last word on Mr. Philippon's grade for competency C.4.c and the only matter Mr. Philippon properly could challenge before the Presiding Officer. Instead, the Staff goes off in an entirely different direction. First Peterson Affidavit at 27-34.

In this regard, it should be noted that Mr. Philippon in his initial hearing presentation before the Presiding Officer challenging the appeal board's conclusion regarding his purported lapse, briefly recited in an introductory paragraph the gist of the argument he presented in his informal appeal to the Staff in seeking to overturn Mr. Peterson's grading and conclusion regarding competency C.4.c in the Operator License Examination Report. First Philippon Affidavit at 10-11. In that report, Mr. Peterson concluded that Mr. Philippon effectively lost control of the use of one operator to perform steps for restoring electrical power when he redirected the operator from the loss of offsite power procedure to the torus leak problem. *See* HFC #10, at 17. In concluding that brief historical recitation in his initial hearing presentation, Mr. Philippon notes that "[t]he staff reviewer's assessment of the correct response to these events was completely opposite from that of the initial examiner." First Philippon Affidavit at 11.

Rather than addressing Mr. Philippon's challenge to the appeal board's conclusion regarding competency C.4.c, the Staff, and more particularly Mr. Peterson (the initial license examiner and the Staff's affiant, who through his affidavits, has presented the Staff's entire case), reverts to challenging Mr. Philippon's arguments from his informal appeal to the Staff where Mr. Philippon challenged Mr. Peterson's conclusions in the Operator License Examination Report. *See* First Peterson Affidavit at 27-34. Not surprisingly, Mr. Peterson's recitation of the underlying facts and events is markedly different from that presented by Mr. Philippon in his informal appeal to the Staff. It suffices to note Mr. Peterson's summary of his position from his initial hearing response before the Presiding Officer:

Mr. Philippon's contention that he directed the BOP operator away from the loss of offsite power AOP 20.300.03 (Hearing File Reference 21) to mitigate the torus level problem is in principle correct; however, the direction given to the BOP operator was only to monitor torus level and then, as directed, perform a premature rapid pressure reduction with SRVs into the Torus and unnecessarily challenging the primary containment. Although it is true that the actions per the EOP 29.100.01 Sheet 2 for the lowering Torus water level (i.e., performing RPV emergency depressurization once Torus level reached -38") were eventually performed, Mr. Philippon directed actions which were contrary to the EOPs. The premature pressure reduction to 400 psig was unnecessary and not in compliance with procedures. His actions degraded plant conditions (RPV and containment) unnecessarily prior to the need for RPV emergency depressurization. The BOP operator's time could have been better utilized in pursuing the loss

of offsite power procedure, in attempts to restore important equipment (SBFW pump, feed and condensate system, and the main turbine bypass valves) to support a more controlled RPV pressure reduction away from the Torus, until the required RPV emergency depressurization for Torus water level was necessary. The other crew that performed the same scenario did not perform the unnecessary and significant rapid RPV depressurization prior to reaching the condition that required emergency depressurization. The BOP operator concentrated on the loss of offsite power procedure, while the P603 operator and the SRO adequately monitored the Torus water level and maintained the rest of the reactor parameters. Therefore, the other crew was able to perform more of the loss of offsite power procedure, closer to restoring power to the main turbine bypass valves and the SBFW pump, before RPV emergency depressurization was required.

First Peterson Affidavit at 33-34.

At this point, a brief digression is necessary. The same scenario 2-2, and the same events, events 8 and 9, involved in competency C.4.c were also involved in the Staff's judging of Mr. Philippon's performance in competency C.7.b "(Directing Operations, Safe Directions)." HFC #5, at 12. As set out in NUREG-1021, the rating factors and corresponding behavioral anchors for competency C.7, "DIRECT SHIFT OPERATIONS," and rating factor b, asks whether Mr. Philippon "provide[d] TIMELY, WELL THOUGHT OUT DIRECTIONS that facilitated CREW PERFORMANCE and demonstrated appropriate CONCERN for the SAFETY of the plant, staff, and public?" HFR #59, at 27. In grading his performance for scenario 2-2, events 8 and 9, on competency C.7.b, Mr. Peterson gave Mr. Philippon a 1, concluding that "[t]he applicant incorrectly interpreted the EOPs to open SRVs to perform a preempted ED. This action was contrary to the EOPs. The applicant's actions and directions were not well thought out and potentially inhibited safe operations." HFC #10, at 18.

On Mr. Philippon's informal appeal, the appeal board raised that score to 3 — the highest rating possible. In reaching its conclusion, the appeal board necessarily rejected the determinations and conclusions of Mr. Peterson set forth in the Operator License Examination Report regarding Mr. Philippon's performance on scenario 2-2, events 8 and 9, for competency C.7.b. *See* HFC #5, at 12-14. Specifically, the appeal board concluded that "[t]he candidate correctly used available systems (SRVs and the RCIC system) from Table 4, 'Alternate Pressure Control Systems,' as referenced in step P-3 of EOP 29.100.01." *Id.* at 14. In awarding Mr. Philippon's performance the highest rating — the same performance under consideration in competency C.4.c for scenario 2-2, events 8 and 9 — the appeal board answered the question whether Mr. Philippon provided timely, safe, well thought out directions that facilitated crew performance by, in effect, finding his "[d]irectives enabled safe, integrated crew performance," the behavioral anchor for the rating of 3. HFR #59, at 27. In large measure, Mr. Peterson's response to Mr. Philippon's initial hearing presentation on competency C.4.c repeats the same position set forth in his Operator License Examination Report regarding

competency C.7.b, which the appeal board already rejected for this same scenario and events with respect to competency C.7.b. *Compare* HFC #10, at 17-18 with First Peterson Affidavit at 28-33.

4. Findings and Conclusions

The Staff's position on competency C.4.c cannot be sustained. By its failure to defend before the Presiding Officer the appeal board's conclusion on which it based its grade of 2 for competency C.4.c (i.e., that Mr. Philippon allowed a lapse to occur in the EOP), the Staff has effectively waived its defense of the appeal board position — the final Staff position and, hence the only Staff position open to Mr. Philippon to challenge before the Presiding Officer.⁷ The Staff's action in this regard is tantamount to conceding Mr. Philippon's position that no such lapse occurred. Needless to say, the Staff is always free to confess error on a matter it now believes was wrongly determined against Mr. Philippon during the examination process or on his informal appeal. In this instance, however, the Staff has not confessed error or in any other manner admitted the appeal board erred. Rather, the Staff has chosen to ignore the appeal board's conclusion that Mr. Philippon allowed a lapse to occur in the EOP procedure and on which the board based its grading of Mr. Philippon's performance on competency C.4.c. This the Staff may not do. Silence is not a confession of error. Nor can there be an implied confession of error.

Instead of admitting its mistake or confessing error, the Staff simply ignores the appeal board's conclusion and seeks to justify the Staff's grading of Mr. Philippon's performance on grounds different than those enunciated by the appeal board on Mr. Philippon's informal appeal. The Staff, in particular Mr. Peterson, now seeks to justify the grading of Mr. Philippon's performance on competency C.4.c by resurrecting the grounds Mr. Peterson initially set forth in his Operator License

⁷ Indeed, the Staff's only allusion to the appeal board's conclusion that Mr. Philippon allowed a lapse to occur came in response to a direct question posed by the Presiding Officer subsequent to the parties' initial filings. *See* Order of March 19, 1999, App. at 6. In its response to Mr. Philippon's initial hearing presentation, the Staff, through Mr. Peterson's affidavit, ignored the appeal board's conclusion on which it based its grade for competency C.4.c and Mr. Philippon's argument that no lapse occurred. Thereafter, the Presiding Officer directed a question to the Staff that referred to the appeal board's conclusion that Mr. Philippon allowed a lapse in the implementation of a procedure and inquired what precisely it meant by the term lapse. *Id.*

Even with this prompting by the Presiding Officer, the Staff did not respond to Mr. Philippon's argument that no lapse occurred or otherwise present a belated defense of the appeal board's conclusion. Rather, Mr. Peterson cryptically responded to the Presiding Officer's question stating that the term lapse "in this case means neglected and/or minimized" and that "Mr. Philippon minimized and/or neglected to carry out the procedure" and "[h]is action constituted a lapse in procedure implementation." Second Peterson Affidavit at 27. This answer neither responded to Mr. Philippon's argument that no lapse occurred nor adequately explained how such a lapse occurred. After ignoring the appeal board's conclusion and Mr. Philippon's argument in his initial hearing presentation, Mr. Peterson's cryptic response to the Presiding Officer's question cannot reasonably be considered a defense of the appeal board's conclusion that a lapse occurred. That Mr. Peterson has chosen to ignore the appeal board's conclusion is not surprising in light of the diametrically opposed positions of the appeal board and Mr. Peterson on the issue of the importance and immediacy of the loss of offsite power procedure.

Examination Report (i.e., that Mr. Philippon effectively lost control of the use of one operator to perform steps for restoring electrical power when he redirected the operator from the loss of offsite power procedure to the torus leak problem and that he violated procedures in directing a preemptive emergency depressurization). In turn, those grounds were effectively overruled by the appeal board in part by its determination on competency C.4.c (i.e., that the BOP operator should not have been directed to the offsite power procedure at all) but also by its determination on the same scenario 2-2, events 8 and 9, for competency C.7.b on Mr. Philippon's informal appeal (i.e., that Mr. Philippon correctly used available systems under the EOP). Stated most plainly, Mr. Peterson, the Staff license examiner, was effectively reversed and overruled by the three Staff members comprising the appeal board that, at least for purposes of the license examination process, were his superiors and constituted a higher authority within the Staff hierarchy. Yet here before the Presiding Officer, Mr. Peterson, on matters already effectively decided by the appeal board, is attempting to reverse and overrule his Staff superiors. Although the Staff, and in particular Mr. Peterson, are free to carry on internecine warfare, they are not free to wage it in this adjudicatory proceeding where all elements of the Staff appear as a single party. In a nutshell, the Staff, and particularly Mr. Peterson, may not take a position or assert facts before the Presiding Officer contrary to a matter decided by the appeal board (i.e., the Staff itself) on Mr. Philippon's informal appeal absent an explicit confession of error.

Therefore, because the Staff has not defended the appeal board's conclusion that Mr. Philippon allowed a lapse to occur in the emergency operating procedure, the Staff has waived its right to do so. Consequently, the Staff has effectively conceded the correctness of Mr. Philippon's position that no such lapse occurred. Having effectively conceded that no lapse occurred in the emergency operating procedure, the Staff has also necessarily negated the very basis upon which the appeal board graded Mr. Philippon's performance for competency C.4.c. The behavioral anchor for a grade of 2, the score the appeal board gave Mr. Philippon's performance, states that the crew occasionally had to question the SRO regarding status and that the SRO allowed lapses in implementation by the crew. The Staff now effectively concedes that no lapse occurred in implementing the emergency operating procedure. Further, the record as a whole does not support the notion that the operating crew occasionally had to question the SRO regarding the status of the plant. Rather, the record as a whole shows that the description for the behavioral anchor for a score of 3 most closely fits Mr. Philippon's performance on competency C.4.c for scenario 2-2, events 8 and 9. In that regard, the record as a whole demonstrates that Mr. Philippon kept the operating crew adequately informed of the plant's procedural status and received acknowledgments from the crew. *See* Second Peterson Affidavit, Exh. 1, at 3 (times 1920, 1932, 1940); *id.* Exh. 2, at 2-3 (times 1915, 1930, 1933). Accordingly, Mr. Philippon's grade on competency C.4, rating factor c, should be changed to 3.

