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GENERAL MATTERS

6.0 GENERAL MATTERS

6.1 Amendments to Existing Licenses and/or Construction Permits

General requirements and guidance for the amendment of an existing license or construction permit for production and utilization facilities are set out in 10 C.F.R. §§ 50.90 and 50.91.

In passing upon an application for an amendment to an operating license or construction permit, "the Commission will be guided by the considerations which govern the issuance of initial licenses or construction permits to the extent applicable and appropriate." 10 C.F.R. § 50.91. These considerations are broadly identified in 10 C.F.R. § 50.40. In essence, Section 50.40 requires that the Commission be persuaded, inter alia, that the application will comply with all applicable regulations, that the health and safety of the public will not be endangered, and that any applicable requirements of 10 C.F.R. Part 51 (governing environmental protection) have been satisfied. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 44 (1978).

For two years following the Three Mile Island accident, the Commission authorized the operation of a nuclear facility by issuing, first, a low-power license and then, a full-power operating license. However, believing that it was unnecessary to issue two separate licenses, the Commission in recent years has "amended" an existing low-power license by dropping the low-power limitation and authorizing full-power operation. Such a "license amendment" in a previously uncontested licensing proceeding is not intended to create any new hearing rights under § 189a. of the Atomic Energy Act of 1954 which requires an appropriate notice and opportunity for hearing on an amendment to an operating license. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Unit 1), CLI-84-19, 20 NRC 1055, 1058-59 (1984).

A Board must evaluate an application for a license amendment according to its terms. The Board may not speculate about future events which might possibly affect the application. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-86-21, 23 NRC 849, 855, 859 (1986).

The Board expressed skepticism that the amendment proposed by Licensee "is a 'material alteration' in the sense intended by the regulations so as to require a construction permit." See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 281-82 (2000), citing 10 C.F.R. § 50.92(a); see also Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC370, 391-92 (2001). Alterations of the type that require a construction permit are those that involve substantial changes that, in effect, transform the facility into something it previously was not or that introduce significant new issues relating to the nature and function of the facility. See Portland General Electric Co. (Trojan Nuclear Plant), LBP-77-69, 6 NRC 1179, 1183 (1977). To trigger the need for a construction permit, the change must "essentially [render] major portions of the original safety analysis for the facility inapplicable to the modified facility." See id.; Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 391-92 (2001).

6.1.1 Staff Review of Proposed Amendments

A Board adjudicating issues regarding a proposed license amendment does not thereby gain authority over the Staff's non-adjudicatory review of the proposed amendment. Therefore, a Board lacked jurisdiction to order the Staff to allow a hearing petitioner's representatives to attend a scheduled closed meeting between the Staff and the amendment applicant regarding the applicant's security submittal. Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-6, 59 NRC 62, 74 (2004).

6.1.2 Amendments to Research Reactor Licenses

(RESERVED)

6.1.3 Matters to Be Considered in License Amendment Proceedings

License amendments can be made immediately effective solely at the discretion of NRC Staff, following a determination by Staff that there are no significant hazards considerations involved. Immediate effectiveness findings by the Staff are not subject to review by Licensing Boards. Gulf States Utilities Company, et al. (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31 (1994), aff'd, CLI-94-10, 40 NRC 43 (1994).

6.1.3.1 Specific Matters Considered in License Amendment Proceedings

While the balancing of costs and benefits of a project is usually done in the context of an environmental impact statement (EIS) prepared because the project will have significant environmental impacts, at least one court has implied that a cost-benefit analysis may be necessary for certain federal actions which, of themselves, do not have a significant environmental impact. Specifically, the court opined that an operating license amendment derating reactor power significantly could upset the original cost-benefit balance and, therefore, require that the cost-benefit balance for the facility be reevaluated. Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1084-85 (D.C. Cir. 1974).

Neither the Staff nor the Licensing Board need concern itself with the matter of the ultimate disposal of spent fuel; i.e., with the possibility that the pool will become an indefinite or permanent repository for its contents, in the evaluation of a proposed expansion of the capacity of a spent fuel pool. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 51 (1978).

A license amendment that does not involve, or result in, environmental impacts other than those previously considered and evaluated in prior initial decisions for the facility in question does not require the preparation and issuance of either an EIS or an environmental impact appraisal (EIA) and negative declaration pursuant to 10 C.F.R. § 51.5(b) and (c). Portland General Electric Co. (Trojan Nuclear Plant), LBP-78-40, 8 NRC 717, 744-45 (1978), aff'd, ALAB-534, 9 NRC 287 (1979).

An operating license amendment that does not modify any systems, structures, or components (SSCs) but which extends the license term to recapture time lost during construction represents a significant amendment, and not merely a ministerial administrative change, notwithstanding prior review during the operating license

proceeding of such SSCs. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-94-35, 40 NRC 180, 188 (1994).

There is no statutory or regulatory requirement that an applicant demonstrate any benefit from a license amendment. Tennessee Valley Authority (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 35 (2002).

One necessary component of NRC review of a license amendment application is review of the proposed amendment's compatibility with the licensee's existing design and licensing basis. If the NRC finds that there would be unacceptable incompatibilities, it may condition its approval of the amendment upon the licensee making necessary adjustments to the existing design and licensing basis to resolve these incompatibilities. Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 565 (2004).

6.1.4 Hearing Requirements for License/Permit Amendments

The Atomic Energy Act of 1954, as amended (AEA) does not specifically require a mandatory hearing on the question as to whether an amendment to an existing license or permit should issue. At the same time, the Act and the regulations (10 C.F.R. § 2.105(a)(3)) require that, where a proposed amendment involves "significant hazards considerations," the opportunity for a hearing on the amendment be provided prior to issuance of the amendment and that any hearing requested be held prior to issuance of the amendment. An opportunity for a hearing will also be provided on any other amendment as to which the Commission, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards determines that an opportunity for public hearing should be afforded. 10 C.F.R. § 2.105(a)(6), (7).

Section 189.a. hearing rights are triggered despite Commission assertion that it did not "amend" the license when the Commission abruptly changed its policy so as to retroactively enlarge extant licensee's authority, and licensee's original license did not authorize licensee to implement major-component dismantling of type undertaken in project. Citizens Awareness Network v. NRC, 59 F.3d 284, 294 (1st Cir. 1995). The statute's phrase "modification of rules and regulations" encompasses substantive interpretative policy changes, and the Commission cannot effect such modifications without complying with the statute's notice and hearing provisions. 59 F.3d at 292.

In evaluating whether an NRC authorization represents a license amendment within the meaning of Section 189a. of the Atomic Energy Act, courts repeatedly have considered whether the NRC approval granted the licensee any greater operating authority or otherwise altered the original terms of a license. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326 (1996).

Where an NRC approval does not permit the licensee to operate in any greater capacity than originally prescribed and all relevant regulations and license terms remain applicable, the authorization does not amend the license. Cleveland Electric

Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 327(1996).

A technical specification is a license condition. A license request to change that condition constitutes a request to amend the license and therefore creates adjudicatory hearing rights under AEA § 189.a., 42 U.S.C. § 2239(a). See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 91 n.6, 93 (1993); General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 150 n.6 (1996).

Construction permit amendment/extension cases, unlike construction permit proceedings, are not subject to the mandatory hearing requirement. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1188 (1984).

An application for an exemption concerning the security plan under 10 C.F.R. § 73.5 does not constitute a license amendment. Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2), CLI-00-5, 51 NRC 90, 96 (2000).

A prior hearing is not required under Section 189.a. of the AEA, as amended, for Commission approval of a license amendment in situations where the NRC Staff makes a "no significant hazards consideration" finding. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 622-623 (1981); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 123 (1986). See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-86-12, 24 NRC 1, 11 (1986), rev'd and remanded on other grounds sub nom. San Luis Obispo Mothers for Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986).

The legislative history of Section 12 of Pub. L. 97-415 (1982), the "Sholly Amendment," modifying Section 189(a) of the AEA, supports the determination that Congress intended that hearings on license amendments be held, if properly requested, even after irreversible actions have been taken upon a finding of no significant hazards consideration. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Unit 1), LBP-84-23, 19 NRC 1412, 1414-15 (1984). Thus, a timely filed contention will not be considered moot, even if the contested action has been completed. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Unit 1), LBP-84-19, 19 NRC 1076, 1084 (1984).

"'The Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration'….'[A] contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding.'" Kelley v. Selin, 42 F.3d 1501, 1511 (6th Cir. 1995), citing Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos., 498 U.S. 211, 228 (1991) (quoting Heckler v. Campbell, 461 U.S. 458, 467 (1983)).

An opportunity for a hearing pursuant to Section 189.a. of the AEA is not triggered by a rulemaking that is generic in nature and involves no specific licensing decision. The rulemaking may specifically benefit a particular plant, but it does not trigger hearing

rights if the rulemaking does not grant a specific plant a right to operate in a greater capacity than it had previously been allowed to operate. Kelley v. Selin, 42 F.3d 1501, 1515 (6th Cir. 1995).

The "Sholly" provisions have been extended to amendments to Part 52 combined construction permits and operating licenses issued pursuant to 10 C.F.R. Part 52. A post-construction amendment to a combined license may be made immediately effective, prior to the completion of any required hearing, if the Commission determines that there are no significant hazards considerations. 10 C.F.R. § 52.97(b)(2)(ii)1, 57 Fed. Reg. 60,975, 60,978 (Dec. 23, 1992).

Upholding the Commission's rule changes to Part 52, the court held that the Commission may rely on prior hearings and findings from the pre-construction and construction stage and significantly limit the scope of a § 189.a. hearing when considering whether to authorize operation of a plant. Nuclear Information Resource Service v. NRC, 969 F.2d 1169 (D.C. Cir. 1992).

The Staff may issue an amendment to a materials license without providing prior notice of an opportunity for a hearing. Curators of the University of Missouri, LBP-90-18, 31 NRC 559, 574 (1990), aff'd on other grounds, CLI-95-1, 41 NRC 71 (1995).

A Board may terminate a hearing on an application for an amendment to an operating license when the only intervenor withdraws from the hearing, and there are no longer any matters in controversy. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Unit 1), LBP-84-39, 20 NRC 1031, 1032 (1984).

A hearing on an application for a facility license amendment may be dismissed when the parties have all agreed to a stipulation for the withdrawal of all the intervenors' admitted contentions and the Board has not raised any sua sponte issues. Pacific Gas and Electric Co. (Humboldt Bay Power Plant, Unit 3), LBP-88-4, 27 NRC 236, 238-39 (1988).

A hearing can be requested on the application for a license amendment to reflect a change in ownership of a facility. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 80 (1977).

A license amendment initiated by Staff order may become immediately effective under § 2.202 without a prior hearing if the public health, safety or interest requires. Furthermore, there is no inherent contradiction between a finding that there is "no significant hazard" in a given case and a finding in the same case that latent conditions may potentially cause harm in the future thus justifying immediate effectiveness of an amendment permitting corrections. Nuclear Fuel Services Inc. and New York State Energy Research and Development Authority (Western New York Nuclear Service Center), CLI-81-29, 14 NRC 940, 942 (1981).

For there to be any statutory right to a hearing on the granting of an exemption, such a grant must be part of a proceeding for the granting, suspending, revoking, or amending of any license or construction permit under the Atomic Energy Act. United States Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 421 (1982).

6.1.4.1 Notice of Hearing on License/Permit Amendments

(RESERVED)

6.1.4.2 Intervention on License/Permit Amendments

The requirements for intervention in license amendment proceedings are the same as the requirements for intervention in initial permit or license proceedings (see generally Section 2.9). The right to intervene is not limited to those persons who oppose the proposed amendment itself, but extends to those who raise related claims involving matters arising directly from the proposed amendment. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-245, 8 AEC 873, 875 (1974).

Persons who would have standing to intervene in new construction permit hearings, which would be required if good cause could not be shown for the extension, have standing to intervene in construction extension proceedings to show that no good cause existed for extension and, consequently, new construction permit hearings would be required to complete construction. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), LBP-80-22, 12 NRC 191, 195 (1980).

The fact that a member of a citizens' group lived 20 miles from a site was not sufficient to grant the group standing to intervene in a proceeding for an amendment to a materials license held by the site. U.S. Dep't of Army (Army Research Laboratory), LBP-00-21, 52 NRC 107 (2000).

6.1.4.3 Summary Disposition Procedures on License/Permit Amendments

Summary disposition procedures may be used in proceedings held upon requests for hearings on proposed amendments. Boston Edison Co. (Pilgrim Nuclear Station, Unit 1), ALAB-191, 7 AEC 417 (1974). In a construction permit amendment proceeding, summary disposition may be granted based on pleadings alone, or pleadings accompanied by affidavits or other documentary information, where there is no genuine issue as to any material fact that warrants a hearing and the moving party is entitled to a decision in its favor as a matter of law. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1189 (1984), citing 10 C.F.R. § 2.710(d) (formerly § 2.749(d)). Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 565 (2004).

6.1.4.4 Matters Considered in Hearings on License Amendments

In considering an amendment to transfer part ownership of a facility, a Licensing Board held that questions concerning the legality of transferring some ownership interest in advance of the Commission action on the amendment was outside its jurisdiction and should be pursued under the provisions of 10 C.F.R. Part 2, Subpart B (dealing with enforcement) instead. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386 (1978). The same Licensing Board also ruled that issues to be considered in such a transfer of ownership proceeding do not include questions of the financial qualifications of the original applicant or the technical qualification of any of the applicants. Detroit

Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 392 (1978).

With regard to environmental considerations in a proceeding on an application for license amendment, a Licensing Board should not embark broadly upon a fresh assessment of the environmental issues which have already been thoroughly considered and which were decided in the initial decision. Rather, the Board's role in the environmental sphere will be limited to assuring itself that the ultimate National Environmental Policy Act (NEPA) conclusions reached in the initial decision are not significantly affected by such new developments. Georgia Power Co. (Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404, 415 (1975).

License amendments can be made immediately effective solely at the discretion of NRC Staff under the so-called "Sholly Amendment," in advance of the holding and completion of any required hearing, following a determination by Staff that there are no significant hazards considerations involved. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 117 (2001); see AEA § 189, 42 U.S.C. § 2239.

The Staff is authorized to make a no significant hazards consideration finding if operation of the facility in accordance with the proposed amendment would not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or
(2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or
(3) Involve a significant reduction in a margin of safety.

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 116 (2001).

Immediate effectiveness findings are not subject to review by Licensing Boards. Florida Power & Light Company (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-08-18, 68 NRC 533, 541 (2008); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 116 (2001). Nor can a Licensing Board review the immediate effectiveness of a license amendment issued on the basis of a "no significant hazards consideration" after the Staff has completed all the steps required for the issuance of the amendment. Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2), LBP-98-24, 48 NRC 219, 222 (1998). However, the Board has authority to review such an amendment if the Staff fails to perform the environmental review required by 10 C.F.R. § 51.25 prior to the issuance of the amendment. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-19, 28 NRC 145, 153-56 (1988).

What may raise significant hazards consideration at one time may, at a later date, no longer present significant hazards consideration due to technological advances and further study. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 118 (2001).

The Commission also has the inherent authority to exercise its discretionary supervisory authority to stay Staff's actions or rescind a license amendment. See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 119 (2001).

A license amendment that does not involve, or result in, environmental impacts other than those previously considered and evaluated in prior initial decisions for the facility in question does not require the preparation and issuance of either an EIS or EIA and negative declaration pursuant to 10 C.F.R. § 51.5(b) and (c). Portland General Electric Co. (Trojan Nuclear Plant), LBP-78-40, 8 NRC 717, 744-45 (1978), aff'd, ALAB-534, 9 NRC 287 (1979). For example, the need for power is not a cognizable issue in a license amendment proceeding where it has been addressed in previous construction permit and operating license proceedings. Trojan, supra, ALAB-534, 9 NRC at 289, cited in Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-81-14, 13 NRC 677, 698 n.49 (1981).

Where health and safety issues were evaluated during the operating license proceeding, a Licensing Board will not admit a contention which provides no new information or other basis for reevaluating the previous findings as a result of the proposed amendment. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 466 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988).

6.1.5 Primary Jurisdiction to Consider License Amendment in Special Hearing

Although the usual procedure for amending an existing license involves a licensee's applying for the proposed amendment pursuant to 10 C.F.R. § 50.90, this is not the sole and exclusive means for obtaining an amendment. For example, where the Commission orders a special hearing on particular issues, the licensee may seek at hearing, and the presiding officer has jurisdiction to issue, an amendment to the license as long as the modification sought bears directly on the questions addressed in the hearing. In such a situation, the licensee need not follow the usual procedure for filing an application for an amendment under 10 C.F.R. 50.90. Consolidated Edison Co. (Indian Point Nuclear Generating Units 1, 2, & 3), ALAB-357, 4 NRC 542 (1976), aff'd, CLI-77-2, 5 NRC 13 (1977). Moreover, the presiding officer's authority to modify license conditions in such an instance is not limited by the inadequacies of the materials submitted by the parties; the presiding officer may take such action as the public interest warrants. Id.

6.1.6 Facility Changes Without License Amendments

10 C.F.R. § 50.59(a)(1) provides that changes may be made to a production or utilization facility without prior NRC approval where such changes do not involve an unreviewed safety question, as defined in Section 50.59(a)(2), or a change in technical specifications. The determination as to whether a proposed change requires prior NRC approval under Section 50.59 apparently rests with the licensee in the first instance. Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 (1994).

Where a hearing on a proposed license amendment was pending and the licensee embarked on "preparatory work" related to the proposed amendment without prior

authorization, the presiding Licensing Board denied an intervenor's request for a cease and desist order with regard to such work on the grounds that there was no showing that such work posed any immediate danger to the public health and safety or violated NEPA and that such work was done entirely at the licensee's risk. Portland General Electric Co. (Trojan Nuclear Plant), LBP-77-69, 6 NRC 1179, 1184 (1977). Subsequently, the Appeal Board indicated that the intervenor's complaint in this regard might more appropriately have been directed, in the first instance, to the Staff under 10 C.F.R. § 2.206, rather than to the Licensing Board. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-451, 6 NRC 889, 891 n.3 (1977).

A low-level waste facility can accept special nuclear material (SNM) for disposal only under an NRC license that it holds, not under a state license under which the facility has accepted reactor materials and components removed from a nuclear power plant site. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 100-01 (1994).

Commitments which are part of the licensing basis for a facility must be complied with, even though they do not take the form of formal license conditions. Changes to commitments of this sort require the filing of a license amendment, which is subject to challenge via the hearing process. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 21 (2003).

6.2 Amendments to Construction Permit Applications

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

NRC regulations permit amendments to applications, including major amendments, and there is no legal basis for a contention challenging an amendment that changes the reactor technology referenced in a combined license application. Virginia Electric and Power Co., d/b/a Dominion Virginia Power and Old Dominion Electrical Coop. (Combined License Application for North Anna Unit 3), LBP-10-17, 72 NRC __ (Sep. 2, 2010)(slip op. at 14).

6.3 Antitrust Considerations

Section 105(c)(9) of the AEA eliminates the requirement that the Commission conduct an antitrust review for applications filed after Aug. 8, 2005. Nonetheless, under Section 105(b) of the AEA, the Commission must still report potential antitrust violations to the Attorney General, and under Section 105(a), the Commission may take appropriate action when a court of competent jurisdiction finds that a licensee has violated an antitrust law. Moreover, as discussed below, many licenses issued by the Commission contain provisions related to antitrust, which remain valid.

Section 105(c)(6) of the AEA indicates that nothing in the Act was intended to relieve any person from complying with the federal antitrust laws. This section does not authorize the

NRC to institute antitrust proceedings against licensees, but does permit the Commission to impose conditions in a license as needed to ensure that activities under the license will not contribute to the creation or maintenance of an anticompetitive situation. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, & 3), LBP-77-7, 5 NRC 452 (1977). Note that reactors licensed as research and development facilities under Section 104.b. of the AEA prior to the 1970 antitrust amendments are excluded from antitrust review. Florida Power & Light Co. (St. Lucie Plant, Unit 1; Turkey Point Plant, Units 3 & 4), ALAB-428, 6 NRC 221, 225 (1977); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-323, 3 NRC 331 (1976).

The standard to be employed by the NRC is whether there is a "reasonable probability" that a situation inconsistent with the antitrust laws and the policies underlying those laws would be created or maintained by the unconditioned licensing of the facility. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), LBP-77-24, 5 NRC 804 (1977). The Commission's statutory obligation, pursuant to Section 105.c., is not limited to investigation of the effects of construction and operation of the facility to be licensed, but rather includes an evaluation of the relationship of the specific nuclear facility to the applicant's total system or power pool. Id. This threshold determination as to whether a situation inconsistent with the antitrust laws could arise from issuance of the proposed license does not involve balancing public interest factors such as public benefits from the activity in question, public convenience and necessity, or the desirability of competition. Only after the Commission determines that an anticompetitive situation exists or is likely to develop under a proposed license are such other factors considered. In exceptional cases, the NRC may issue the license, despite the possibility of an anticompetitive situation, if it determines that, on balance, issuance of the license would be in the public interest. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, & 3), ALAB-385, 5 NRC 621, 632-633 (1977).

Under Section 105.c. of the AEA, a hearing on whether authorizing construction of a nuclear power facility "would create or maintain a situation inconsistent with the antitrust laws" is called for if the Attorney General so recommends or an interested party requests one and files a timely petition to intervene. When an antitrust hearing is convened, a permit to construct the project may not be awarded without the parties' consent until the proceedings are completed. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 10 (1977).

One of the policies reflected in Section 105.c. of the AEA is that a government-developed monopoly – like nuclear power electricity generation – should not be used to contravene the policies of the antitrust laws. Section 105.c. is a mechanism to allow smaller utilities, municipals and cooperatives access to the licensing process to pursue their interests in the event that larger utility applicants might use a government license to create or maintain an anticompetitive market position. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 946 (1978).

When the Attorney General recommends an antitrust hearing on a license for a commercial nuclear facility, the NRC is required to conduct one. This is the clear implication of Section 105.c(5) of the AEA. Where such a hearing is held, the Attorney General or his designee may participate as a party in connection with the subject matter of his advice. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), CLI-78-5, 7 NRC 397, 398 (1978); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3) and Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2),

ALAB-560, 10 NRC 265, 272 (1979). However, where the Licensing Board's jurisdiction over an antitrust proceeding does not rest upon Section 105.c(5), the Justice Department must comply with the standards for intervention, including the standards governing untimely intervention petitions. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) and Cleveland Electric Illuminating Co. and Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-91-38, 34 NRC 229, 253-54 (1991), aff'd in part on other grounds and appeal denied, CLI-92-11, 36 NRC 47 (1992).