In any event, it should be noted that, contrary to the appeal board's conclusion in competency C.4.c but in full accord with the appeal board's determinations with respect to competency C.7.b for these same events, the record does not support a determination that there was a lapse by Mr. Philippon in implementing the emergency operating procedures. Most simply stated, the record as a whole demonstrates that there was no lapse in implementing EOP 20.100.01 inasmuch as the steps of the procedure, including emergency depressurization, were carried out in a timely fashion. Indeed, pursuant to the design of the examination, Mr. Philippon met the expected response to scenario 2-2, events 8 and 9, by initiating the loss of offsite power procedure.

Additionally, it should be noted that Mr. Peterson's arguments before the Presiding Officer largely mirror his Operator License Examination Report on competencies C.4.c and C.7.b. He argues that Mr. Philippon lost control of the use of one operator to restore emergency electrical power by redirecting him to the torus leak problem and that Mr. Philippon's actions in reducing reactor vessel pressure were contrary to procedures. Mr. Peterson's arguments are unpersuasive. A reasonable construction of all the record evidence shows that, in the circumstances, Mr. Philippon's actions in implementing procedures by the operating crew for scenario 2-2, events 8 and 9, were reasonable and prudent. This conclusion with respect to competency C.4.c is fully consistent with the appeal board's determination in competency C.7.b involving the same scenario and events. With respect to competency C.7.b, the appeal board graded Mr. Philippon's performance a 3, thereby acknowledging that his directives enabled safe integrated crew performance in answering the rating factor question whether Mr. Philippon provided safe, timely, well thought out directions that facilitated crew performance. Mr. Peterson's position is in direct conflict with the appeal board's determination and cannot be reconciled with it by any reasonable explanation concerning the differences in rating factors. Moreover, the appeal board's grading of competency C.7.b puts to rest Mr. Peterson's claim that Mr. Philippon's actions were contrary to the emergency operating procedures.

D. Competency C.8.a

Finally, Mr. Philippon challenges the Staff's scoring of his performance on competency C.8, rating factor a, involving simulator scenario 2-2, event 7 (reactor building component cooling water (RBCCW) pump trip), and scenario 2-3, event 3 (average power range monitor channel B failure). In each of these events, the SRO is expected to take a number of actions using abnormal operating procedures, emergency operating procedures, and other relevant plant procedures. In responding to these events, the SRO is expected to recognize the relevant technical specifications and take the actions required by each. *See* HFC #10, at 15, 19.

As set forth in NUREG-1021, the description of the rating factors and the corresponding behavior anchor for competency C.8, “COMPLY WITH AND USE TECHNICAL SPECIFICATIONS,” and rating factor a, asks:

DID THE APPLICANT:

(a) RECOGNIZE when conditions were covered by technical specifications (TS)?

3	2	1
Recognize TS limiting conditions for operation and action statements without use of references	Minor errors and misunderstandings with respect to TS applications	Failed to correctly recognize situations covered by TS and action statements

HFR #59, at 28.

1. Expected Response to Scenario 2-2, Event 7, and Scenario 2-3, Event 3

In scenario 2-2, event 7, annunciators indicate that the “C” pump for the reactor building component cooling water has tripped and that there is an overload condition on a RBCCW pump. The SRO is expected to perform the actions under an abnormal operating procedure leading to the restoration of the RBCCW system and then determine the applicability of TS 3.7.1.2, “Emergency Equipment Cooling Water System,” (EECW) action a.1, and TS 3.8.2.1, “Electrical Power Systems-DC Sources,” action b and note #. HFC #10, at 15. In scenario 2-3, event 3, the average power range monitor (APRM) channel B fails upscale causing annunciators to alarm and reactor protective system B indicates a half-scam. *Id.* at 9. For this event, the SRO should direct the RO to bypass the failed APRM and reset the half-scam. The SRO should then evaluate the APRM channel failure for applicability of TS 3.3.1, “Reactor Protection System Instrumentation,” TS 3.3.6, “Control Rod Block Instrumentation,” and TS 3.3.7.5, “Accident Monitoring Instrumentation.” *Id.*

2. Conclusions of Mr. Peterson on Competency C.8.a

In his Operator License Examination Report, Mr. Peterson found that, with respect to scenario 2-2, event 7, Mr. Philippon recognized the applicability of Emergency Equipment Cooling Water System Technical Specification 3.7.1.2, but that he failed to recognize the applicability of TS 3.8.2.1, which required the additional understanding that the situation caused a loss of ECCW system cooling to the DC battery charger room. *Id.* at 15-16. With respect to event 3 of scenario 2-3, Mr. Peterson found that Mr. Philippon failed to recognize the applicability of TS 3.3.7.5. Because of his failure to recognize these technical specifications, Mr.

Peterson found Mr. Philippon's performance on competency C.8.a met the anchor description for a rating of 1. *Id.* at 3.⁸

3. *The Parties' Positions*

In challenging the score of 1 he received on rating factor a, of competency C.8, Mr. Philippon essentially concedes that he did not initially recognize the applicability of TS 3.8.2.1 stemming from a loss of flow to the DC battery charger room coolers. He argues, however, that required action b under the technical specification may, according to note # of the specification, be delayed up to 16 hours if the proper actions are taken under TS 3.7.1.2. Therefore, Mr. Philippon argues that he "had a total of 18 hours to recognize this Technical Specification prior to any action being required" and "[h]ad the scenario provided me enough time I would have had plenty of time to recognize the applicability of TS 3.8.2.1." First Philippon Affidavit at 19.

With respect to event 3 of scenario 2-3, Mr. Philippon asserts that because the two technical specifications he did recognize, TS 3.3.1 and TS 3.3.6, are more limiting in all situations in which they arise than TS 3.3.7.5, which he did not initially recognize, "had the scenario allowed me enough time I would have recognized the applicability of this Technical Specification also." *Id.* at 20. He argues, therefore, that both instances are examples of minor errors warranting a grade of 2. *Id.*

The Staff argues that while Mr. Philippon correctly identified the applicability of TS 3.7.1.2 in scenario 2-2, event 7, his failure to recognize the applicability of TS 3.8.2.1 reflects a failure to understand that the situation caused a loss of EECW system cooling water flow to the DC battery charger room coolers. The Staff concedes that action under TS 3.8.2.1 may be delayed up to 16 hours but asserts that a permissible delay in action does not correspond to a permissible delay in recognizing and entering the technical specification limiting condition for operation. First Peterson Affidavit at 43-44. Further, with respect to scenario 2-3, event 3, the Staff argues that although TS 3.3.1 may be more limiting than TS 3.3.7.5 as Mr. Philippon asserts, the SRO, nevertheless, has the responsibility of recognizing all applicable technical specifications. *Id.* at 44. Finally, in response to his plea about the need for more time, the Staff states that Mr. Philippon was given an amount of time comparable to that given to other applicants to recognize plant conditions and identify the applicable technical specifications. *Id.* at 43.

⁸Mr. Philippon did not pursue an informal appeal before the NRC Staff on the grading of his performance on competency C.8.a so there was no further Staff review of this issue. In this regard, it should be noted that there are no regulatory provisions requiring an operator license applicant to pursue an informal Staff appeal on any issues that an applicant subsequently raises on an appeal pursuant to 10 C.F.R. § 2.103(b)(2). Consequently, his failure to invoke the informal appeal process does not bar him from challenging this ruling in this adjudication.

4. Findings and Conclusions

Mr. Philippon's claim that he had 16 hours to recognize the applicability of TS 3.8.2.1 is simply incorrect. Rather, the Staff is correct that Mr. Philippon was responsible for noting the entry into TS 3.8.2.1 when technical specification applicability occurs. At most, therefore, he had until the end of his shift to alert the incoming shift to the possible need for action. Further, the Staff is also correct that Mr. Philippon, as SRO, had the responsibility for recognizing all applicable technical specifications and he failed to recognize TS 3.3.7.5. Although Mr. Peterson indicated in his Operator License Examination Report that this missed technical specification would have resulted in minor consequences, contrary to Mr. Philippon's claim that his mistakes were minor, the severity of the consequences does not erase Mr. Philippon's failure to identify TS 3.3.7.5. Indeed, as the Staff points out, there is no modifier in the anchor description for the performance rating of 1 that covers only situations of major consequences. Further, in failing to recognize the applicability of TS 3.8.2.1, Mr. Philippon failed to recognize the situation caused by a loss of EECW system cooling water flow to the DC battery charger room coolers. Accordingly, the Staff's grade of 1 for Mr. Philippon's performance on competency C.8.a is fully justified and appropriate and Mr. Philippon has failed to establish the contrary.

III. CONCLUSION

For the foregoing reasons and as set forth in Part II.A of this decision, the Staff's grading of Mr. Philippon's performance on competency C.4.b is sustained. Similarly, as set forth in Part II.D, the Staff grading of Mr. Philippon's performance on competency C.8.a is also sustained. However, as set forth in Part II.B, with respect to the Staff's grading of Mr. Philippon's performance on competency C.8.c, Mr. Philippon has met his burden of demonstrating that the Staff's scoring is unjustified and inappropriate and that his grade should be raised from 2 to 3. Further, as set forth in Part II.C, the Staff's scoring of Mr. Philippon's performance on competency C.4.c is unjustified and inappropriate and his grade should be raised from 2 to 3. Therefore, under the guidelines of NUREG-1021 for achieving a passing grade, Mr. Philippon's grade for competencies C.8 and C.4 are now greater than 1.8 and he has met that standard. Accordingly, the Staff is authorized to grant Mr. Philippon's application for a senior reactor operator license.

Pursuant to 10 C.F.R. § 2.1251(a), this initial decision shall constitute the final action of the Commission 30 days from the date on which it is issued unless a party petitions for Commission review in accordance with section 2.786 and 2.1253, or the Commission directs otherwise. Further, in accordance with 10 C.F.R. §§ 2.786 and 2.1253, within 15 days after service of this initial decision any party may file a petition for review with the Commission on the grounds specified in section

2.786(b)(4). The filing of a petition for review is mandatory in order for a party to have exhausted its administrative remedies before seeking judicial review. Within 10 days after service of a petition for review, any party to the proceeding may file an answer supporting or opposing Commission review. The petition for review and any answers shall conform to the requirements of section 2.786(b)(2)-(3).

It is so ORDERED.

By the Presiding Officer

Thomas S. Moore
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 9, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alan S. Rosenthal, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of

Docket No. 50-219-OLA-2
(ASLBP No. 00-773-02-OLA)

GPU NUCLEAR CORPORATION
(Oyster Creek Nuclear Generating
Station)

December 15, 1999

MEMORANDUM AND ORDER
(Terminating Proceeding)

Pending before this Board is the application of GPU Nuclear Corporation (GPUN) for an amendment to the operating license for its Oyster Creek Nuclear Generating Station that would allow the use of the reactor building crane to handle loads up to and including 45 tons during power operations. By December 9, 1999 letter to the Board, GPUN requests permission to withdraw the application without prejudice.

The request is *granted*. Accordingly, the license amendment application is now deemed withdrawn without prejudice and the proceeding is *terminated*.

This action has the effect of mooted the November 5, 1999 request of the Nuclear Information and Resource Service (NIRS) for a hearing on the GPUN license amendment application and for leave to intervene. In the event, however, that the amendment application should be submitted anew, the NIRS request will be automatically reinstated; the prior concession of GPUN and the NRC Staff

regarding standing given effect;¹ and a schedule for the submission of contentions and supporting bases determined by the Board.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD²

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 15, 1999

¹ See November 29, 1999 Memorandum and Order at 2. NIRS would be expected to affirm that there was not a material alteration in the basis for standing asserted in its November 5 filing.