In dealing with antitrust issues, the NRC's role is something more than that of a neutral forum for economic disputes between private parties. If an antitrust hearing is convened, it should encompass all significant antitrust implications of the license, not merely the complaints of private intervenors. If no one performs this function, the NRC Staff should assure that a complete picture is presented to Licensing Boards. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 949 (1978).

The antitrust review undertaken by the Commission in licensing the construction of a nuclear power plant is, by statute, to determine "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws…." Section 105.c(5) of the AEA, 42 U.S.C. § 2135c(5). This means that the licensed activities must play some active role in creating or maintaining the anticompetitive situation. Put another way, the nuclear power plant must be an actor, an influence, on the anticompetitive scene. Florida Power & Light Co. (St. Lucie Plant, Unit 2), ALAB-665, 15 NRC 22, 32 (1982).

Where a license is found to create or maintain a situation inconsistent with the antitrust laws, the Commission may impose corrective conditions on the license rather than withhold it. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-13, 7 NRC 583, 597 (1978).

In making a determination under AEA Section 105.c. about the antitrust implications of a licensing action, the Commission must act to ensure that two results do not obtain: Activities under the license must not (1) "maintain" a "situation inconsistent with the antitrust laws" or (2) "create" such a situation. In making its ultimate determination about whether an applicant's activities under the license will result in a "situation inconsistent with the antitrust laws," the term "maintain" permits the Commission to look at the applicant's past and present competitive performance in the relevant market, whereas the word "create" envisions that the Commission's assessment will be a forward-looking, predictive analysis concerning the competitive environment in which the facility will operate. See Alabama Power Co. v. NRC, 692 F.2d 1362, 1367-68 (11th Cir. 1982), cert. denied, 464 U.S. 816 (1983). Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-92-32, 36 NRC 269, 288 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

Only the NRC is empowered to make the initial determination under Section 105(c) whether activities under the license would create or maintain a situation inconsistent with the antitrust laws, and if so what license conditions should be required as a remedy. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 574 (1979).

In specifying which federal antitrust laws are implicated in an NRC antitrust review, AEA Section 105 references all the major provisions governing antitrust regulation, including

the Sherman, Clayton and Federal Trade Commission Acts. It is a basic tenet that "the antitrust laws seek to prevent conduct which weakens or destroys competition." See Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, & 3) et al., ALAB-560, 10 NRC 265, 279 & n.34 (1979) (principal purpose of Sherman, Clayton and Federal Trade Commission Acts is preservation of and encouragement of competition). Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-92-32, 36 NRC 269, 290 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

In order to conduct a Section 105.c. proceeding, it is not necessary to establish a violation of the antitrust laws. Any violation of the antitrust laws also meets the less rigorous standard of Section 105.c. which is inconsistent with the antitrust laws. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 570 (1979). The Commission has a broader authority that encompasses those instances in which there is a "reasonable probability" that those laws "or the policies clearly underlying those laws" will be infringed. Alabama Power Co., 692 F.2d 1362,1367-68 (11th Cir. 1982), cert. denied, 464 U.S. 816 (1983); Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-92-32, 36 NRC 269, 290 n.54 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

A threshold showing of lower cost nuclear power is not required as an indispensable prerequisite of retaining antitrust conditions. City of Cleveland v. NRC, 68 F.3d 1361, 1369 (D.C. Cir. 1995).

NRC statutory responsibilities under Section 105(c) cannot be impaired or limited by a state agency. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 577 (1979).

The legislative history and language of the Public Utilities Regulatory Policies Act of 1978 clearly establish that the act was not intended to divest NRC of its antitrust jurisdiction. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 577 (1979).

Once the U.S. Attorney General has withdrawn from a proceeding and permission has been granted to the remaining intervenors to withdraw, the Board no longer has jurisdiction to entertain an antitrust proceeding under the provisions of the AEA. Florida Power & Light Co. (St. Lucie Plant, Unit 2), LBP-82-21, 15 NRC 639, 640-641 (1982).

6.3.A Application of Antitrust Laws; Market Power

> One of the cardinal precepts of antitrust regulation is that a commercial entity that is dominant in the relevant market (even if its dominance is lawfully gained) is accountable for the manner in which it exercises the degree of market power that dominance affords. See Otter Tail Power Co. v. United States, 410 U.S. 366, 377 (1973). See also A. Neal, The Antitrust Laws of the United States, at 126 (2d ed. 1970). Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-92-32, 32 NRC 269, 290 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).
>
> "Market power" is generally defined as the "power of a firm to affect the price which will prevail on the market in which the firm trades."[cites omitted] If a firm possesses market power such that it has a substantial power to exclude competitors by reducing

price, then it is considered to have "monopoly power." If an entity with market dominance utilizes its market power with the purpose of destroying competitors or to otherwise foreclose competition or gain a competitive advantage, then its conduct will violate the antitrust laws, specifically Section 2 of the Sherman Act. See, e.g., Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992); Otter Tail Power Co., 410 U.S. 366, 377 (1973). Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al.,LBP-92-32, 36 NRC 269, 291 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

AEA § 105.c. directs that the focus of the Commission's consideration during an antitrust review must be whether, considering a variety of factors, a nuclear utility has market dominance and, if so, given its past (and predicted) competitive behavior, whether it can and will use that market power in its activities relating to the operation of its licensed facility to affect adversely the competitive situation in the relevant market. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-92-32, 36 NRC 269, 298-99 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

Under general antitrust principles, what is required relative to a particular competitive situation is an analysis of the existence and use of market power among competing firms to determine whether anticompetitive conditions exist. This assessment, in turn, is based upon a number of different factors that have been recognized as providing some indicia of a firm's competitive potency in the relevant market, including firm size, market concentration, barriers to entry, pricing policy, profitability, and past competitive conduct. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-92-32, 36 NRC 269, 291 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

Nothing in AEA § 105c, or in the pertinent antitrust laws and cases supports the proposition that traditional antitrust market power analysis is inapplicable in the first instance when the assessment of the competitive impact of a particular asset (i.e., a nuclear facility) is involved. Consistent with the antitrust laws referenced in AEA § 105c, what ultimately is at issue under that provision is not a competitor's comparative cost of doing business, but rather its possession and use of market power. And if a commercial entity's market dominance gives it the power to affect competition, how it uses that power – not merely its cost of doing business – remains the locus for any antitrust analysis under Section 105c. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-92-32, 36 NRC 269, 292 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

6.3.B Application of Antitrust Laws; Remedial Authority

During an antitrust review under AEA Section 105c, if it can be demonstrated that market power has or would be misused, then with cause to believe that the applicant's "activities under the license would create or maintain a situation inconsistent with the antitrust laws," the Commission can intervene to take remedial measures. On the other hand, if the Commission reaches a judgment that an otherwise dominant utility has not and will not abuse its market power, i.e., that its "activities under the license" will not "create or maintain a situation inconsistent with the antitrust laws," then the Commission need not intercede. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-92-32, 36 NRC 269, 295 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

In reaching a judgment under AEA Section 105c about a utility's "activities under the license," the Commission is permitted to undertake a "broad inquiry" into an applicant's conduct. See Alabama Power Co., 692 F.2d 1362, 1368 (11th Cir. 1982), cert. denied, 464 U.S. 816 (1983). Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-92-32, 36 NRC 269, 295 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

6.3.1 Consideration of Antitrust Matters After the Construction Permit Stage

The NRC antitrust responsibility does not extend over the full life of a licensed facility but is limited to two procedural stages – the construction permit stage and the operating license stage. This limitation on NRC jurisdiction extends to the Director of Nuclear Reactor Regulation as well as to the rest of the NRC. Florida Power & Light Co. (St. Lucie Plant, Unit 1; Turkey Point Plant, Units 3 & 4), ALAB-428, 6 NRC 221, 226-227 (1977). For reactors which have undergone antitrust review in connection with a construction permit application pursuant to Section 105c of the AEA, Section 105c(2) governs the question of antitrust review at the operating license stage. Antitrust issues may only be pursued at this stage if a finding is made that the licensee's activities have significantly changed subsequent to the construction permit review. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), CLI-77-13, 5 NRC 1303, 1310 (1977). Where a construction permit antitrust proceeding is under way, the antitrust provisions of the AEA effectively preclude the Commission from instituting a second antitrust hearing in conjunction with an operating license application for the plant. Florida Power & Light Co. (St. Lucie Plant, Unit 2), ALAB-661, 14 NRC 1117, 1122 (1-981). Where, subsequent to issuance of a construction permit and to termination of the jurisdiction of the Licensing Board which considered the application, new contractual arrangements give rise to antitrust contentions, such contentions cannot be resolved by the original Licensing Board. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-381, 5 NRC 582 (1977). The Commission's regulations indicate that the new antitrust concerns should be raised at the operating license stage. The Commission Staff could also initiate show cause proceedings requiring the licensee to demonstrate why antitrust conditions should not be imposed in an amendment to the construction permit. Id. Where the petitioner who raises the antitrust contentions is a co-licensee, 10 C.F.R. § 50.90 permits the petitioner to seek an amendment to the construction permit which would impose antitrust considerations. Id.

The NRC may facilitate operating license stage antitrust review by waiving the requirements of 10 C.F.R. § 50.30(d) and § 50.34(b) (which require operating license applications to be accompanied by the filing of an FSAR). This permits operating license antitrust review at a much earlier stage prior to completion of the FSAR. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), CLI-77-13, 5 NRC 1303, 1319 (1977).

AEA §105 and its implementing regulations contemplate that mandatory antitrust review be conducted early in the construction permit process. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 946 (1978).

Antitrust review might be conducted out-of-time if significant doubts were cast on the adequacy of the initial antitrust review. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 945 (1978).

Despite the fact that further antitrust review following issuance of a construction permit will usually await the operating license stage of review, a construction permit amendment may give rise to an additional antitrust review prior to the operating license stage. An application for a construction permit amendment that would add new co-owners to a plant is within the scope of the phrase in Section 105.c(1) of the AEA requiring antitrust review of "any license application." As such, it triggers an opportunity for intervention based on the antitrust aspects of adding new co-owners. To hold otherwise would subvert congressional intent by insulating applicants coming in by way of amendment from antitrust investigation. Moreover, because a joint venture might raise antitrust problems that would not exist if the joint applicants were considered individually, the Licensing Board has jurisdiction to consider intervention petitions and antitrust issues filed in connection with a new application for joint ownership. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-13, 7 NRC 583, 588 (1978).

A narrower, second antitrust review is to occur at the operating license stage, if and only if, "The Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission…" in connection with the construction permit for the facility. South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 823 (1980).

The ultimate issue in the operating license stage antitrust review is the same as for the construction permit review: would the contemplated license create a situation inconsistent with the antitrust laws or the policies underlying those laws. South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 824 (1980).

To trigger antitrust review at the operating license stage, the significant changes specified by Section 105.c. of the AEA must (1) have occurred since the previous antitrust review of the licensee; (2) be reasonably attributable to the licensee; and (3) have antitrust implications that would warrant Commission remedy. This requires an examination of (a) whether an antitrust review would be likely to conclude that the situation as changed has negative antitrust implications and (b) whether the Commission has available remedies. South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 824-25 (1980).

In determining whether significant changes have occurred which require referral of the matter to the Attorney General, the Commission must find: (1) that there is a factual basis for the determination; and (2) that the alleged changes are reasonably apparent. South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 824-25 (1980).

Although the NRC regulations do not specify a period during which requests for a significant change determination will be timely, the relevant question in determining timeliness is whether the request has followed sufficiently promptly the operating

license application. South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 829 (1980).

6.3.1.1 Limitations on Antitrust Review After Issuance of Operating License

Congress did not invest the NRC with ongoing antitrust responsibility during the period subsequent to issuance of an operating license and the NRC's authority in this area terminates at that point. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), CLI-77-13, 5 NRC 1303, 1317 (1977). Congress did not envision for the NRC a broad, ongoing antitrust enforcement role but, rather, established specific procedures (and incentives) intended to tie antitrust review to the two-step licensing process. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 945 (1978). However, a Licensing Board has determined that, pursuant to its general authority to amend a facility license at the request of the licensee, AEA § 189a and 10 C.F.R. § 50.90, it had jurisdiction to consider the licensees' request to suspend the antitrust conditions in their operating licenses. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-91-38, 34 NRC 229, 239-44 (1991), aff'd in part and appeal denied, CLI-92-11, 36 NRC 47 (1992), subsequent history, LBP-92-32, 36 NRC 269, 295 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

Under license renewal provisions of the AEA, an antitrust review is not required for applications for renewal of nuclear plant commercial licenses or research and development nuclear plant licenses. The NRC acted permissibly in limiting its antitrust review duties to situations in which it issued new operating licenses. American Public Power Assoc. v. NRC, 990 F.2d 1310, 1312-13 (D.C. Cir. 1993).

The Commission has concluded, upon a close analysis of the AEA, that its antitrust reviews of post-operating license transfer applications cannot be squared with the terms or intent of the Act and that the Commission therefore lacks authority to conduct them. But even if the Commission possesses some general residual authority to continue to undertake such antitrust reviews, it is certainly true that the Act nowhere requires them, and the Commission thinks it sensible from a legal and policy perspective to no longer conduct them. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441, 460 (1999). In the Wolf Creek Case, the Commission concluded that the competitive and regulatory landscape has dramatically changed since 1970 in favor of those electric utilities who are the intended beneficiaries of the Section 105 antitrust reviews, especially in connection with acquisitions of nuclear power facilities and access to transmission services. The Commission concludes that the duplication of other antitrust reviews makes no sense and only impedes nationwide efforts to streamline the federal government. The Commission subsequently codified its Wolf Creek decision by rulemaking, Antitrust Review Authority: Clarification, 65 Fed. Reg. 44,649 (July 19, 2000); see also Pacific Gas & Electric Co. (Diablo Canyon Power Plant, Units 1 & 2), CLI-03-2, 57 NRC 19, 34-35 (2003), vacated as moot sub nom. Northern Calif. Power Agency v. NRC, 393 F.3d 223 (D.C. Cir. 2004).

NRC antitrust review of post-operating license transfers is unnecessary from both a legal and policy perspective. GPU Nuclear, Inc., et al. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 210 (2000) (responding to fear that

corporations "may be stretched too thin in their ability to operate a multitude of nuclear reactors").

The fact that a particular license transfer may have antitrust implications does not remove it from the NEPA categorical exclusion. In any event, because the AEA does not require, and arguably, does not even allow, the Commission to conduct antitrust evaluations of license transfer application, any "failure" of the Commission to conduct such an evaluation cannot constitute a federal action warranting a NEPA review. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266 at 30, n.55 (2000), quoting Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 167-68 (2000).

The Commission no longer conducts antitrust reviews in license transfer proceedings. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 318 (2000), citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 168, 174 (2000); GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 210 (2000); Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999); Final Rule, Antitrust Review Authority: Clarification, 65 Fed. Reg. 44,649 (July 19, 2000).

6.3.2 Intervention in Antitrust Proceedings

The Commission's regulations make clear that an antitrust intervention petition: (1) must first describe a situation inconsistent with the antitrust laws; (2) would be deficient if it consists of a description of a situation inconsistent with the antitrust laws, however well pleaded, accompanied by a mere paraphrase of the statutory language alleging that the situation described therein would be created or maintained by the activities under the license; and (3) must identify the specific relief sought and whether, how and the extent to which the request fails to be satisfied by the license conditions proposed by the Attorney General. The most critical requirement of an antitrust intervention petition is an explanation of how the activities under the license would create or maintain an anticompetitive situation. Florida Power & Light Co. (St. Lucie Plant, Unit 2), ALAB-665, 15 NRC 22, 29 (1982), citing Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 574-75 (1975).

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

The criteria of 10 C.F.R. § 2.309 for late petitions are as appropriate for evaluation of late antitrust petitions as in health, safety and environmental licensing, but the Section 2.309 (formerly Section 2.714) criteria should be more stringently applied to late antitrust petitions, particularly in assessing the good cause factor. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 946 (1978).

Late requests for antitrust review hearings may be entertained in the period between the filing of an application for a construction permit – the time when the advice of the Attorney General is sought – and its issuance. However, as the time for issuance of the construction permit draws closer, Licensing Boards should scrutinize more closely and carefully the petitioner's claims of good cause. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 946 (1978).

Where an antitrust petition is so late that relief will divert from the licensee needed and difficult-to-replace power, the Licensing Board may shape any relief granted to meet this problem. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 948 (1978).

Where a late petition for intervention is involved, the factors set forth within 10 C.F.R. § 2.309(c) (formerly § 2.714(a)(1)) must be balanced and applied before petitions may be granted; the test becomes increasingly vigorous as time passes. Of particular significance is the availability of other remedies for the late petitioner where remedies are available before the Federal Energy Regulatory Commission and petitioner has not shown that the remedy is insufficient. Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), LBP-81-28, 14 NRC 333, 336, 338 (1981).

6.3.3 Discovery in Antitrust Proceedings

The Noerr-Pennington doctrine will operate to immunize those legitimately petitioning the government, or exercising other First Amendment rights, from liability under the antitrust laws, even where the challenged activities were conducted for purposes condemned by the antitrust laws. Florida Power & Light Co. (St. Lucie Plant, Unit 2), LBP-79-4, 9 NRC 164, 174 (1979).

Material on applicant's activities designed to influence legislation and requested through discovery is relevant and may reasonably be calculated to lead to the discovery of admissible evidence, and therefore is not immune from discovery. The Noerr-Pennington cases, on which applicant had based its argument, go to the substantive protection of the First Amendment and do not immunize litigants from discovery. Appropriate discovery into applicant's legislative activities must be permitted, and the information sought to be discovered may well be directly admissible as evidence. Florida Power & Light Co. (St. Lucie Plant, Unit 2), LBP-79-4, 9 NRC 164, 175 (1979).

6.3.3.1 Discovery Cutoff Dates for Antitrust Proceedings

The imposition of the cutoff date for discovery is for the purpose of making a preliminary ruling about relevancy for discovery. The cutoff date is only a date after which, in the dimension of time, relevancy may be assumed for discovery purposes. Requests for information from before the cutoff date must show that the information requested is relevant in time to the situation to be created or maintained by a licensed activity. If the information sought is relevant, and not otherwise barred, it may be discovered, no matter how old, upon a reasonable showing. This is entirely consistent with 10 C.F.R. § 2.705(b) (formerly § 2.740(b)) and Rule 26(b) which are in turn consistent with the Manual for Complex Litigation, Part 1, § 4.30. Florida

Power & Light Co. (St. Lucie Plant, Unit No. 2), LBP-79-4, 9 NRC 164, 169-70 (1979).

In antitrust proceedings, the relevant period for discovery must be determined by the circumstances of the alleged situation inconsistent with the antitrust laws, not the planning of the nuclear facility. Florida Power & Light Co. (St. Lucie Plant, Unit 2), LBP-79-4, 9 NRC 164, 168 (1979).

The standard for allowing discovery requests predating a set cutoff date is that there be a reasonable possibility of relevancy; it is not necessary to show relevancy plus good cause. Florida Power & Light Co. (St. Lucie Plant, Unit 2), LBP-79-4, 9 NRC 164, 172 (1979).

6.4 Attorney Conduct

6.4.1 Practice Before Commission

10 C.F.R. § 2.314 (formerly § 2.713) contains general provisions with respect to representation by counsel in an adjudicatory proceeding, standards of conduct and suspension of attorneys.

Counsel appearing before all NRC adjudicatory tribunals "have a manifest and iron-clad obligation of candor." This obligation includes the duty to call to the tribunal's attention facts of record which cast a different light upon the substance of arguments being advanced by counsel. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-505, 8 NRC 527, 532 (1978).

A lawyer citing legal authority to an adjudicatory board in support of a position, with knowledge of other applicable authority adverse to that position, has a clear professional obligation to inform the board of the existence of such adverse authority. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1174 n.21 (1983), citing Rule 3.3(a)(3) of the American Bar Association (ABA) Model Rules of Professional Conduct (1983).

Lawyers shall represent their clients "zealously within the bounds of the law." Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-691, 16 NRC 897, 916, 918 (1982).

In judging the propriety of a lawyer's participation in the preparation of testimony of a witness, the key factor is not who originated the words that comprise the testimony, but whether the witness can truthfully attest that the statement is complete and accurate to the best of his or her knowledge. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-691, 16 NRC 897, 918 (1982).

Counsel have an obligation to keep adjudicatory boards informed of the material facts which are relevant to issues pending before them. University of California (UCLA Research Reactor), LBP-84-22, 19 NRC 1383, 1401 (1984), citing Consumers Power Co. (Midland Plant, Units 1 & 2), 16 NRC 897, 910 (1982); Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 & 3), ALAB-677, 15 NRC 1387 (1982); Consumers Power Co. (Midland Plant, Units 1& 2), ALAB-458, 7 NRC 155, 172 n.64 (1978).

A party's obligation to disclose material information extends to, and is often the responsibility of, counsel, especially in litigation involving highly complex technology where many decisions regarding materiality of information can only be made jointly by a party and its counsel. University of California (UCLA Research Reactor), LBP-84-22, 19 NRC 1383, 1405 (1984).

Counsel's obligations to disclose all relevant and material factual information to the Licensing Board under the AEA are not substantially different from those laid out by the ABA's Model Rules of Professional Conduct. In discharging his obligations, counsel may verify the accuracy of factual information with his client or verify the accuracy of the factual information himself. University of California (UCLA Research Reactor), LBP-84-22, 19 NRC 1383, 1406-07 (1984).

The Commission's Rules of Practice require parties and their representatives to conduct themselves with honor, dignity, and decorum as they should before a court of law. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-691, 16 NRC 897, 916 (1982), citing 10 C.F.R. 2.314(a) (formerly 2.713(a)). See Hydro Resources, Inc., LBP-98-4, 47 NRC 17 (1998). A letter from an intervenor's counsel to an applicant's counsel which is reasonably perceived as a threat to seek criminal sanctions against the applicant's employees or to seek disciplinary action by the Bar against the applicant's attorneys in order to compel the applicant to negotiate the cancellation of its facility does not meet this standard. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-86-15, 23 NRC 595, 668-670 (1986).