² Judge Peter Lam was not available to participate in this Memorandum and Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Charles Bechhoefer, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of

Docket No. 40-8027-MLA-4
(ASLBP No. 99-770-09-MLA)

SEQUOYAH FUELS CORPORATION
(Gore, Oklahoma Site Decommissioning)

December 16, 1999

In a proceeding considering a proposed restricted decommissioning plan for a uranium processing facility, under the Commission's informal hearing procedures, the Presiding Officer grants the request for a hearing of the State of Oklahoma, finding the State to have standing and to have proffered several germane areas of concern.

RULES OF PRACTICE: INFORMAL HEARINGS

To be granted a hearing in an informal Subpart L proceeding, the Commission requires, *inter alia*, that a petitioner demonstrate its standing and also specify its areas of concern about the licensing activity that is the subject matter of the proceeding. 10 C.F.R. § 2.1205(e).

RULES OF PRACTICE: STANDING (INFORMAL PROCEEDING)

Commission practice requires a petitioner seeking a hearing to demonstrate its standing in accord with contemporaneous judicial concepts of standing. To be granted a hearing, a nonapplicant must demonstrate its interest in the proceeding and how its interests may be affected by the results of the proceeding.

RULES OF PRACTICE: STANDING

Contemporaneous judicial concepts of standing require that a petitioner demonstrate that it will suffer an “injury in fact,” that there be a causal connection between the alleged injury and the action complained of, and the injury be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. 154, 167-68 (1997). In addition, a petitioner must meet the “prudential” requirement that the complaint arguably falls within the zone of interests of the governing law. *Id.* at 175.

RULES OF PRACTICE: STANDING (PLEADING REQUIREMENTS)

Although a petitioner has the burden of establishing its standing, its statements in support of its standing are to be construed in its favor.

RULES OF PRACTICE: STANDING (GROUP)

Although a member of a group with an interest in a proceeding must normally authorize the group to represent his or her interests to achieve standing for the group, such explicit authorization is not necessary in the case of a State representing as sovereign the interests of a number of its citizens.

RULES OF PRACTICE: INFORMAL PROCEDURES (AREAS OF CONCERN)

For a request for a hearing in a proceeding subject to 10 C.F.R. Part 2, Subpart L, to be granted, a nonapplicant requester must demonstrate at least one acceptable “area of concern.” To be acceptable, such area need only be “germane” to the subject matter of the proceeding. 10 C.F.R. § 2.1205(h).

RULES OF PRACTICE: STANDING (INJURY IN FACT)

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

INFORMAL PROCEDURES: AREAS OF CONCERN

Areas of concern constitute the general subject matter of issues that a petitioner seeks to litigate in an informal proceeding. The only requirement is that they be “germane” to the subject matter of the proceeding. To be germane, an area must be relevant to whether the sought license amendment should be denied or conditioned and need only be sufficient to establish that the issues a petitioner

seeks to raise fall “generally” within the range of matters properly subject to challenge in the proceeding.

CRITERIA: LICENSE TERMINATION UNDER RESTRICTED CONDITIONS

Under 10 C.F.R. § 20.1403, a site may be suitable for restricted decommissioning even though it includes long- as well as short-lived radioactive contaminants.

**MEMORANDUM AND ORDER
(Granting Request for Hearing)**

Pending before me is the State of Oklahoma’s [Oklahoma] Supplemental Request for Hearing, filed September 3, 1999,¹ seeking, pursuant to 10 C.F.R. § 2.1205, an informal hearing on Sequoyah Fuels Corporation’s [SFC] proposed amendment to its Source Material License No. SUB-1010, to decommission SFC’s uranium conversion facility located near Gore, Oklahoma. Oklahoma’s Subpart L request alleges that SFC fails to comply with applicable NRC regulations, thus endangering the interests and health and safety of the citizens and environment within its borders.

SFC and the NRC Staff each filed timely responses to Oklahoma’s Supplemental Request, dated September 24, 1999 and October 1, 1999, respectively. SFC opposes Oklahoma’s request for lack of standing and an adequate area of concern. The NRC Staff concludes that Oklahoma has satisfactorily demonstrated its standing, has stated areas of concern germane to the challenged action, and interposes no objection to my granting Oklahoma’s request.² For reasons hereinafter set forth, I am *granting* Oklahoma’s hearing request and, following receipt by the Presiding Officer, his Special Assistant, and the parties of the hearing file (*see* 10 C.F.R. § 2.1231), am scheduling a prehearing conference to consider and define more precisely issues to be litigated and schedules for further filings.

¹Filing of the Supplemental Request was authorized by my Memorandum and Order (Supplement to Request for Hearing), dated Aug. 12, 1999 (unpublished), and by my Memorandum and Order (Denying Motion for Reconsideration), LBP-99-37, 50 NRC 210 (1999).

²On October 15, 1999, SFC filed a motion for leave to reply to the Staff’s response, together with its reply. On October 25 and November 1, respectively, Oklahoma and the Staff each filed motions to reject SFC’s proposed reply or, alternatively, to provide them with opportunities to respond to SFC’s reply. I hereby *grant* SFC’s motion to file a reply. I also agree with Oklahoma and the Staff that SFC’s reply raises substantive matters. Because of the result I am reaching based on other considerations, however, I am declining to invite Oklahoma or the Staff to file their responses to SFC’s reply at this time. Later in this Order, I am establishing a schedule for Oklahoma and the Staff to respond to SFC’s reply.

A. Background

SFC submitted its First Revised Decommissioning Plan on December 15, 1998, but it was rejected by the Staff as providing an inadequate basis for Staff review of the plan's compliance with applicable NRC regulations. SFC's proposed amendment, currently denominated as the Second Revised Site Decommissioning Plan [SRSDP], was submitted on March 26, 1999, and seeks authority to decommission the facility based upon restricted release pursuant to 10 C.F.R. § 20.1403. (Based on information provided by Oklahoma, SFC's existing license currently calls for unrestricted decommissioning.) Following publication of a Notice of Opportunity for Hearing,³ Oklahoma on July 7, 1999 filed a timely request for a hearing that was opposed both by SFC and the NRC Staff. SFC claimed the State lacked a sufficient demonstration of standing and also failed to define adequately Oklahoma's areas of concern.⁴ The Staff, although recognizing an adequate statement of injury in fact (one aspect of standing), faulted Oklahoma for failing to explain how its interests may be affected by the results of the proceeding and for failing to identify an area of concern adequately.⁵

Because I believed that Oklahoma's request only marginally failed to demonstrate standing, and under my authority set forth in 10 C.F.R. § 2.1209, I afforded Oklahoma the opportunity — identical to that explicitly provided for the more formal and structured 10 C.F.R. Part 2, Subpart G proceedings, *see* 10 C.F.R. § 2.714(a)(3) — to file an amendment to its initial filing.⁶ Oklahoma filed a timely supplement to its initial hearing request, and SFC and the Staff each filed timely responses.⁷

In response, SFC again asserts that Oklahoma fails both to demonstrate its standing adequately and to indicate with adequate specificity its areas of concern. For its part, the NRC Staff concludes that Oklahoma adequately sets forth its standing and that many, although not all, of its areas of concern are set forth with adequate specificity and comprise permissible matters for adjudication. I turn now to describe the requirements for a hearing under 10 C.F.R. Part 2, Subpart L, and the manner in which the Oklahoma Supplement addresses them.

³ 64 Fed. Reg. 31,023 (June 9, 1999).

⁴ SFC Answer in Opposition to Request for Hearing of Attorney General of Oklahoma, dated July 19, 1999.

⁵ NRC Staff's Response to Request for Hearing Filed by the State of Oklahoma, dated August 6, 1999.

⁶ In my Memorandum and Order of August 30, 1999, LBP-99-37, 50 NRC 210, I denied SFC's motion for reconsideration of my Order affording Oklahoma an opportunity to supplement its initial hearing request.

⁷ State of Oklahoma's Supplemental Request for Hearing, dated September 3, 1999 [Oklahoma Supplement]; Sequoyah Fuels Corporation's Response to State of Oklahoma's Supplemental Request for Hearing, dated September 24, 1999 [SFC Response]; NRC Staff's Answer to State of Oklahoma's Supplemental Request for Hearing, dated October 1, 1999 [Staff Answer].

B. Requirements for Hearing

1. General Requirements

To be granted a hearing in an informal Subpart L proceeding of this type, the Commission requires, *inter alia*, that a petitioner demonstrate its standing and also specify its areas of concern about the licensing activity that is the subject matter of the proceeding. 10 C.F.R. § 2.1205(e). As in a formal 10 C.F.R. Part 2, Subpart G proceeding, the standing requirement in an informal proceeding stems from section 189a(1) of the Atomic Energy Act, 42 U.S.C. § 2239(a), which affords a hearing to “any person whose *interest may be affected* by the proceeding” (emphasis supplied).”

Commission practice requires that a petitioner seeking a hearing or intervention demonstrate its standing in accord with contemporaneous judicial concepts of standing. *See, e.g., Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983) (formal proceeding); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976) (formal proceeding); *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 80-81 (1993) (informal proceeding); *Sequoyah Fuels Corp.*, LBP-91-5, 33 NRC 163, 164-65 (1991) (informal proceeding, involving same license at issue here); *Chemetron Corp.* (Bert Avenue, Harvard Avenue, and McGean-Rohco Sites, Newburgh Heights and Cuyahoga Heights, Ohio), LBP-94-20, 40 NRC 17 (1994) (informal proceeding). To be granted a hearing, a nonapplicant, like Oklahoma, must demonstrate “[its] interest . . . in the proceeding” and “[h]ow [its] interests may be affected by the results of the proceeding, including the reasons why [it] should be permitted a hearing.” 10 C.F.R. § 2.1205(e)(1), (2).

A contemporaneous judicial exposition of standing appears in a recent U.S. Supreme Court decision, *Bennett v. Spear*, 520 U.S. 154 (1997). The Court there denominated as the “irreducible constitutional minimum” requirements for standing that (1) the plaintiff (here, Petitioner) suffer an “injury in fact” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical”; (2) there be a causal connection between the alleged injury and the action complained of [the proposed license amendment authorizing restricted decommissioning]; and (3) the injury will be redressed by a favorable decision. *Id.* at 167-68; *see also Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1016-17 (1998) (focusing in particular on the element of redressability); *Atlas Corp.* (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 423 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In addition, a petitioner must meet the “prudential” standing requirement that the complaint “arguably” falls within the “zone of interests” of the governing law, here the Atomic Energy Act

and the National Environmental Policy Act (NEPA). *Bennett v. Spear*, *supra*, 520 U.S. at 175.⁸

2. *Oklahoma's Alleged Injuries*

Although Oklahoma has the burden of establishing its standing, its statements in support of its standing are to be construed in its favor. *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995); *Atlas Corp.*, LBP-97-9, *supra*, 45 NRC at 424; *see also Kelley v. Selin*, 42 F.3d 1501, 1507-08 (6th Cir. 1995). I turn first to the interests Oklahoma seeks to protect and how it believes they may be affected by the SRSDP.

Oklahoma alleges that approval of the SRSDP will affect its “significant property, financial and other interests, such as the air, land, waters, environment, natural resources, wildlife, and citizens of Oklahoma.”⁹ Initially, it asserts that, as a sovereign, it is a *parens patriae* and has a duty to protect the health, safety, and welfare of all its citizens, particularly those who live, work, travel, or recreate at or near the site.¹⁰ The State goes on to claim that the SRSDP will affect groundwater in the vicinity of the site and the waters of the Illinois and/or Arkansas Rivers which are used for drinking, irrigation and livestock, thus injuring those interests and Oklahoma’s natural resources.¹¹

Oklahoma next asserts a quasi-sovereign interest in the physical and economic health of its citizens, including protecting the integrity of ground and surface waters, the area’s tax base, and Oklahoma’s tax revenues. Oklahoma further claims a proprietary interest in the air, land, waters, wildlife, and other natural resources found within its borders, claiming it owns the waters in certain defined streams on the SFC site, as well as the waters in nearby streams and lakes.¹² Oklahoma also asserts ownership of all wildlife in the State and claims it operates and manages the Robert S. Kerr Unit of the McClellan-Kerr Wildlife Refuge, located near the SFC site, and leases to others certain agricultural rights and privileges inside that

⁸ The latter determination must be made with particular reference to whether “the requester meets the *judicial standards for standing*,” (emphasis supplied) considering, among other factors, (1) the nature of the requester’s right under the Act to be made a party to the proceeding; (2) the nature and extent of the requestor’s property, financial, or other interest in the proceeding; and (3) the possible effect of any order that may be entered in the proceeding upon the requester’s interest. 10 C.F.R. § 2.1205(h).

The requestor must also demonstrate the timeliness of its petition. 10 C.F.R. § 2.1205(d)(4). Both Oklahoma’s initial hearing request and its supplement were timely filed.

⁹ Oklahoma Supplement at 11.

¹⁰ *Id.* at 11-12. Oklahoma named four of its citizens living near the SFC site, although it did not explicitly state that those citizens authorized Oklahoma to represent them. In the case of a State, such explicit authorization is not necessary. *International Uranium (USA) Corp.* (Receipt of Material from Tonawanda, New York), LBP-98-21, 48 NRC 137, 145 (1998); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1998).

¹¹ Oklahoma Supplement at 12.

¹² Specifically, Salt Branch, the Illinois River (as to which the SFC site is assertedly located on a bend), the Arkansas River, Lake Tenkiller, and Robert S. Kerr Lake.

refuge. Further, Oklahoma alleges that it owns, operates, and maintains certain roads and thoroughfares in close proximity to the site — namely, State Highway 10, which runs adjacent to the site.¹³ Oklahoma asserts that all of these interests will be affected by the SRDC. Finally, Oklahoma states that it has an interest in the correct application and enforcement of laws, rules, and regulations governing NRC-licensed facilities in Oklahoma because this decision will impact similar facilities within the State.¹⁴

Oklahoma claims these interests are affected by the numerous areas of concern it has listed. There need only be one such area for a hearing to be granted (*see Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2)*, ALAB-130, 6 AEC 423, 424 (1973)) and, to be acceptable as a basis for a hearing, such area need only be “germane” to the subject matter of the proceeding.

In particular, Oklahoma claims that the SRS DP involves a significant source of radioactivity, leading to obvious potential for offsite consequences, and that a presumption of standing based on geographic proximity to its interests may be applied. It cites the onsite, above-grade disposal cell for the permanent disposal of decommissioning wastes which, it claims, would have a volume of 5-11 million cubic feet, a footprint of 10-20 acres, and a height of approximately 40 feet above grade. Such cell, according to Oklahoma, would be sited in “very close proximity” to both the Illinois and Arkansas Rivers, as well as defined onsite streams. Although Oklahoma does not specify how much radioactivity is involved or how it is significant, it claims that the cell and the SRS DP thus produce an “obvious potential for offsite consequences.”¹⁵

3. Other Parties’ Positions Concerning Standing

SFC asserts that the Oklahoma Supplement fails to adequately demonstrate various elements of standing, such as “injury in fact” and how Oklahoma’s stated interests will be affected by the SRS DP. SFC cites a lack of specificity as to each element of standing, particularly a failure to demonstrate “concrete harm.”¹⁶ SFC further faults the Supplemental Request for failing to specify adequately each of the five asserted injuries in fact on which it is premised. According to SFC, each is based “essentially on speculation” and lacks evidentiary support.¹⁷ For example, with respect to groundwater, SFC claims that the “Supplemental Request provides no specific description of what this harm will be, when it will occur, what levels of releases will supposedly occur, or how approval of the [SRS DP]

¹³ Oklahoma Supplement at 13-15.

¹⁴ *Id.* at 16-17. Oklahoma states there are several other facilities like the one at issue in this proceeding, and it specifically names the Fansteel, Inc. facility in Muskogee, Oklahoma.

¹⁵ *Id.* at 18 n.17.

¹⁶ SFC Response at 6.

¹⁷ *Id.* at 7.

will increase (rather than reduce) the likelihood of those releases.”¹⁸ SFC adds that the Supplemental Request provides no “evidence” indicating that releases would exceed levels specified in NRC regulations or within the 1000-year time span allegedly covered by the regulations.

SFC goes on to claim that the Supplemental Request fails to identify any plausible connection between approval of the SRSDP and the alleged harm. It contrasts the contaminated structures, equipment, soil, and water already on site with the alleged decrease in risk to be provided by the SRSDP, and faults the Supplemental Request for not providing a “clear or plausible” explanation how the alleged harms might result from approval and implementation of the SRDC. SFC concludes that, to the extent the harms are plausible at all, they are due to preexisting conditions and are more probable if the SRSDP is not approved than if it is.¹⁹

Finally, SFC asserts that the harms alleged by Oklahoma cannot be redressed by a decision in the State’s favor. SFC in this regard equates rejection of the SRSDP with continuation of the current onsite contamination. SFC criticizes Oklahoma for failing to provide suggestions or strategies for how decommissioning might be better accomplished.²⁰

For its part, the NRC Staff reiterates its previous position that Oklahoma has demonstrated injury in fact to certain interests within the zone of interests protected by the Atomic Energy Act or NEPA. The Staff also acknowledges that a presumption of injury in fact for standing purposes may be applied in nonpower reactor cases when the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences, citing *Georgia Tech*, CLI-95-12, 42 NRC at 116 (which itself cites *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994)); and *Armed Forces Radiobiology Research Institute* (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 153-54 (1982). Finally, the Staff points to cases holding that even minor radiological exposures can create the requisite injury in fact for standing purposes. *E.g.*, *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 70, *aff’d*, CLI-96-7, 43 NRC 235, 246-48 (1996).

The Staff goes on to spell out which of Oklahoma’s alleged injuries in fact have been adequately demonstrated to be affected by the SRSDP and which have not been. The Staff further agrees with Oklahoma that an order rejecting the SRSDP would redress Oklahoma’s alleged injuries.

¹⁸ *Id.*

¹⁹ *Id.* at 15-16.

²⁰ *Id.* at 16-18.

4. *Ruling on Standing*

Oklahoma has met the Commission's standing requirements in a number of ways. First, as a sovereign with a duty to protect all its citizens (including those listed in its Supplement at 11-12 n.9, who assertedly live, work, travel, or recreate near the site), it has demonstrated an interest in that capacity. Because it has catalogued a number of asserted injuries to its citizens carrying out activities near the site (such as contamination of the groundwater on which they rely, or alternatively, limitation of their use of the Robert S. Kerr Unit of the McClellan-Kerr Wildlife Refuge), it clearly, in its sovereign capacity, has standing to challenge the SRSDP. *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29 (1999); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 33 (1998) (holding "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.")

Second, as the owner of streams, lakes, air, and property on or near the site, Oklahoma has catalogued a number of asserted injuries to those interests resulting from alleged pollution and discharges emanating as a result of the SRSDP. That such pollution or those discharges may conform to regulatory criteria is not controlling for standing purposes — the State's interests will nevertheless be affected by the SRSDP. *Atlas Corp.* (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 425 (1997); *General Public Utilities Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 158 (1996). Indeed, a statement of asserted injury that is insufficient to found a valid contention (in a formal proceeding) may well be adequate to provide a basis for standing. *See Consumers Power Co.* (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 115 (1979).

In that connection, permissible radiation doses under 10 C.F.R. § 20.1403 (authorizing license termination under restricted conditions such as is sought here) includes not only specified maximum doses but also a requirement that the doses be "as low as is reasonably achievable" (ALARA). To the extent that SFC may have performed an ALARA calculation, Oklahoma may challenge the adequacy of that calculation and has done so here in its statement of concerns.

Oklahoma's stated interest in the correct application of decommissioning regulations, however, to the extent it may be applied to other facilities in Oklahoma, is not one that may be litigated here. This is not a rulemaking proceeding governing a number of facilities. Each licensing proceeding is confined to the application of governing rules to a particular facility. Oklahoma should be able to express its views with respect to each of such facilities within the State, which are likely to be the subject of an opportunity for a hearing (as was this facility). To apply its standards throughout the State, Oklahoma would have to challenge decommis-

sioning at each facility within the State when there is an opportunity for an NRC hearing.

As I determined earlier, Oklahoma's initial request for a hearing was timely filed. (Its Supplement was also timely submitted, on the schedule I established for that purpose.) Finally, relative to the "redressability" question, I set forth a number of Oklahoma's areas of concern that qualify as bases for issues to be litigated. That being so, Oklahoma has clearly established its standing to be granted a hearing in this matter. If I should agree with Oklahoma in its allegations concerning the SRSDP, the result could be either the substantial modification of the SRSDP to meet Oklahoma's concerns or, possibly, the disapproval of the proposed amendment incorporating the SRSDP and the resulting continued effectiveness of the current licensing condition requiring unrestricted decommissioning for the entire site — both potential results completely in accord with what Oklahoma seeks in this proceeding.²¹

5. *Areas of Concern*

In an informal proceeding such as this one, areas of concern constitute the general subject matter of issues that a petitioner seeks to litigate. As such, they are analogous to contentions in formal adjudications, although not freighted with the same technical requirements. Indeed, about the only requirement that must be met is that they be "germane" to the subject matter of the proceeding. 10 C.F.R. § 2.1205(h).

SFC claims that none of Oklahoma's areas of concern are identified with enough detail to show that they are germane to this proceeding.²² However, SFC invokes standards of detail that clearly are not appropriate at this early stage of the proceeding, prior to issuance to parties of the hearing file. As correctly described by Oklahoma,²³ an area of concern is "germane" if relevant to whether the sought license amendment should be denied or conditioned. As set forth in the Statement of Considerations for 10 C.F.R. Part 2, Subpart L, the statement of concerns need not be extensive but must be sufficient to establish that the issues a petitioner seeks to raise fall "generally" within the range of matters that are properly subject to challenge in the proceeding. 54 Fed. Reg. 8269, 8272 (Feb. 28, 1989). The concerns must also be "rational." *Babcock and Wilcox Co.* (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-94-12, 39 NRC 215, 217 (1994).

Nor must the areas of concern be set forth at this stage of the proceeding with the degree of detail or specificity that might be appropriate for an issue that

²¹ See Oklahoma Supplement at 26-27 and Exh. 10.

²² SFC Response at 19.

²³ Oklahoma Supplement at 27-28.

will be litigated. *Babcock and Wilcox Co.* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 153-54 (1992). In fact, they are more like the “aspects” requirement in formal litigation, setting the stage for formal contentions in those proceedings and definitive issues for litigation in informal proceedings. *Combustion Engineering, Inc.* (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 147 (1989).

I turn now to the areas of concern identified by Oklahoma, to ascertain whether at least one is “germane” to this proceeding so as to warrant granting Oklahoma’s hearing request.