Counsel's derogatory description of the NRC Staff constitutes intemperate, even disrespectful, rhetoric and is wholly inappropriate in legal pleadings. Curators of the University of Missouri, CLI-95-17, 42 NRC 229, 232-33 (1995).

Gamesmanship and "sporting conduct" between or among lawyers and parties is not condoned in NRC proceedings. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-691, 16 NRC 897, 919 (1982).

Attorneys practicing before Licensing and Appeal Boards are to conduct themselves in a dignified and professional manner and are not to engage in name calling with respect to opposing counsel. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835 (1974). In this vein, Licensing Boards have a duty to regulate the course of hearings and the conduct of participants in the interest of insuring a fair, impartial, expeditious and orderly adjudicatory process, 10 C.F.R. § 2.319(g) (formerly § 2.718(e)); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-417, 5 NRC 1442, 1445-46 (1977), and the Commission has the authority to disqualify an attorney or an entire law firm for unprofessional conduct, whatever its form. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-332, 3 NRC 785 (1976).

The Code of Professional Responsibility considerably restricts the comments that counsel representing a party in an administrative hearing may make to the public. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-592, 11 NRC 744, 750 (1980). The ABA has since replaced the Code of Professional Responsibility with the Model Rules of Professional Responsibility, which provide attorneys with significantly greater latitude in discussing pending adjudications

in public forums. Compare Model Rules of Prof'l Conduct R. 3.6 (2010) (prohibiting attorneys from making public extrajudicial statements that "the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding") with Model Code of Prof'l Responsibility DR 7-107 (1981) (generally prohibiting attorneys from making extrajudicial statements that would be "reasonably likely to interfere" with a fair adjudication). See also Lonnie T. Brown, Jr., "'May it Please the Camera,…I Mean the Court'" – An Intrajudicial Solution to an Extrajudicial Problem," 39 Ga. L. Rev. 83, 94-112 (2004) (discussing the evolution of Model Rule 3.6).

Parties should not impugn one another's integrity without first submitting supporting evidence. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-5A, 15 NRC 216 (1982).

6.4.2 Disciplinary Matters re Attorneys

The Commission has the authority to disqualify an attorney or an entire law firm for unprofessional conduct, whatever its form. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-332, 3 NRC 785 (1976). 10 C.F.R. § 2.314(c) (formerly § 2.713(c)) lists various acts or omissions by an attorney which would justify his suspension from further participation in a proceeding. That section also sets forth the procedure to be followed by the presiding officer in issuing an order barring the attorney from participation.

A Licensing Board may, if necessary for the orderly conduct of a proceeding, reprimand, censure or suspend from participation in the particular proceeding pending before it any party or representative of a party who shall be guilty of disorderly, disruptive, or contemptuous conduct. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-82-87, 16 NRC 1195, 1201 (1982); Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), CLI-07-28, 66 NRC 275 (2007).

Where a party's representative (or counsel) engages in repeated disregard of the Commission's practices and procedures, disciplinary action may include summary rejection (without referral to the Commission or Licensing Boards) of future pleadings under such representative's signature that do not conform with all procedural requirements. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-06-4, 63 NRC 32, 38-39 (2006).

An intervenor's generalized allegations of prejudice resulting from the submission of an alleged ex parte communication by applicant's counsel to a Board are insufficient to support a motion to disqualify counsel. The intervenor must demonstrate how specific Board rulings have been prejudiced by the submission of the ex parte communication. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), CLI-86-18, 24 NRC 501, 504-05 (1986).

Petitions which raise questions about the ethics and reputation of another member of the Bar should only be filed after careful research and deliberation. Moreover, although ill feeling understandably results from any petition for disciplinary action, retaliation in kind should not be the routine response. Cincinnati Gas & Electric Co.

(William H. Zimmer Nuclear Power Station, Unit 1), CLI-82-36, 16 NRC 1512, 1514 n.1 (1982).

A party's lack of resources does not excuse its baseless and undocumented charges against the integrity and professional responsibility of counsel for an opposing party. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-85-45, 22 NRC 819, 828 (1985).

The Commission has no interest in general matters of attorney discipline and chooses to focus instead on the means necessary to keep its judicatory proceedings orderly and to avoid unnecessary delays. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), CLI-82-36, 16 NRC 1512, 1514 n.1 (1982), citing 45 Fed. Reg. 3,594 (1980).

While the Commission has inherent supervisory power over all agency personnel and proceedings, it is not necessarily appropriate to bring any and all matters to the Commission in the first instance. Under 10 C.F.R. § 2.314 (formerly § 2.713), where a complaint relates directly to a specified attorney's actions in a proceeding before a Licensing Board, that complaint should be brought to the Board in the first instance if correction is necessary for the integrity of the proceedings. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), CLI-82-36, 16 NRC 1512, 1514 n.1 (1982).

6.4.2.1 Jurisdiction of Special Board re Attorney Discipline

The Special Board appointed to consider the disqualification issue has the ultimate responsibility as to that decision. The Licensing Board before which the disqualification question was initially raised should determine only whether the allegations of misconduct state a case for disqualification and should refer the case to the Special Board if they do. After the Special Board's decision, the Licensing Board merely carries out the ministerial duty of entering an order in accordance with the Special Board's decision. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-332, 3 NRC 785 (1976).

6.4.2.2 Procedures in Special Disqualification Hearings re Attorney Conduct

The attorney or law firm accused of misconduct is entitled to a full hearing on the matter. The Commission's discovery rules are applicable to the proceeding and all parties have the right to present evidence and cross-examine witnesses. The burden of proof is on the party moving for disqualification and the Special Board's decision must be based on a preponderance of the evidence. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-332, 3 NRC 785 (1976).

In general, the doctrine of collateral estoppel applies to disqualification proceedings. An earlier judicial decision would be entitled to collateral estoppel effect unless giving it effect would intrude upon the Commission's ability to ensure the orderly and proper prosecution of its internal proceedings. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, & 3), ALAB-378, 5 NRC 557 (1977). As to costs incurred from an attorney discipline proceeding, there is no basis on which the NRC can reimburse a private attorney for out-of-pocket expenses in connection with the termination, and settlement of a special proceeding brought to investigate

misconduct charges against a private attorney and NRC Staff attorneys. Consumers Power Co. (Midland Plant, Units 1 & 2), CLI-79-3, 9 NRC 107, 109 (1979).

6.4.2.3 Conflict of Interest

Disqualification of an attorney or law firm is appropriate where the attorney formerly represented a party whose interests were adverse to his present client in a related matter. The aggrieved former client need not show that specific confidences were breached but only that there is a substantial relationship between the issues in the pending action and those in the prior representation. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-332, 3 NRC 785 (1976).

A perceived bias in an attorney's view of a proceeding is distinguishable from a situation where there is an attorney conflict of interest of a type recognized in law to compromise counsel's ability to represent his client, e.g., that he had previously represented another party in the proceeding, or had a financial interest in common with another party, or the like. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), CLI-82-36, 16 NRC 1512, 1515 (1982).

An attorney for a party in an NRC proceeding should discontinue his or her representation of the client when it becomes apparent that the attorney will be called to testify as a necessary witness in the proceeding. However, an attorney will not be disqualified when it is shown that the client would suffer substantial hardship because of the distinctive value of the attorney. A party may waive the possible disqualification of its attorney if the opposing parties are not thereby prejudiced. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-85-19, 21 NRC 1707, 1717-20 (1985), citing DR 5-101(B)(4), DR 5-102(A) and (B) of the Code of Professional Responsibility, and Model Rule 3.7(a)(3) of the ABA Model Rules of Professional Conduct.

In order for an attorney for a party to be disqualified for an apparent conflict of interest, there must be a showing beyond a mere assumption that there is a significant possibility of serious misconduct. "A 'presumption of regularity attaches to the actions of Government agencies.' Absent 'clear evidence to the contrary,' we presume that public officers will 'properly discharge[] their official duties.'" U.S. Dept. of Energy (High-Level Waste Repository), CLI-08-11, 67 NRC 379, 384 (2008).

6.5 Communications Between Staff/Applicant/Other Parties/Adjudicatory Bodies

During the course of an ongoing adjudication, Commission regulations restrict communications between the Commission adjudicatory employees and certain employees within the NRC who are participating in the proceeding or any person outside the NRC, with respect to information relevant to the merits of an adjudicatory proceeding. Commission adjudicatory employees include the Commissioners, their immediate Staff, and other employees advising the Commission on adjudicatory matters, the Licensing Board and their immediate Staffs. See 10 C.F.R. §§ 2.347, 2.348 (formerly §§ 2.780, 2.781). Employees "participating in a proceeding" include those engaged in the performance of any investigative or litigating function in the proceeding or in a factually related proceeding. See 10 C.F.R. § 2.348(a) (formerly § 2.781(a)). Communications

between Commission adjudicatory employees and other NRC employees are subject to the "separation of functions" restrictions in 10 C.F.R. § 2.348 (formerly § 2.781). Communications between Commission adjudicatory employees and any person outside the NRC are subject to the ex parte restrictions in 10 C.F.R. § 2.347 (formerly § 2.780).

Although the separation of functions and ex parte contact restrictions are subject to different regulations, case law discussing prohibited communications in the context of one situation may be equally applicable to the other. Thus, depending on the issue, it may be helpful or necessary to review case law arising in both areas.

6.5.1 Ex Parte Communications Rule

10 C.F.R. § 2.347 (formerly § 2.780) sets forth the applicable rules with respect to ex parte (off-the-record) communications involving NRC personnel who exercise quasi-judicial functions with respect to the issuance, denial, amendment, transfer, renewal, modification, suspension or revocation of a license or permit. In general, the regulation prohibits ex parte communications with Commissioners, members of their immediate Staffs, NRC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions, and Licensing Board members and their immediate staffs.

The ex parte rule proscribes litigants' discussing, off-the record, matters in litigation with members of the adjudicatory board. The rule does not apply to undisputed issues in contested proceedings and uncontested mandatory proceedings. 10 C.F.R. § 2.347(f)(5).

It does not apply to discussions between and among the parties, between the NRC Staff and the applicant or between the Staff, applicant, other litigants and third parties (including state officials and federal agencies) not involved in the proceeding. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 269 (1978). The NRC Staff does not advise the Commission or the Boards. The Staff is a separate and distinct entity that participates as a party in a proceeding and may confer with the other parties. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-785, 20 NRC 848, 883 n.161 (1984).

The ex parte rule relates only to discussions of any substantive matter at issue in a proceeding on the record. It does not apply to discussions of procedural matters, such as extensions of time for filing of affidavits. Consumers Power Co. (Big Rock Point Plant), LBP-82-8, 15 NRC 299, 336 (1982). See, e.g., Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-5, 17 NRC 331, 332 (1983), citing 10 C.F.R. § 2.347(a) (formerly § 2.780(a)).

Nothing in the Commission's ex parte rule pursuant to 10 C.F.R. § 2.347 (formerly § 2.780) precludes conversations among parties, none of whom is a decisionmaker in the licensing proceeding. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-680, 16 NRC 127, 144 (1982). See also Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-717, 17 NRC 346, 378 (1983).