1. Whether the Restricted Decommissioning Option Under 10 C.F.R. § 20.1403 May Be Applied to the SFC Site

Oklahoma, citing the Statement of Considerations for 10 C.F.R. § 20.1403, claims that NRC intended the restricted decommissioning option to apply only to facilities where radioactive contaminants will decay to unrestricted dose levels within a finite period of institutional control and that, in contrast, the radioactive contaminants at the SFC site will remain potentially hazardous for billions of years. Oklahoma also cites the provision in SFC’s current license calling for unrestricted decommissioning.²⁴

The applicability of restricted decommissioning to the SFC site is a question of law that is manifestly germane to this proceeding. Contrary to the conclusions of SFC and the Staff, Oklahoma is not attempting to challenge the regulation, only various parties’ interpretations of the regulation — a practice that is not proscribed by 10 C.F.R. § 2.1239(a). Oklahoma is merely attempting to advance its own interpretation of the regulation, backed by substantive references to support its view.

Even though this area of concern is germane to this proceeding, as a matter of law Oklahoma is incorrect in asserting that restricted decommissioning is not appropriate for the Sequoyah site. As both SFC and the Staff observe, and notwithstanding the Statement of Considerations from which an intent to limit applicability may perhaps be gleaned, the restricted decommissioning option as finally adopted in the final rule does not appear to be limited by the types of radioactive contaminants under consideration.²⁵ True, the Statement of Considerations expresses the Commission’s belief that unrestricted decommissioning is generally preferable to restricted decommissioning. 62 Fed. Reg. 39,058, 39,069 (1997). Recognizing, however, that there may be situations where there may be net public or environmental harm in achieving unrestricted use for a site, the Commission adopted the restricted-decommissioning option to preclude the need for granting numerous ex-

²⁴ *Id.* at 30.

²⁵ SFC Response at 21-24; Staff Answer at 15-16.

emptions for sites where unrestricted decommissioning was either not achievable or not practical. Thus, if a licensee meets the particular criteria set forth in the rule for restricted license termination, it is authorized to use such decommissioning for its site.

Moreover, the provision of SFC's current license calling for unrestricted decommissioning (invoked by Oklahoma) is not controlling or even persuasive. For, in this proceeding, SFC is seeking to delete the license provision requiring unrestricted decommissioning (the only type available when SFC sought its license).²⁶ For this reason, Oklahoma's first area of concern, although germane, does not present a litigable question. However, whether a licensee has satisfied the conditions for restricted decommissioning may be litigated. Oklahoma's second area of concern seeks such litigation.

2. *Whether the SRSDP Complies with the ALARA Requirement of 10 C.F.R. § 20.1403*

Oklahoma claims that the SRSDP fails to demonstrate that such further reductions in residual radioactivity as would be necessary to achieve unrestricted decommissioning of the SFC site would result in net public or environmental harm. Oklahoma further claims that the SRSDP fails to demonstrate that its levels of residual radioactivity are ALARA. Thus, Oklahoma claims that the SRSDP does not comply with the explicit terms for invoking restricted decommissioning.²⁷

SFC asserts that this area of concern is inadequate because it does not identify any specific basis for concluding that the SRSDP does not comply with 10 C.F.R. § 20.1403. In particular, SFC faults Oklahoma for failing to mention any remedial measure alleged to be a reasonably achievable method of dose reduction. SFC also claims that the SRSDP need not show both net public or environmental harm and ALARA, claiming the Licensee has the option of meeting either test, that the ALARA calculation has been incorporated into the SRSDP by reference, and that Oklahoma has provided no specific reason why the ALARA analysis is inadequate. Thus, this area is said to be not germane to the proceeding.²⁸ In addition, SFC claims this area of concern is late-filed without justification, inasmuch as Oklahoma's initial hearing request assertedly failed to mention the ALARA requirement.²⁹

On the other hand, the Staff asserts that the challenge to SFC's ALARA study sets forth an area of concern germane to the proceeding. The Staff reiterates that, at this stage of the proceeding, Oklahoma is not obliged to put forth a comprehensive

²⁶SFC Response at 23.

²⁷Oklahoma Supplement at 32-33.

²⁸SFC Response at 24-25.

²⁹*Id.* at 39.

exposition in support of this litigable question but need provide only minimal information necessary to ensure that the area is germane. The Staff considers this area to be germane. In addition, it regards the area of concern reasonably to be considered as supplementary to the generalized statements in Oklahoma's initial request and, hence, not late-filed.³⁰

I agree that this area of concern is germane. I also agree that the ALARA issue is sufficiently related to generalized statements in Oklahoma's original request to be considered timely.³¹ The specific issues in this area that are to be litigated, if any, must be particularized at a later date, following distribution of the hearing file. In that connection, the information that SFC claims to have already made available to Oklahoma cannot be considered as a substitute for the hearing file requirement. Therefore, the precise issues for litigation in this area (if any) will be further delineated through the prehearing conference authorized by this Order.

3. *Acceptability of the SRSDP's Total Effective Dose Equivalent (TEDE) Modeling*

Oklahoma claims that the dose rate from residual radioactivity, which must satisfy the 25 mrem standard to qualify for restricted decommissioning under 10 C.F.R. § 20.1403(b), is not being calculated correctly in the SRDC. The State asserts that the models, assumptions, and input parameters in the SRSDP are either erroneous, inapplicable, or extremely liberal, making it doubtful that the TEDE from residual radioactivity distinguished from background will not exceed the 25 mrem regulatory limit.³²

As particular examples for its general claim, Oklahoma specifies (1) the legitimacy of the scenario to determine the 25 mrem/year TEDE from Derived Concentration Levels; (2) the failure to include groundwater in the analysis, in light of the "resident farmer" scenario; (3) other unsubstantiated assumptions about the "resident farmer" scenario that are not in compliance with U.S. Environmental Protection Agency (EPA) guidance; and (4) failure of the models to include the production of radon at the SFC site.³³

In response, SFC claims that the SRSDP uses a computer code (identified therein) used by the NRC Staff and others for this purpose and asserts that the

³⁰ Staff Answer at 16-18. The Staff in this respect cites *Atlas Corp.*, LBP-97-9, 45 NRC at 423; *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 281-82 (1998); *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 154 (1992); and *Sequoyah Fuels Corp.*, LBP-94-39, 40 NRC 314, 316 (1994).

³¹ By comparison, the supplement in a Subpart G formal proceeding may include information current as of its date of filing. Given my other reasons for treating areas of concern spelled out in the Oklahoma Supplement as timely filed, I need not here decide whether a supplementary filing in a Subpart L proceeding (where authorized) may include information current as of the date of its filing.

³² Supplemental Request at 33-34.

³³ *Id.* at 34 n.28.

Supplemental Request does not specify any particular model, assumption, or input parameter assertedly in error or otherwise explain why SFC's use of a particular model is unacceptable. SFC concludes that the Supplemental Request fails to include enough information to ascertain whether the area is germane. SFC adds that the issues of groundwater and radon are not identified adequately and, further, that under Commission guidance, radon need only be considered in designing mitigation techniques, not in performing an ALARA analysis.³⁴

As for the Staff, it criticizes the Supplemental Request for failing to identify the unsubstantiated assumptions about the resident family scenario not in compliance with EPA guidance, and it would reject this aspect of the area of concern. But the Staff asserts that the SRSDP uses a site-specific model (the resident farmer scenario) that considered some but not all groundwater paths and would accept the specific arguments concerning groundwater as an area of concern germane to the proceeding.³⁵

Although the alleged failure of models adequately to consider EPA guidance may be significant, Oklahoma's failure to specify what particular aspects of the model fail to adhere to EPA standards makes it impossible to determine whether the claims in this regard are germane. I agree with the Staff, however, that the allegations concerning groundwater are clearly germane to the proceeding and suitable for litigation. To this extent, I am accepting this area of concern. Specific issues for litigation will be further delineated at a future prehearing conference.

4. Failure of SRSDP to Conform with Institutional Control Requirements of 10 C.F.R. § 20.1403(e)

Requirements for restricted decommissioning include a demonstration that, were institutional controls no longer in effect, residual radioactivity at the site will not exceed certain levels. Oklahoma claims that the SRDC fails to adequately make such a demonstration. As a basis, it cites the allegedly deficient models discussed in its third area of concern (one of which I have found to be germane). It deems these models not to be "prudently conservative."³⁶

SFC asserts that since, in its view, area 3 does not identify particular flaws in the dose assessment models and is unacceptably vague, area 4 is likewise unacceptably vague. SFC adds that there is no applicable standard for models as "prudently conservative." For its part, the Staff finds a germane area of concern with respect to the groundwater pathways it found germane in area 3 (and which I also find to be germane). The Staff does not comment on "prudently conservative."

³⁴ SFC Response at 25-27.

³⁵ Staff Answer at 18-19.

³⁶ Oklahoma Supplement at 34-35.

This area of concern is germane insofar as it relates to groundwater modeling pathways set forth in area 3 as deficient. SFC is correct, however, that the reference to “prudently conservative” models, to the extent it may be intended as anything other than descriptive, invokes a standard not incorporated into NRC rules and, hence, does not portray the appropriate standard for my evaluating the issue emanating from this area of concern. Specific issues for litigation will be further delineated at a future prehearing conference.

5. Institutional Control and Long-Term Custodianship at the SFC Site

This area of concern encompasses several potential issues. Oklahoma claims that the SRSDP fails adequately to demonstrate legally enforceable institutional controls, as required by 10 C.F.R. § 20.1403(b), so as to provide reasonable assurance that the TEDE from residual radioactivity will not exceed 25 mrem/yr. Among other matters, Oklahoma claims that the SRSDP fails to (1) identify a long-term custodian; (2) map out adequately long-term custodial care of the site; and (3) address adequately maintenance and replacement of the disposal cell, rip-rap, rolling the clay liner, fence, etc., factors said to directly impact the TEDE. Finally, Oklahoma claims that deed restrictions (including those proposed by SFC) are of doubtful value for long-term institutional control, especially for the extreme lengths of time at issue in the SRDP.³⁷

SFC portrays this area of concern as too vague and additionally as misstating the legal requirements applicable to decommissioning of the SFC site. It portrays the area of concern as a “challenge” to NRC regulations. It thus concludes that Oklahoma’s statements are not adequate to identify an admissible area of concern.³⁸

For its part, the Staff finds certain portions of this area of concern to be germane.³⁹ Specifically, it points to the alleged failure of SFC to identify a long-term custodian and failure to map out long-term custodial care adequately. The Staff disagrees with SFC’s position that a long-term custodian is not required because deed restrictions and government ownership are alternatives for establishing institutional controls, asserting that, for restricted release, all sites must have not only institutional controls but also a custodian.⁴⁰

This area of concern brings to the fore SFC’s reply (*see* note 2), which asserts that the regulatory standards giving rise to this area of concern, set forth in 10 C.F.R. Part 40, Appendix A, are not applicable to the SFC site. At this stage, I am deferring my ruling on such applicability. I note, however, that the Notice of Opportunity for Hearing in this proceeding, to which Oklahoma has responded,

³⁷ *Id.* at 35-36.

³⁸ SFC Response at 28-30.

³⁹ Staff Answer at 23.

⁴⁰ *Id.* at 23 n.18.

refers explicitly to this Appendix as a foundation for the Staff review of SFC's SRSDP. *See* 64 Fed. Reg. 31,023 (June 9, 1999).⁴¹ Thus, where a request for a hearing is founded upon review under that criterion, together with an asserted failure of the Licensee's plan to conform to such criterion, failure to conform in specified ways represents a permissible area of concern.

Thus, this area of concern is germane. Following submission of responsive briefs by Oklahoma and the Staff, as authorized in this Memorandum and Order, I will deal with the effect that Appendix A may play in this proceeding. In particular, does the Notice of Opportunity for Hearing reflect a case-specific order to the effect that Appendix A is applicable? What other criteria, if any, would govern the Staff's review of the restricted-decommissioning proposal? In the consideration of specific issues for hearing at the forthcoming prehearing conference, the applicability of Appendix A will be further considered.

6. Failure To Comply with NRC Public Participation Requirements

Oklahoma asserts that the SRSDP is "fatally flawed" for failing to include adequate documentation as to how the advice of individuals or institutions in the affected community was taken into account, as required by 10 C.F.R. § 20.1403(d). It asserts that little or no advice of individuals or institutions in the community was incorporated into the SRSDP.⁴²

SFC states that Oklahoma's Supplemental Request seeks to create a regulatory requirement that a licensee modify its plans to adopt all or some unstated portion of changes proposed in public comments and, as such, constitutes an impermissible challenge to the regulation. SFC also views this area of concern as impermissibly vague.⁴³ Similarly, the Staff views this area of concern as lacking the specificity necessary to determine germaneness.⁴⁴

This area of concern is too vague to be considered germane. In particular, Oklahoma does not specify any particular advice that was proffered but not referenced in the SRSDP. The regulation only requires discussion "as appropriate," but Oklahoma fails to specify why the discussion in the SRSDP is not appropriate. Accordingly, I find this area not to be germane.

⁴¹ "The SDP proposes placing radiologically contaminated materials in a single, on-site above-grade disposal cell constructed to the technical criteria of 10 CFR Part 40, appendix A." 64 Fed. Reg. at 31,023.

⁴² Oklahoma Supplement at 36-37.

⁴³ SFC Response at 30-31.

⁴⁴ Staff Answer at 24.

7. *Financial Assurance*

Oklahoma asserts that the SRS DP fails to comply with NRC financial assurance requirements, as set forth in 10 C.F.R. § 20.1403(c). Oklahoma states that the \$21,244 provided for annual costs of long-term site control fails to include the following items:⁴⁵

- a. Repair of disposal cell;
- b. Replacement of disposal cell;
- c. Repair of disposal cell cap;
- d. Replacement of disposal cell cap;
- e. Short- and long-term testing and analysis of disposal cell performance;
- f. Repair of groundwater monitoring systems;
- g. Replacement of groundwater monitoring systems;
- h. Future remediation, decontamination and decommissioning;
- i. Additional cleanup in the event radiological criteria are not met and residual radioactivity at SFC site poses a significant threat to public health and safety;
- j. Collection and remediation of leachate from disposal cell;
- k. Engineered barrier repair;
- l. Engineered barrier replacement;
- m. Emergency planning and training;
- n. Site security;
- o. Funding for enforcement of institutional controls;
- p. Unforeseen problems, acts of God, or other force majeure events.

SFC would have me reject this area of concern on the grounds that its cost estimate does cover certain of the items, that Oklahoma has not demonstrated why these items are incorrect, that others are not required to be covered, and that, collectively, the items pose an impermissible challenge to the regulation.⁴⁶

The Staff takes the position that, although lack of a line item for each individual expense of custodianship does not necessarily mean that no financial provision has been made for these items, the proposed budget does not provide sufficient detail regarding certain expenses to determine if they are adequately funded. It acknowledges that inadequate funding for proposed activities has been held to be an area of concern germane to a licensing activity, citing *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 282 (1998). And it adds that the Staff's technical review will consider whether there is adequate funding for all necessary and reasonably anticipated expenses, including those listed as items a, c and d (considered as one item), f, g, n, and p. With respect to those items, the Staff states that Oklahoma has stated a germane area of concern.

⁴⁵ These items are designated as in the Oklahoma Supplement at 37-38, except for item p, which is derived from the text of the Oklahoma Supplement at 38.

⁴⁶ SFC Response at 31-33.

Further, with respect to item j, the Staff indicates that the adequacy of funding for leachate collection and remediation has been found germane in another proceeding and would have me find it germane here. It comments that SFC's opposition on the ground that Oklahoma has failed to assert that groundwater contamination will exceed regulatory limits is erroneous inasmuch as such an assertion is not necessary to demonstrate germaneness.

With respect to item e, the Staff indicates that short-term monitoring of disposal cell performance is the subject of Staff technical review and states a germane area of concern. Because long-term monitoring is only required where specified circumstances occur, and Oklahoma has not adequately asserted such potential circumstances, the Staff perceives the long-term monitoring aspect of e as not germane.

The Staff also states that items b, k, l, m, and o are not germane, because they are neither required nor reasonably anticipated expenses or relate to matters not required to be included in the SRSDP.⁴⁷

The Staff's analysis of the financial qualifications area of concern is comprehensive and adequately considers the legal criteria under which the Staff proposes to conduct its review. As was observed previously, the forthcoming prehearing conference will consider defining specific issues to be litigated, including the legal applicability of the standards being used by the Staff — in particular, 10 C.F.R. Part 40, Appendix A. As for now, as advocated by the Staff with respect to this area of concern, items a, c and d (considered as one item), e (short-term monitoring), f, g, j, n, and p are germane. Items b, e (long-term monitoring), k, l, m, and o are not germane.

8. *Failure To Remediate Groundwater*

As its eighth area of concern, Oklahoma asserts that, in the SRSDP, SFC proposes to remove and treat only the Terrace Groundwater at the site, leaving the Shallow Bedrock Groundwater untreated. Further, that the SRSDP proposes to leave nitrates in the Alluvial Groundwater System untreated, with the intent of allowing the nitrates to flush into Robert S. Kerr Lake. As a result, Oklahoma asserts damage to various of its natural resources (including air, land, water, and wildlife). In addition, it asserts that no institutional control proposed in the SRSDP is capable of containing migration of existing radioactive contamination outside of the institutional control boundary, deeming this to be a "fatal flaw" in the SRSDP. Finally, it asserts that failure to remediate groundwater will have a "grave impact" on TEDE that is not covered by its modeling efforts.⁴⁸

⁴⁷ Staff Answer at 24-29.

⁴⁸ Oklahoma Supplement at 39.

SFC finds this area of concern to be not germane because, in its opinion, there is no NRC requirement that contamination in groundwater be contained, except as necessary to achieve the peak TEDE from residual radioactivity at not in excess of 25 mrem (and that the doses be ALARA). SFC claims that to contend otherwise would constitute a challenge to the regulations. SFC adds that Oklahoma has provided no basis for questioning SFC's position that migration of groundwater is consistent with its estimate of total all-pathways dose. Finally, SFC asserts that nitrites are not subject to NRC regulatory control, so that releases need not be treated in the SRSDP.⁴⁹

On the other hand, the Staff states that the SRSDP proposes remediation of groundwater by "monitored natural attenuation," which involves monitoring groundwater during attenuation of the existing contamination by natural processes, and that the acceptability of this proposal will be evaluated by the Staff. Further, that although the NRC does not regulate nitrates, *per se*, it will evaluate nitrate levels in accordance with NRC's NEPA obligations. Thus, the Staff finds this area of concern to be relevant and hence germane, citing *Sequoyah Fuels Corp.*, LBP-94-39, 40 NRC 314, 316 (1994).⁵⁰

Oklahoma's concerns about groundwater contamination and SFC's failure to remediate groundwater clearly are relevant to its interests, if such failure may result in doses exceeding regulatory criteria. That nitrates may not constitute radioactive material does not mean that they may not produce an impact on human health, emanating from a site over which NRC has had jurisdiction. In fact, the NRC has explicitly exercised regulatory authority over nonradioactive materials emanating from NRC sites that may have a "potential for health risks caused by human exposure to waste constituents." See 10 C.F.R. Part 40, Appendix A, Criteria 5B, 5C, and 7. The Staff's proposed review under NEPA thus appears to be entirely appropriate. Oklahoma's concerns in this regard are germane to this proceeding.

9. Design and Sufficiency of Proposed Disposal Cell

As its final area of concern, Oklahoma challenges both the design and the sufficiency of the disposal cell. Oklahoma asserts that the SRSDP fails to include sufficient design information to judge the cell's adequacy, commenting that the SRSDP only reveals that the cell will be built directly on native soil, without any liner or leachate collection system.

Oklahoma goes on to assert that (1) all disposal cells leak; (2) as described in the SRSDP, the disposal cell cap will limit but not obviate the intrusion of water into the cell; (3) solidification of radioactive waste material in the cell will not stop, but at best will retard water intrusion and the creation of leachate; and (4),

⁴⁹ SFC Response at 33-34, including n.13.

⁵⁰ Staff Answer at 20-21.

as described by SFC's own contractor, release of contaminants from the disposal cell is inevitable. It adds that the inadequate maintenance budget in the SRSDP (*see* area of concern 7) will amplify and accelerate this contamination process, and by not providing adequate funding for maintenance and repair of the cap, SFC virtually ensures that the cap will not be adequately maintained and will quickly degrade.

Next, Oklahoma asserts that the cell will be placed directly over existing monitoring wells, permitting contaminants to reach and contaminate groundwater, and that plugging these wells will not prevent contamination, given the extended time periods involved; and, further, that due to the location of the site, groundwater beneath the site is vulnerable to contamination. Oklahoma also asserts that the SRSDP fails to address the probability of migration of the Illinois and/or Arkansas Rivers into the site, and that catastrophic failure of the cell would immediately affect the air, land, waters, wildlife, and natural resources of Oklahoma, as well as the health, safety, and welfare of its citizens, and would produce economic hardship.⁵¹

SFC claims that this area of concern essentially duplicates other areas, all of which it considers not to be germane. With respect to groundwater contamination, it faults Oklahoma's Supplemental Statement for failing to provide any showing that doses will exceed regulatory limits or could be reduced by a reasonably achievable alternative. To the extent Oklahoma claims effects for more than 1000 years, and any effects at all from radon, SFC deems the area to be a challenge to the regulations. For these reasons, SFC claims this area as well to be not germane.⁵²

The Staff acknowledges that the issues included within this area of concern will be the subject of its own technical and environmental review. It agrees with SFC that the regulatory time frame for review of safety issues is 1000 years but states that there are no automatic time limits applicable to its environmental review. With respect to the potential migration of the Illinois and Arkansas Rivers into the SFC site, and SFC's claim (SFC Response at 36) that such migration would tend to make them flow uphill and thus not constitute a germane claim, the Staff observes that migration can arise from either migration of the river beds or from erosion of the rivers into ground underneath the site and that at this time it cannot state that such erosion is not a "possible eventuality."⁵³

As for lack of a cell liner or leachate collection system, the Staff states that such a liner or collection system is required unless SFC can demonstrate that its plan will prevent migration of hazardous constituents into groundwater "at any further time" (citing 10 C.F.R. Part 40, Appendix A, Criterion 5A(3)). With respect

⁵¹ Oklahoma Supplement at 39-42.

⁵² SFC Response at 34-36.

⁵³ Staff Answer at 29-30.

to the alleged placement of the cell over existing groundwater monitoring wells, and the claim that plugging of such wells will not prevent a direct pathway to groundwater contamination, the Staff asserts that it is not possible to conclude that a properly plugged well cannot provide a conduit for contamination in the cell to reach groundwater in the time frames involved because of possible degradation of the plugs and the presence of radioactive contaminants such as uranium, thorium, and radium in the cell. As a result, the Staff finds all of the elements of this area of concern to be relevant to the proposed action and hence germane to the proceeding.⁵⁴

Based on the Staff's analysis, Oklahoma's ninth area of concern is admitted as germane. Specific issues (some of which overlap other admissible areas of concern) will be developed and consolidated (as appropriate) at a prehearing conference. It should be noted, however, that only if I should determine that it is appropriate for the Staff to rely on (or at least use as guidance for its review) the requirements set forth in 10 C.F.R. Part 40, Appendix A would all aspects of this area of concern necessarily be considered germane and hence a source of litigable issues. I will leave this matter for resolution at a prehearing conference, to be held following my receipt of the hearing file and further briefing by Oklahoma and the Staff concerning the propriety of referencing 10 C.F.R. Part 40, Appendix A as a standard of review.