Generic discussions of general health and safety problems and responsibilities of the Commission not arising from or directly related to matters in adjudication are not

ex parte. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-3, 17 NRC 72, 74 (1983), citing 10 C.F.R. 2.347 (formerly 2.780(d)).

Regarding a prohibition on ex parte contacts, the ex parte rule is not properly invoked where in an enforcement matter the licensee is complying with Staff's order and has not sought a hearing, nor is a petition for an enforcement action sufficient to invoke the provisions of 10 C.F.R. § 2.347 (formerly § 2.780). Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), CLI-83-4, 17 NRC 75, 76 (1983).

The Staff's communication of the results of its reviews, through public filings served on all parties and the adjudicatory boards, does not constitute an ex parte communication. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 197 n.39 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

In determining whether an ex parte communication has so tainted the decisionmaking process as to require vacating a Board's decision, the Commission has evaluated the following factors: the gravity of the ex parte communication; whether the contacts could have influenced the agency's decision; whether the party making the contacts benefited from the Board's final decision; whether the contents of the communication were known to the other parties to the proceeding; and whether vacating the Board's decision would serve a useful purpose. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), CLI-86-18, 24 NRC 501, 506 (1986), citing Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority, 685 F.2d 547, 564-565 (D.C. Cir. 1982).

6.5.2 "Separation of Functions" Rules

Communications between NRC employees advising the Commission on adjudicatory matters and NRC employees participating in adjudicatory proceedings on behalf of the Staff are subject to the restrictions in 10 C.F.R. § 2.348(a) (formerly § 2.781(a)). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 56-57 (1996). A separation of functions violation is "not a concern if it does not reach the ultimate decision maker." CLI-96-5, 43 NRC at 57 (quoting Press Broadcasting Co., Inc v. FCC, 59 F.3d 1365, 1369 (D.C. Cir. 1995)).

The Commission retains the power, pursuant to 10 C.F.R. § 2.206(c), to consult with the NRC Staff on a formal or informal basis regarding the institution of enforcement proceedings. See Yankee Atomic Electric Co. (Yankee Rowe Nuclear Power Station), CLI-91-11, 34 NRC 3, 6 (1991).

Separation of functions does not apply to uncontested proceedings or to an undisputed issue in contested initial license proceedings. 10 C.F.R. § 2.348(d)(3).

6.5.3 Telephone Conference Calls

A conference call between an adjudicatory board and some but not all of the parties should be avoided except in the case of the most dire necessity. Such calls must be avoided even where no substantive matters are to be discussed and the rule precluding ex parte communications is, therefore, not technically violated. Puerto Rico

Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-313, 3 NRC 94 (1976).

In general, where substantive matters are to be considered in a prehearing conference call, all parties must be on the line unless that representation has been waived. Promptly after any prehearing conference carried on via telephone during which rulings governing the conduct of future proceedings have been made, Licensing Boards must draft and enter written orders confirming those rulings. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-334, 3 NRC 809 (1976). See 10 C.F.R. § 2.329(d) (formerly § 2.752(c)).

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

6.5.4 Staff-Applicant Communications

6.5.4.1 Staff Review of Application

A prospective applicant may confer informally with the Staff prior to filing its application. 10 C.F.R. §§ 2.101(a)(1), 2.102(a).

The Staff may continue to confer privately with the applicant even after a hearing has been noticed. While a Licensing Board has supervisory authority over Staff actions that are part of the hearing process, it has no jurisdiction to supervise the Staff's review process and, as such, cannot order the Staff and applicant to hold their private discussions in the vicinity of the site or to provide transcripts of such discussions. Northeast Nuclear Energy Co. (Montague Nuclear Power Station, Units 1 & 2), LBP-75-19, 1 NRC 436 (1975). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-5, 37 NRC 168, 170 (1993).

With certain exceptions, all meetings conducted by the NRC technical Staff as part of its review of a particular domestic license or permit application, including applications for amendments to a license or permit, are to be open to attendance by all parties or petitioners for leave to intervene in the case. See Enhancing Public Participation in NRC Meetings: Policy Statement, 67 Fed. Reg. 36,920 (May 28, 2002). The policy has its origins in a statement of Staff policy originally published as Domestic License Applications, Open Meetings and Statement of NRC Staff Policy, 43 Fed. Reg. 28,058 (June 28, 1978).

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

6.5.4.2 Staff-Applicant Correspondence

All Staff-applicant correspondence is required to be served on all parties to a proceeding and such service must be continued through the entire judicial review process, at least with respect to those parties participating in the review and those issues which are the subject of the review. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-184, 7 AEC 229, 237 n.9 (1974); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 183 (1974). Note that this requirement of service on all parties of documents exchanged between applicant and Staff in the review process does not arise from 10 C.F.R. § 2.302(b) (formerly § 2.701(b)) which separately requires that all documents offered for filing in adjudications be served on all parties. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 & 2), LBP-82-119A, 16 NRC 2069, 2112 (1982). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 152-53 (1993).

6.5.5 Notice of Relevant Significant Developments

6.5.5.1 Duty to Inform Adjudicatory Board of Significant Developments

The NRC Staff has an obligation to lay all relevant materials before the Board to enable it to adequately dispose of the issues before it. Consolidated Edison Co. (Indian Point Nuclear Generating Units 1, 2 & 3), CLI-77-2, 5 NRC 13 (1977); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1091 n.18 (1983), citing Indian Point, supra, 5 NRC at 15. See generally Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 & 3), ALAB-677, 15 NRC 1387 (1982); Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671, 680 (1975). Moreover, the Staff is obligated to make every effort promptly to report newly discovered important information or significant developments related to a proceeding to the presiding Licensing Board and the parties. The Staff's obligation to report applies to 10 C.F.R. Part 2, Subpart L proceedings in which the Staff has "a continuing duty to keep the hearing file up to date." 10 C.F.R. § 2.1203(c) (formerly § 2.1231(c)). Curators of the University of Missouri, LBP-90-34, 32 NRC 253, 254-55 (1990).

This duty to report arises immediately upon the Staff's discovery of the information, and the Staff is not to delay in reporting until it has completed its own evaluation of the matter. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480, 491 n.11 (1976). This same obligation extends to all parties, each of whom has an affirmative duty to keep Boards advised of significant changes and developments relevant to the proceeding. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404, 408 (1975); Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 625-626 (1973); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1357 (1984); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-14, 23 NRC 553, 560 (1986); Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), LBP-86-15, 23 NRC 595, 623-625 (1986). See Curators of the University of Missouri, LBP-90-34, 32

NRC 253, 255-57 (1990). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-5, 37 NRC 168, 170 (1993).

Parties in Commission proceedings have an absolute obligation to alert adjudicatory bodies in a timely fashion of material changes in evidence regarding: (1) new information that is relevant and material to the matter being adjudicated; (2) modifications and rescissions of important evidentiary submissions; and (3) outdated or incorrect information on which the Board may rely. Similarly, internal Staff procedures must ensure that Staff counsel be fully appraised of new developments. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 & 3), ALAB-677, 15 NRC 1387, 1388, 1394 (1982), citing Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 406 n.26 (1976); Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404, 411 (1975); and Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 625 (1973); Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 & 2), ALAB-752, 18 NRC 1318, 1320 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-765, 19 NRC 645, 656 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-785, 20 NRC 848, 884 n.163 (1984).

However, the Commission has discussed the conflict between the Staff's duty to disclose information to the boards and other parties, and the need to protect such information. The Commission noted that, pursuant to its Policy Statement on Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36,032 (Sep. 13, 1984), the NRC Staff or the Office of Investigations could provide to a board, or a board could request, for ex parte in camera presentation, information concerning an inspection or investigation when the information is material and relevant to any issue in controversy in the proceeding. The Commission held that the Appeal Board did not have the authority to request information from the Office of Investigations for use in reviewing a motion to reopen where the motion to reopen concerned previously uncontested issues and not "issues in controversy in a proceeding." Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 7 (1986). See Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-829, 23 NRC 55, 58 & n.1 (1986).

All parties, including the Staff, are obliged to bring any significant new information to the boards' attention. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 197 n.39 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985), citing Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 & 3), ALAB-677, 15 NRC 1387, 1394 (1982); Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1210 n.11 (1983). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 152-53 n.46 (1993).

Parties and counsel must adhere to the highest standards in disclosing all relevant factual information to the Licensing Board. Material facts must be affirmatively disclosed. If counsel have any doubt whether they have a duty to disclose certain facts, they must disclose. An externality such as a threatened lawsuit does not relieve a party of its duty to disclose relevant information and its other duties to the Board. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-81-63, 14 NRC 1768, 1778, 1795 (1981); Union Electric Co. (Callaway Plant, Unit 1), ALAB-750,

18 NRC 1205, 1210 n.11 (1983); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1092 n.8 (1984); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 & 2), LBP-85-11, 21 NRC 609, 624 n.9 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986).

If a licensee or applicant has a reasonable doubt concerning the materiality of information in relation to its Board notification obligation or duties under Section 186 of the AEA, 42 U.S.C. § 2236a, the information should be disclosed for the Board to decide its true worth. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1358 (1984), citing Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 625 n.15 (1973) and Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-691, 16 NRC 897, 914 (1982), review declined, CLI-83-2, 17 NRC 69 (1983); Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), LBP-85-6, 21 NRC 447, 461 (1985); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-14, 23 NRC 553, 560 (1986).

Before submitting information to the Board pursuant to its notification obligations, a licensee or applicant is entitled to a reasonable period of time for internal review of the documents under consideration. However, an obvious exception exists for information that could have an immediate effect on matters currently being pursued at hearing, or that disclose possible serious safety or environmental problems requiring immediate attention. An applicant or licensee is obliged to report the latter to the NRC Staff without delay in accordance with numerous regulatory requirements. See, e.g.,10 C.F.R. § 50.72. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1359 n.8 (1984).

The routine submittal of informational copies of technical materials to a Board is not sufficient to fulfill a party's obligation to notify the Board of material changes in significant matters relevant to the proceeding. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-53, 20 NRC 1531, 1539 n.23 (1984). If a Board notification is to serve its intended purpose, it must contain an exposition adequate to allow a ready appreciation of (1) the precise nature of the addressed issue and (2) the extent to which the issue might have a bearing upon the particular facility before the Board. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1114 n.59 (1983), citing Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-551, 9 NRC 704, 710 (1979); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1092 n.8 (1984).

The untimely provision of significant information is an important measure of a licensee's character, particularly if it is found to constitute a material false statement. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 198 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

An applicant's failure to notify a Board of significant information may reflect a deficiency in character or competence if such failure is a deliberate breach of a clearly defined duty, a pattern of conduct to that effect, or an indication of bad faith.

Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-86-15, 23 NRC 595, 625-626 (1986).

6.6 Decommissioning

Prior to 1996, hearings in decommissioning proceedings were held relatively early in the process and the issues litigated related to whether the agency should approve the licensee's decommissioning plan. The hearings were held pursuant to the formal hearing requirements in 10 C.F.R. Part 2, Subpart G. This is no longer the case. The only predictable Staff action during decommissioning that will trigger the opportunity for a hearing will be on whether to approve the licensee's termination plan, which will be submitted at the end of the project, not at the beginning. It is contemplated that a termination plan will be much simpler than the decommissioning plan because it will not include a dismantlement plan and may be as simple as a final site survey plan. Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. 39,278, 39,280 (July 19, 1996).