C. Further Proceedings

Because I have found Oklahoma to have standing to participate in this proceeding and to have set forth several litigable areas of concern, I hereby *grant* its request for a hearing. Oklahoma thus becomes a formal party to this proceeding. A Notice of Hearing will be issued in the near future. Under the Rules of Practice, the Staff has 30 days from my issuance of this Memorandum and Order to provide the hearing file to the Presiding Officer, his Special Assistant, and the parties. 10 C.F.R. § 2.1231(a). Because of the likelihood of an extensive hearing file, the hearing file should be filed or otherwise made available by Monday, January 31, 2000. Briefs by Oklahoma and the Staff on the applicability of 10 C.F.R. Part 40, Appendix A, to this proceeding should be filed by Friday, February 18, 2000. I expect to decide this matter prior to the prehearing conference considering issues for adjudication, inasmuch as my decision may impact the issues to be litigated. Proposed issues for adjudication by Oklahoma (based on areas of concern that have been found to be valid), should be filed by March 3, 2000. Shortly thereafter, I expect to hold a prehearing conference near Gore, Oklahoma, to consider

⁵⁴ Staff Answer at 30-32.

issues for adjudication. At a later date, I will announce the time and location of this conference.

D. Service/Filing Requirements

The preferred method for filing and serving documents in this proceeding is by same-day electronic transmission (i.e., by e-mail), with a paper copy sent that same day to each party served. (Because the hearing file likely includes many documents not created electronically, this preference does not extend to the filing of the hearing-file documents.) Electronic copies may be in their native word-processing format (e.g., WordPerfect or MS Word). Service by e-mail will be considered timely if sent not later than 11:59 p.m. of the date due under NRC's Subpart L rules.

Sometime after January 1, 2000, NRC may have in place an electronic filing system that will eliminate the need for paper copies. Until that system is operational, however, the parties must continue to submit signed hard copies of any filings to the Rulemaking and Adjudications Branch, Office of the Secretary, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Room 0-16-H-15, Rockville, Maryland 20852. The fax number for the Secretary is (301)415-1101 and the e-mail address is *hearingdocket@nrc.gov*. Courtesy e-mail copies should be provided at the time of filing with the Secretary to the Presiding Officer at *cx2@nrc.gov* and his Special Assistant at *tdm@nrc.gov*. (As an aid to the Presiding Officer, parties are requested to place the date for each pleading (i.e., the date it is filed and served) on the document's first page.)

E. Order

In light of the foregoing discussion, and based on the entire record, it is, this 16th day of December 1999, ORDERED:

1. The request for a hearing of the State of Oklahoma is *granted*. Oklahoma hereby becomes a party to this proceeding.
2. The hearing file is to be distributed on January 31, 2000.
3. The following areas of concern are found germane: 2; 3 (groundwater models); 4 (groundwater); 5; 7a, c and d, e (short-term monitoring), f, g, j, n, and p; 8; and 9.
4. The following areas of concern are not germane: 1; 3 (EPA guidance); 6; 7b, e (long-term monitoring), k, l, m, and o.
5. Briefs in response to SFC's reply brief, concerning the applicability to this proceeding of 10 C.F.R. Part 40, Appendix A, may be filed by Oklahoma and the Staff by Friday, February 18, 2000.

6. Proposed issues for litigation (based on areas of concern that I have found germane) are to be filed by Oklahoma on Friday, March 3, 2000.

7. This Order is subject to appeal to the Commission in accordance with the terms of 10 C.F.R. § 2.1205(o). Any appeal must be filed within ten (10) days of service of this Order. The appeal may be supported or opposed by any party by filing a counter-statement within fifteen (15) days of the service of the appeal brief.

Charles Bechhoefer, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 16, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of

Docket No. 40-7580-MLA
(ASLBP No. 00-772-01-MLA)

FANSTEEL, INC.
(Muskogee, Oklahoma Facility)

December 29, 1999

RULES OF PRACTICE: INFORMAL HEARINGS

In a Subpart L informal proceeding, the State's request for a hearing must describe in detail: (1) its interest in the proceeding; (2) how its interest may be affected by the results of the proceeding; (3) its areas of concern germane to the subject matter of the proceeding; and (4) the circumstances that establish the timeliness of its hearing request. 10 C.F.R. § 2.1205(e)(1)-(4).

RULES OF PRACTICE: STANDING

To be admitted as a party to the proceeding, the State must also satisfy the judicial requirements of standing. 10 C.F.R. § 2.1205(h).

RULES OF PRACTICE: STANDING

The State must assert an injury-in-fact that is fairly traceable to the proposed action and that is likely to be redressed by a favorable decision by the Presiding Officer. The alleged injury-in-fact must also be within the "zone of interest"

*Re-served January 4, 2000.

protected by the Atomic Energy Act or the National Environmental Policy Act. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 167-68, 175 (1997).

RULES OF PRACTICE: INFORMAL HEARINGS

In its request for an informal hearing, the State must also identify and describe in detail areas of concern germane to the decommissioning plan. 10 C.F.R. §§ 2.1205(e)(3) & (h).

RULES OF PRACTICE: INFORMAL HEARINGS (AREAS OF CONCERN)

In an informal proceeding, the areas of concern constitute the general subject matter of issues that the petitioner seeks to litigate. An area of concern is “germane” if it is relevant to the question whether the requested license amendment should be denied or conditioned.

**MEMORANDUM AND ORDER
(Granting the Request for Hearing)**

Pursuant to 10 C.F.R. § 2.1205, the State of Oklahoma (State) requests an informal hearing on the request of Fansteel, Inc. (Fansteel) to amend its Source Material Licence No. SMB-911 for both the construction of a permanent, onsite, above-grade, radioactive waste disposal cell at its facility located near Muskogee, Oklahoma, and restricted-release decommissioning of the disposal site pursuant to 10 C.F.R § 20.1403. The State’s Subpart L request challenges the decommissioning plan, alleging that the proposal fails to comply with NRC regulations, thus endangering the health and safety of the citizens and environment within its borders.

For the reasons set forth below, the State has established its standing and set forth several areas of concern germane to the subject of this proceeding. Therefore, the State’s request for a Subpart L informal hearing on Fansteel’s proposed source material license amendment is granted.

I. BACKGROUND

Until 1989, Fansteel conducted operations to recover various rare metals at its facility located near Muskogee, Oklahoma, under Source Material License No. SMB-911. The residues and contaminated soil currently located at the site resulted from operations at the facility for the production of tantalum and columbium metals

from ores and slags that also contained low concentrations of uranium and thorium. Fansteel's proposed decommissioning plan for the facility was submitted to the NRC Staff on July 6, 1998, and was further supplemented on December 4, 1998. This proposed decommissioning plan consists of a twofold approach: first, the majority of the facility would be decommissioned for unrestricted release pursuant to 10 C.F.R. § 20.1402; second, a permanent, onsite, above-grade, disposal cell for the disposal of radioactive decommissioning waste would be located at the site and the corresponding portion of the site would be decommissioned through restricted release pursuant to 10 C.F.R. § 20.1403.

Notice of consideration for Fansteel's proposed amendment was published in the *Federal Register* on September 14, 1999. *See* 64 Fed. Reg. 49,823 (1999). Pursuant to 10 C.F.R. § 2.1205, the State of Oklahoma responded to this notice and filed its timely request for an informal hearing on the proposed decommissioning plan on October 14, 1999. Fansteel filed its response to the State's request for a hearing on October 29, 1999, and the NRC Staff filed its response on November 5, 1999.

In this Subpart L informal proceeding, the State's request for a hearing must describe in detail: (1) its interest in the proceeding; (2) how its interests may be affected by the results of the proceeding; (3) its areas of concern germane to the subject matter of the proceeding; and (4) the circumstances that establish the timeliness of its hearing request. 10 C.F.R. § 2.1205(e)(1)-(4). To be admitted as a party to the proceeding, the State must also satisfy the judicial requirements of standing. 10 C.F.R. § 2.1205(h). Thus, the State must assert an injury-in-fact that is fairly traceable to the proposed action and that is likely to be redressed by a favorable decision by the Presiding Officer. The alleged injury-in-fact must also be within the "zone of interests" protected by the Atomic Energy Act (AEA) and the National Environmental Policy Act (NEPA). *See, e.g., Bennett v. Spear*, 520 U.S. 154, 167-68, 175 (1997).

The State asserts that it has "significant property, financial, sovereign, and other interests, such as the air, land, waters, environment, natural resources, wildlife, and citizens of Oklahoma, that will be affected by the results of the [p]roceeding." State of Oklahoma's Request for Hearing, (Oct. 14, 1999) at 9 [hereinafter State Request]. Next, the State asserts that as a sovereign, it is *parens patriae* and has a duty to protect the health, safety, and welfare of its citizens. Oklahoma also claims it has a quasi-sovereign interest in the physical and economic health of its citizens, including the protection of ground and surface water integrity, the area's tax base, and Oklahoma's tax revenue. Oklahoma alleges a proprietary interest in all the land, air, water, wildlife, and other natural resources within its borders. The State also alleges that it operates and manages the Webbers Fall Unit of the McCellan-Kerr Wildlife Refuge and the Cherokee Gruber Wildlife Refuge located near the Fansteel site. Further, it alleges that it operates and maintains roads and thoroughfares in close proximity to the site, namely, State Highway 165 that runs

adjacent to the site. Finally, the State asserts an interest in the correct application and enforcement of laws and regulations governing NRC-licensed facilities because of their precedential impact upon future decommissioning proceedings within Oklahoma's borders. *Id.* at 9-12. The State asserts that these interests will be harmed by the decommissioning plan because it provides for a significant source of radioactivity to be left at the site that may lead to offsite consequences. Oklahoma claims that the proximity of the storage cell to the Arkansas River, Highway 165, and the waters of two wildlife refuges poses a potential danger for harmful offsite consequences. *Id.*

In its request for an informal hearing, the State must also identify and describe in detail areas of concern germane to the decommissioning plan. 10 C.F.R. §§ 2.1205(e)(3) & (h). In an informal proceeding, the areas of concern constitute the general subject matter of issues that the Petitioner seeks to litigate. An area of concern is "germane" if it is relevant to the question whether the requested license amendment should be denied or conditioned.

The State identifies several areas of concern that it alleges are germane to the present proceeding. First, the State alleges that the NRC did not intend for 10 C.F.R. § 20.1403 restricted-release decommissioning to be applied to the Fansteel site. Next, the State argues that the Fansteel decommissioning plan fails to comply with the requirements of section 20.1403(a) that residual levels of radioactivity be as low as reasonably achievable (ALARA). The State also claims that the decommissioning plan fails to comply with section 20.1403(e), which requires that total effective dose equivalent (TEDE) levels not exceed certain prescribed levels if institutional controls fail. Next, the State asserts that the decommissioning plan does not satisfy the requirements of section 20.1403(b) because Fansteel fails to show legally enforceable institutional controls and long-term custodianship for the site. Similarly, the State alleges that the plan fails to satisfy section 20.1403(c) financial assurance requirements. Finally, the State challenges the design and sufficiency of the disposal cell site Fansteel proposes to use in its decommissioning plan. *See* State Request at 25-44.