An opportunity for a hearing may be available earlier in the process for any activities requiring an amendment to the license, or if the Staff takes enforcement action against a licensee during the decommissioning process.

There is no question that the NRC has subject matter jurisdiction over the decommissioning of licensed facilities and the public's protection against dangers to health, life or property from the operation of licensed nuclear facilities. Sequoyah Fuels Corp. and General Atomics (Gore, OK, Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 365 (1994).

Outside the realm of the Commission's jurisdiction are decisions concerning the disposition of excess funds from a ratepayer-funded Decommissioning Trust Fund. GPU Nuclear, Inc., et al. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 210-11 (2000). The Commission does not have statutory authority to determine the recipient of excess decommissioning funds. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 305 (2000).

Section 50.82(e) of 10 C.F.R. expressly requires that decommissioning be performed in accordance with the regulations, including the "as low as is reasonably achievable" (ALARA) rule in 10 C.F.R. § 20.1101. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 250-51 (1996).

After decommissioning, the fact that a very small portion of a site may not be releasable does not preclude the release of the overwhelming remainder of the site. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 252 (1996).

Under 10 C.F.R. § 20.1403, a site may be suitable for restricted decommissioning even though it includes long-lived as well as short-lived radioactive contaminants. Sequoyah Fuels Corporation (Gore, OK, Site Decommissioning) LBP-99-46, 50 NRC 386, 396-97 (1999).

6.6.1 Decommissioning Plan

To obtain a hearing on the adequacy of the decommissioning plan, petitioners must show some specific, tangible link between the alleged errors in the plan and the health and safety impacts they invoke. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 258 (1996).

As provided in 10 C.F.R. § 40.42(g)(2), an alternate schedule for the submittal of a decommissioning plan should be approved if it (1) is necessary to the effective conduct of decommissioning operations; (2) presents no undue risk from radiation; and (3) is otherwise in the public interest. U.S. Army (Jefferson Proving Ground Site), LBP-08-4, 67 NRC 105 (2008).

6.6.1.1 Decommissioning Funding

The Commission's regulations regarding decommissioning funding are intended to minimize administrative effort and provide reasonable assurance that funds will be available to carry out decommissioning in a manner that protects public health and safety. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 143 (2001) (citing Final Rule: General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,030 (June 27, 1988)). "The generic formulas set out in 10 C.F.R. § 50.75(c) fulfill the dual purpose of the rule." Consolidated Edison, Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 144 (2001).

A litigable contention asserting that a reactor decommissioning plan does not comply with the funding requirements of 10 C.F.R. § 50.82(b)(4) and (c) must show not only that one or more of a plan's cost estimate provisions are in error, "but that there is not reasonable assurance that the amount will be paid." Yankee Atomic Electric Co. (Yankee Atomic Nuclear Station), CLI-96-1, 43 NRC 1, 9 (1996). A petitioner must establish that some reasonable ground exists for concluding that the licensee will not have sufficient funds to cover decommissioning costs for the facility. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61 (1996).

Decommissioning trusts are reserved for decommissioning as defined in 10 C.F.R. § 50.2. Thus, offsite remediation is not an accepted expense. However, some licensees use the decommissioning trust to accumulate funds for both "decommissioning" as NRC defines it and decommissioning in the broader sense that includes interim spent fuel management, nonradioactive structure demolition, and site remediation to greenfield status. The Commission has accepted this approach as long as the NRC-defined "decommissioning" funds are clearly earmarked. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 307-308 (2000).

Decommissioning funding costs exclude the cost of removal and disposal of spent fuel (10 C.F.R. § 50.75(c)n.1), but do not clearly exclude costs of interim onsite storage of spent fuel. The cost of casks to store spent fuel in an onsite independent

spent fuel storage installation (ISFSI) does not appear to be excluded. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 218 (1993).

The adequacy of a corporate parent's supplemental commitment is not material to NRC license transfer proceedings. The NRC does not need to examine site-specific conditions in calculating the costs of decommissioning. The NRC's decommissioning funding regulation, 10 C.F.R. § 50.75(c), generically establishes the amount of decommissioning funds that must be set aside. Vermont Yankee Nuclear Power Corp., et al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 165-166 (2000).

Sections 30.35(a) and 70.25(a) of the Commission's regulations generally require a materials license applicant to submit a decommissioning funding plan if the amount of unsealed byproduct material or unsealed SNM to be licensed exceeds certain levels. However, Section 30.35(c)(2) and 70.25(c)(2) provide specific exceptions to the requirements of Sections 30.35(a) and 70.25(a) for any holder of a license issued on or before July 27, 1990. Such a licensee has a choice of either (1) filing a decommissioning plan on or before July 27, 1990, or (2) filing a Certification of Financial Assurance on or before that date and then filing a decommissioning funding plan in its next license renewal application. Curators of University of Missouri, CLI-95-1, 41 NRC 71, 165 (1995).

NRC regulations regarding decommissioning funding do not require the inclusion of costs related to nonradioactive structures or materials beyond those necessary to terminate an NRC license. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 145 (2001).

In addition, once the funds are in the decommissioning trust, withdrawals are limited by 10 C.F.R. § 50.82, so that "non-decommissioning" funds (as defined by the NRC) could be spent after the NRC-defined "decommissioning" work had been finished or committed. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 308 n.52 (2000).

NRC regulations do not require a license transfer application to provide an estimate of the actual decommissioning and site cleanup costs. Instead the Commission's decommissioning funding regulation under 10 C.F.R. § 50.75(c) generically establishes the amount of decommissioning funds that must be set aside. A petitioner cannot challenge the regulation in a license transfer adjudication. The NRC's decommissioning funding rule reflects a deliberate decision not to require site-specific estimates in setting decommissioning funding levels. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 308 (2000), citing Northern States Power Co. (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, reconsid. denied, CLI-00-14 52 NRC 37, 59 (2000).

The use of site-specific estimates was expressly rejected by the Commission in its decommissioning rulemaking, although the Commission did recognize that site-specific cost estimates may be prepared for rate regulators. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 144 (2001), citing Final Rule: Financial Assurances Requirements for Decommissioning Nuclear Power Reactors, 63 Fed. Reg. 50,465, 50,468-69 (Sep. 22, 1998); Final Rule: General Design Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,030 (June 27, 1988).

The argument that decommissioning technology is still in an experimental stage is considered a collateral attack on 10 C.F.R. § 50.75(c) establishing the amount that must be set aside and is thus invalid. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 309 (2000), quoting Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 167 n.9 (2000) and citing Northern States Power Co. (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1& 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37 (2000), reconsid. denied, CLI-00-19, 52 NRC 135 (2000).

An applicant's claimed inability to pay for decommissioning as desired by the intervenor does not mean the intervenor's alleged injuries are not redressable, so as to defeat the intervenor's standing to contest the applicant's proposed decommissioning plan. Sequoyah Fuels Corp. (Gore, Oklahoma, Site Decommissioning), CLI-01-2, 53 NRC 2, 14-15 (2001).

A contention challenging the reasonableness of a decommissioning plan's cost estimate is not litigable if reasonable assurance of decommissioning costs is not in serious doubt and if the only available relief would be a formalistic redraft of the plan with a new estimate. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 257 (1996).

Decisions concerning rate questions related to a ratepayer-funded Decommissioning Trust Fund are outside the Commission's jurisdiction. GPU Nuclear, Inc., et al. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 210-11 (2000).

The standard for determining that the funds for decommissioning the plant will be forthcoming is whether there is "reasonable assurance" of adequate funding, not whether that assurance is "ironclad." Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 261-62 (1996).

Criterion 9 of 10 C.F.R. Part 40, Appendix A, requires submission of a plan for decommissioning, including cost estimates, prior to issuance of the materials license. Hydro Resources, Inc., CLI-00-8, 51 NRC 227, 238-39 (2000).

Section 3113 of the USEC Privatization Act (42 U.S.C. § 2297) requires DOE to accept depleted uranium hexafluoride for deconversion and disposal at the request of an NRC-licensed uranium enrichment facility operator, but it gives DOE exclusive authority to determine the amount of reimbursement required for disposition of that

depleted uranium waste. Neither an intervenor nor an applicant/licensee has the authority to challenge or direct DOE's estimates of the fees it will charge to a uranium facility that requests DOE to disposition its depleted uranium wastes. Louisiana Energy Services, L.P. (National Enrichment Facility), LBP-06-15, 63 NRC 591, 629 (2006).

6.7 Early Site Review Procedures

Part 2 of the Commission's regulations has been amended to provide for adjudicatory early site reviews. See 10 C.F.R. §§ 2.101(a)(1), 2.600-2.606. The early site review procedures, which differ from those set forth in Subpart A of 10 C.F.R. Part 52 and Appendix Q to 10 C.F.R. Part 52 (formerly in10 C.F.R. Part 50), allow for the early issuance of a partial initial decision on site suitability matters.

Early site review regulations provide for a detailed review of site suitability matters by the Staff, an adjudicatory hearing directed toward the site suitability issues proposed by the applicant, and the issuance by a Licensing Board of an early partial decision on site suitability issues. A partial decision on site suitability is not a sufficient basis for the issuance of a construction permit or for an LWA. Neither of these steps can be taken without further action, which includes the full review required by Section 102(2) of the National Environmental Policy Act of 1969, as amended (NEPA), and by 10 C.F.R. Part 51, which implements NEPA. Philadelphia Electric Co. (Fulton Generating Station, Units 1 & 2), LBP-79-23, 10 NRC 220, 223 (1979).

The early partial decision on site suitability does not authorize the applicant to do anything; it does provide the applicant with information of value to the applicant in its decision to either abandon the site or proceed with plans for the design, construction, and operation of a specific nuclear power plant at that site. Implementation of any such plans is dependent upon further review by the Staff and approval by a Licensing Board. Philadelphia Electric Co. (Fulton Generating Station, Units 1 & 2), LBP-79-23, 10 NRC 220, 223 (1979).

The Commission, in its discretion, will determine whether formal or informal hearing procedures will be used to conduct a Part 52 post-construction hearing on a combined construction permit and operating license. 10 C.F.R. § 52.103(d), 57 Fed. Reg. 60,975, 60,978 (Dec. 23, 1992). See Nuclear Information Resource Service v. NRC, 969 F.2d 1169 (D.C. Cir. 1992).

6.7.1 Scope of Early Site Review

The early site review is not a "major Federal action significantly affecting the human environment" such as would require a full NEPA review of the entire proposed project. Commonwealth Edison Co. (Carroll County Site), ALAB-601, 12 NRC 18, 25 (1980).

The scope of the early site review is properly limited to the issues specified in the notice of hearing subject to the limits of NEPA, Section 102(2)(c), 42 U.S.C. § 4332(2)(c). Commonwealth Edison Co. (Carroll County Site), ALAB-601, 12 NRC 18, 26 (1980).

6.8 Endangered Species Act

6.8.1 Required Findings re Endangered Species Act

Under Section 7 of the Endangered Species Act, federal agencies, in consultation with the Department of the Interior, are to take such action as necessary to insure that actions authorized by them do not "jeopardize the continued existence of such endangered species." Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 360 (1978). The federal agency is to obtain input from the Department of the Interior and then make its decision. A Licensing Board may not approve relevant action until Interior has been consulted. Approval by the Board which is conditioned on later approval by the Department of the Interior does not fulfill the requirements of the Endangered Species Act. "To give advance approval to whatever Interior might decide is to abdicate the Commission's duty under the Act to make its own fully informed decision." Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 363-64 (1978).