The NRC Staff supports the State's request, arguing that Oklahoma has satisfied the requirements of standing and identified areas of concern germane to the present proceeding. The Staff argues that the harm the State asserts to its interests from the alleged defects in the decommissioning plan adequately allege an injury-in-fact within the zone of interests protected by the statutes governing the proceeding and that the injuries asserted may be redressed through a favorable decision by the Presiding Officer. The Staff then identifies and details the areas of concern that it finds are germane to the proceeding. *See* NRC Staff's Response to Request for Hearing Filed by the State of Oklahoma (Nov. 5, 1999) [hereinafter Staff Response].

Fansteel opposes the State's request for a hearing and asserts Oklahoma lacks standing. It also argues that none of the concerns raised by Fansteel are

germane to this proceeding. According to Fansteel, the injuries asserted by the State are too general, unfounded, and speculative and, therefore, insufficient to warrant its admission into the hearing. It also asserts that the State has failed to provide an explanation of how these speculative injuries might result from the decommissioning plan and that the Board is unable to favorably redress any of these injuries. Finally, Fansteel specifically addresses each of the State's areas of concern arguing that they are not germane to the proceeding and concludes that they are therefore inadmissible. *See* Fansteel Inc.'s Answer in Opposition to the Request for Hearing Filed by the State of Oklahoma (Oct. 29, 1999) [hereinafter Fansteel Response].

II. ANALYSIS

A. Standing

The State must satisfy the judicial requirements of standing by asserting an injury-in-fact that is fairly traceable to the proposed action and that is likely to be redressed by a favorable Board decision. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998). *See Bennett v. Spear*, 520 U.S. 154, 167 (1997) (requiring a "concrete and particularized" injury that is "actual or imminent"); *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1017 (1998) (stressing the importance of "redressibility — a likelihood that the requested relief will redress the alleged injury"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The alleged injury-in-fact must also be within the "zone of interests" protected by the Atomic Energy Act (AEA) or the National Environmental Policy Act (NEPA). *See Bennett v. Spear*, 520 U.S. at 175. The State has the burden of establishing its standing; however, the Presiding Officer must construe the petitioner's statements in its favor. *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

The State has established that it has various interests that may be affected by Fansteel's proposed decommissioning plan. The State has demonstrated that it has a duty to protect the health and safety of the citizens and environment contained within its borders and that these interests, relative to the citizens who live, work, and travel near the site, may be affected by the consequences of Fansteel's proposal. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 169, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998). Previous agency decisions have recognized such a right of the sovereign, noting "the strong interest that a government body . . . has in protecting the individuals and territory that fall under its sovereign guardianship establishes an organizational interest for standing purposes." *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29

(1999). *See Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning)*, LBP-99-46, 50 NRC 386, 394 (1999). Oklahoma has also asserted a number of injuries to the streams, air, and property it owns at or near the Fansteel site from alleged discharges resulting from the decommissioning plan. State Request at 17-19. These alleged harms are sufficient to establish an injury-in-fact and these injuries fall within the interests protected by the Atomic Energy Act and NEPA. Furthermore, a determination that the State's asserted injury is fairly traceable to the proposed action "is not dependent on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible." *Sequoyah Fuels Corp. (Gore, Oklahoma Site)*, CLI-94-12, 40 NRC 64, 75 (1994). That standard is met here. And, the State's alleged injuries to its interests, the harm to the citizens, and the potential injury to the environment at or near the Muskogee site, are all redressible by a Board decision favorable to the State's position, such as the denial of the request for restricted-release decommissioning. Accordingly, the State has established its standing.

B. Areas of Concern

In addition to satisfying the requirements of standing, a request for a 10 C.F.R. Part 2, Subpart L hearing must "describe in detail . . . [t]he requestor's areas of concern about the licensing activity that is the subject matter of the proceeding." 10 C.F.R. § 2.1205(e)(3). The Presiding Officer must then determine that the State's "specified areas of concern are germane to the subject matter of the proceeding." 10 C.F.R. § 2.1205(h). Accordingly, a statement of concern "must provide enough specificity to afford the Presiding Officer the ability to link the concern with the subject matter of the proceeding in order to make a decision to admit the statement for litigation." *Sequoyah Fuels Corp.*, LBP-94-39, 40 NRC 314, 316 (1994). Areas of concern must contain information specific enough to establish that they are "generally" within the range of matters subject to challenge in this proceeding. *See* 54 Fed. Reg. 8269, 8272 (1989) (Statement of considerations, informal hearing procedures for materials licensing adjudications). The level of description in these areas of concern "need not be extensive but must fall generally within the scope of the hearing." *Babcock and Wilcox Co. (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania)*, LBP-94-4, 39 NRC 47, 52 (1994). This standard differs from the standard that governs the admission of contentions in formal hearings in that the informal standard is easier to satisfy. *See Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120)*, LBP-98-9, 47 NRC 261, 280 (1998).

The State identifies several areas of concern that it alleges are germane to the present proceeding. First, Oklahoma claims that the NRC did not intend for 10 C.F.R. § 20.1403 restricted-release decommissioning to be applied to the Fansteel site because of the presence of uranium and thorium, which have extremely long

half-lives. Oklahoma maintains that the NRC intended for this regulation to be applied only to facilities where radioactive contaminants will decay to unrestricted dose levels within a finite period of institutional control. State Request at 27. In response, Fansteel argues that there is no language restricting section 20.1403 to sites contaminated with short-lived nuclides. Fansteel Response at 24-26. The State's area of concern merely presents a legal question involving regulatory construction. The merits of this legal issue are not to be determined at this initial point in the proceeding. Contrary to the Staff's claims, this area of concern is not an impermissible attack on NRC regulations; rather it raises a garden variety issue of regulatory interpretation. This area of concern with regard to the meaning of section 20.1403 is, therefore, accepted as germane to the subject matter of this proceeding.

Next, the State claims that the proposed decommissioning plan does not comply with the requirements of 10 C.F.R. § 20.1403(a) because it fails (1) to demonstrate that residual levels of radioactivity are ALARA or (2) to show that any further reductions in residual radioactivity necessary to achieve unrestricted decommissioning would result in net public or environmental harm. Alleging that the "ALARA analysis is entirely too simplified to be of any analytical value," Oklahoma challenges values and figures used by Fansteel and asserts that public and environmental harm will result. State Request at 31. At this initial stage of the proceeding the Presiding Officer's task is not to determine the merits of the proffered claims as Fansteel would have it. Thus, Fansteel's challenges to the State's proffered areas of concern contain a level of detail that is unnecessary and improper before the hearing file is made part of the proceeding record. Previous decisions have held alleged failures to satisfy applicable requirements to be admissible areas of concern. *See Hydro Resources*, LBP-98-9, 47 NRC at 281-82. Thus, the State's claim here advances an area of concern germane to this proceeding.

Oklahoma's next area of concern, Fansteel's compliance with 10 C.F.R. § 20.1403(e), which requires assurance that TEDE levels would not exceed applicable limits in the event that institutional controls fail, is also admitted as germane to the current proceeding. *See* State Request at 33-34. The State supports its area of concern by identifying what it alleges are errors in Fansteel's modeling. Once again, a determination on the admissibility of an area of concern is not a determination of the merits and Fansteel's detailed arguments go to the merits of the issue, not to the question of germaneness.

In order for the Fansteel to employ restricted-release decommissioning it also must comply with the requirements of 10 C.F.R. § 20.1403(b). The State's fourth area of concern asserts that the plan does not comply with this section because it fails to demonstrate legally enforceable institutional controls and long-term custodianship that provides assurance that the TEDE from residual radioactivity distinguishable from the background to the average member of the critical group

will not exceed 25 mrem/year. Staff Request at 34-36. It should be noted that the Staff asserts that it is unable to determine “whether the physical controls are legally enforceable or whether the site will meet the dose limit requirements of section 20.1403.” Staff Response at 13. Similarly, the Staff states it must also undertake further review “to determine whether public health and safety will be assured if Fansteel were permitted to decommission the site for restricted release with an on-site containment cell.” *Id.* Thus, with the existence of such a dispute, this area of concern is obviously germane to the proceeding and is accepted as an area of concern.

The State also asserts that the decommissioning plan fails to comply with 10 C.F.R. § 20.1403(c) financial assurance requirements because Fansteel incorrectly calculates the cost of long-term site control. Oklahoma details a number of considerations, not taken into consideration by Fansteel, that it believes will increase the amount of money needed for long-term stewardship of the site. State Request at 36-37. Previous Board decisions have held inadequate financial assurance to be a germane area of concern. *See Sequoyah Fuels*, LBP-99-46, 50 NRC at 402-03; *Hydro Resources*, LBP-98-9, 47 NRC at 282. This area of concern is admitted because Fansteel’s proposed financial assurance plan does not provide the detail necessary to determine definitively at this time whether it has sufficiently provided for the long-term control of the site. In this regard, it should be noted that after the hearing file is made part of the proceeding record and the parties have made their initial presentations, some, or all, of the State’s specific charges regarding the inadequacies of Fansteel’s decommissioning plan with respect to financial assurance may be shown to be inappropriate. But the time to deal with such specifics is on the merits of the area of concern, not in determining whether the State’s concern is relevant and, hence germane, to the proceeding.

The State’s final area of concern, a challenge to the design and sufficiency of the disposal cell site Fansteel proposes to use in its decommissioning plan, is also accepted as germane to this proceeding. Oklahoma alleges the following in this area of concern: the disposal cell is inadequate to prevent contamination of groundwater beneath the site because the plan does not include a liner or leachate collection system; the placement of the disposal cell will create a “superhighway” for contaminants to enter groundwater in the site; plugging wells will not prevent a direct pathway for further groundwater contamination; the Fansteel plan will place the disposal cell directly in the probable maximum flood plain; and that the decommissioning plan does not account for the fact that the disposal cell will be placed near an existing sewer main and gas line or the damage to the disposal cell if these lines ever require repair. State Request at 38-43. It should be noted that the Staff intends to analyze these issues as part of its 10 C.F.R. Part 51 technical and environmental review. Staff Response at 18-20. Accordingly, this area of concern is obviously relevant to the proceeding and is admitted as germane to the proceeding.

III. CONCLUSION

With regard to its request for a Subpart L informal hearing, the State of Oklahoma has established its standing and set forth several areas of concern germane to Fansteel's proposed amendment to its source material license. Therefore, the State's October 14, 1999 request for a hearing regarding Fansteels' application to amend its source material license for restricted-release decommissioning is *granted*.

This Order is subject to appeal to the Commission in accordance with the terms of 10 C.F.R. § 2.1205(o). Any appeal must be filed within ten (10) days of service of this Order. The appeal may be supported or opposed by any party by filing a counter-statement within fifteen (15) days of the service of the appeal brief.

Further, pursuant to 10 C.F.R. § 2.1231(a) the Staff shall prepare and file the hearing file by January 31, 2000. The hearing file shall contain a chronologically numbered index of each item comprising the hearing file. Each item in the hearing file shall be separately tabbed in accordance with the index and each item shall be separated from the other hearing file items by a substantial colored sheet of paper that contains the tabs for the hearing file item that follows.

Finally, while the Staff is preparing the hearing file, the Presiding Officer will issue an order setting forth a schedule and directives for the conduct of the proceeding. In that regard, the Presiding Officer intends to hold a telephone conference with the parties at 10:30 a.m. EST on Wednesday, January 12, 2000. Therefore, counsel for each party shall file with the Presiding Officer by January 7, 2000, a filing setting forth the name and telephone number of the counsel who will participate in the telephone conference.

It is so ORDERED.

By the Presiding Officer

Thomas S. Moore
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 29, 1999

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