A Licensing Board's finding with regard to the Endangered Species Act aspects of a construction permit application should not be restricted to a consideration of the particular points raised by contentions. Once informed that an endangered species lives in the vicinity of the proposed plant, the Licensing Board is obligated to examine all possible adverse effects upon the species which might result from construction or operation of the plant and to make findings with respect to them. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 361 (1978). In this vein, releases from the plant which will not produce significant adverse effects on endangered species clearly "will not jeopardize their continued existence." The Act does not require a finding that there will not be any adverse effects. "Insignificant effects are not proscribed by the Statute." ALAB-463, 7 NRC at 360. Likewise, if there are no significant adverse effects on an endangered species, there will be no "harm" to the species under Section 9 of the Act. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 366-67, n.114 (1978).

6.8.2 Degree of Proof Needed re Endangered Species Act

The finding that the proposed action will not jeopardize the continued existence of an endangered species must be established by a preponderance of the evidence rather than by clear and convincing proof. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 360 (1978).

6.9 Financial Qualifications

Section 182(a) of the AEA does not impose any financial qualifications requirement on license applicants; it merely authorizes the Commission to impose such financial requirements as it may deem appropriate. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 8, 9 (1978); see also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-27, 61 NRC 145, 149 (2004). The relevant implementing regulation is 10 C.F.R. 50.33(f) which is amplified by Appendix C to 10 C.F.R. Part 50. Appendix C of 10 C.F.R. Part 50 is not designed to apply to a 10 C.F.R. Part 72 proceeding in toto, although there may be some parallels in

appropriate circumstances. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-6, 51 NRC 101, 114 (2000).

The "reasonable assurance" requirement in the regulation was adopted to assure that financial conditions did not compromise the applicant's clear self-interest in safety. It contemplates actual inquiry into the applicant's financial qualifications. It is not enough that the applicant is a regulated public utility. "Reasonable assurance" means that the applicant must have a reasonable financing plan in light of relevant circumstances. However, given the history of the present rule and the relatively modest implementing requirements in Appendix C, it does not mean a demonstration of near certainty that an applicant will never be pressed for funds during the course of construction. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 18 (1978). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-895, 28 NRC 7, 18 & n.39 (1988), citing Coalition for the Environment v. NRC, 795 F.2d 168 (D.C. Cir. 1986).

Financial assurance findings (whether under Part 50 or Part 72) are, by their nature, predictive and "speculation of some sort is unavoidable." Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-03-11, 58 NRC 47, 71 (2003).

Financial assurance must be viewed on a case-by-case basis. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-10, 61 NRC 131, 138 (2004).

Non-utility applicants for operating licenses are required by the NRC's financial qualifications rule to demonstrate adequate financial qualifications before operating a facility. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 129 (2001). A Board is not authorized to grant exemptions from this rule or to acquiesce in arguments that would result in the rule's circumvention. Gulf States Utilities Co. (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460, 473 (1995).

Safety considerations are the heart of the financial qualifications rule. The Board reasoned in this regard that insufficient funding can cause licensees to cut corners on operating or maintenance expenses. Gulf States Utilities Co. (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460, 473 (1995). Moreover, the Commission has recognized that a licensee in financially straitened circumstances would be under more pressure to commit safety violations or take safety "shortcuts" than one in good financial shape. ; Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 48 (1994).

The Commission found in a proceeding for an ISFSI license (where the adequacy of model service agreements for ensuring sufficient financing was at issue) that the applicant need not establish the creditworthiness of each and every potential customer prior to operations. It is enough that the applicant's customers will have the ability and contractual obligation to pay. The applicant cannot be expected to prove that all of its customers invariably will fulfill their financial commitments; there is always a risk in business that some customer may ignore its obligations and force its creditor into court. "The Commission will accept financial assurances based on plausible assumptions and forecasts, even though the possibility is not insignificant that things will turn out less favorably than expected." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage

Installation), CLI-04-10, 61 NRC 131, 137-38 (2004) (quoting N. Atl. Energy Serv. Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 222 (1999)).

The fundamental question in reviewing an intervenor's challenge to an ISFSI applicant's financing plan is whether it departs from governing regulations, the Commission's controlling order on financial qualifications (CLI-00-13), and sound financial sense. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-10, 61 NRC 131, 139 (2004).

Following judicial review of an earlier rule (see New England Coalition on Nuclear Pollution v. NRC, 727 F.2d 1127 (D.C. Cir. 1984), on Sep. 12, 1984, the Commission issued amendments to 10 C.F.R. § 50.33(f) which:

(1) reinstated financial qualifications review for electric utilities which apply for facility construction permits; and
(2) eliminated financial qualifications review for electric utilities which apply for operating licenses, if the utility is a regulated public utility or is authorized to set its own rates.

See 49 Fed. Reg. 35,747 (Sep. 12, 1984), as corrected, 49 Fed. Reg. 36,631 (Sep. 19, 1984); Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-784, 20 NRC 845, 847 (1984); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC 59, 84 & n.126 (1985).

Commission regulations recognize that underfunding can affect plant safety. Under 10 C.F.R. § 50.33(f)(2), applicants – with the exception of electric utilities – seeking to operate a facility must demonstrate that they possess or have reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license. Behind the financial qualifications rule is a safety rationale. Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 48 (1994).

In its statement of considerations accompanying the 1984 promulgation of the revised financial qualification review requirements, the Commission discussed the special circumstances which might justify a waiver, pursuant to 10 C.F.R. § 2.335(b) (formerly § 2.758(b)), of the exemption from financial qualifications review for an electric utility operating license applicant. 49 Fed. Reg. 35,747, 35,751 (Sep. 12, 1984). Among the possible special circumstances for which a waiver may be appropriate are: (1) a showing that the local public utility commission will not allow the electric utility to recover the costs of operating the facility through its rates; and (2) a showing of a nexus between the safe operation of a facility and the electric utility's financial condition. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-895, 28 NRC 7, 17, 21-22 (1988). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-89-10, 29 NRC 297, 302-03 (1989), aff'd in part and rev'd in part, ALAB-920, 30 NRC 121, 133-35 (1989). The 1984 financial qualifications rulemaking proceeding did not limit the special circumstances that could serve as grounds for waiver under 10 C.F.R. § 2.335 (formerly § 2.758). Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-88-10, 28 NRC 573, 596 (1988), reconsid. denied, CLI-89-3, 29 NRC 234 (1989).

Section 50.33(f), the Commission's financial qualification exemption, applies only to regulated electric utilities. Gulf States Utilities Co., et al. (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31 (1994), aff'd, CLI-94-10, 40 NRC 43 (1994).

If a licensee has a service agreement with an "electrical utility" as defined in 10 C.F.R. § 50.33(f), in which the utility offers reasonable assurances as to the payment of the licensee's costs, then this satisfies the financial qualifications of 10 C.F.R. § 50.33(f) for the licensing of utilization and production facilities and the financial qualifications of 10 C.F.R. § 72 for the licensing of ISFSIs. Northern States Power Co. (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 50-52 (2000).

In the licensing of a proposed ISFSI facility, the use of pass-through provisions (labeling certain expenditures as costs that the applicant will pass directly to its customers) offers reasonable assurance that the construction, operating, and maintenance costs will be covered by incoming revenue. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-05-21, 62 NRC 248, 301 (2003).

Reasonable financial assurance requires an applicant to only provide estimates of construction costs, not pre-construction costs, such as design drawings of the facility. PFS, LBP-05-21, 62 NRC at 301.

An anti-CWIP (construction work in progress) law which prohibits a public utility from recovering plant construction costs through rate increases until the plant is in commercial operation is not a special circumstance which justifies a waiver under 10 C.F.R. 2.335 (formerly 2.758) of the exemption from financial qualifications review for public utility operating license applicants. For a complete discussion of the NRC's procedures for waiving a rule of general applicability, see infra Section 6.21.4. The potential delay in recovering such costs was considered by the Commission during rulemaking and was found not to undercut the rationale of the rule that ratemakers would authorize sufficient rates to assure adequate funding for safe full power operation of the plant. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-89-20, 30 NRC 231, 240-41 (1989).

In order to obtain a waiver, pursuant to 10 C.F.R. § 2.335 (formerly § 2.758(b)), of the financial qualifications review exemption in a low-power operating license proceeding, a petitioner must establish that the electric utility has insufficient funds to cover the costs of safe low-power operation of its facility. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-895, 28 NRC 7, 18-19 (1988).

Unusual and compelling circumstances are needed to warrant a waiver of the financial qualifications rule. Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), LBP-83-37, 18 NRC 52, 57 (1983). Implicit in the "compelling circumstances" standard is the need to show the existence of at least a "significant" safety issue. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-89-3, 29 NRC 234, 239 (1989).

A waiver of the 10 C.F.R. Part 72 financial qualifications standards is not an infringement on an intervenor's right to litigate material issues bearing on a licensing decision. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-6, 51 NRC 101, 117 (2000).

Matters involving decommissioning funding are considered under the Commission's decommissioning rule, issued on June 27, 1988, and not as a part of the financial qualifications review under 10 C.F.R. § 50.33(f). The decommissioning rule requires an

applicant to provide reasonable assurance that, at the time of termination of operations, it will have available adequate funds for the decommissioning of its facility in a safe and timely manner. 53 Fed. Reg. 24,018, 24,037 (June 27, 1988). The Commission applied the decommissioning rule to the unusual circumstances in the Seabrook operating license proceeding, and directed the applicant to provide, before low-power operation could be authorized, reasonable assurance that adequate funding for decommissioning will be available in the event that low-power operation has occurred and a full-power license is not granted. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-88-7, 28 NRC 271, 272-73 (1988). In a subsequent decision, the Commission held that the decommissioning rule is directed to the safe and timely decommissioning of a reactor after a lengthy period of full-power operation, and thus is not directly applicable to the hypothetical situation addressed in CLI-88-7 – the denial of a full-power operating license following low power operation. However, due to the unusual circumstances in the Seabrook operating license proceeding, the Commission in CLI-88-7 did apply the safety concern underlying the decommissioning rule requiring the availability of adequate funds for safe and timely decommissioning. The Commission did not require the applicants to provide a final decommissioning plan containing precise and detailed information. Given the hypothetical situation, the applicants were required to provide only reasonable estimates of decommissioning costs and a reasonable assurance of availability of funding. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-88-10, 28 NRC 573, 584-86 (1988), reconsid. denied, CLI-89-3, 29 NRC 234 (1989), second motion for reconsid. denied, CLI-89-7, 29 NRC 395 (1989).

Outside of the reactor context, it is sufficient for a license applicant to identify adequate mechanisms to demonstrate reasonable financial assurance, such as license conditions and other commitments. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000) (citing Louisiana Energy Services (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997)); See also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-27, 61 NRC 145, 150 (2004) (stating that in cases where the applicant does not have cash in hand, the Commission has allowed the use of license conditions to ensure that the licensee does not start operations without assurance of future revenues). In CLI-04-27, the Commission noted that it had earlier approved the use of service contracts to show financial assurance in an ISFSI licensing proceeding; it further determined that, under certain circumstances, an applicant's use of "passthrough" contracts could provide the necessary assurances as well as "fixed-price" contracts. See PFS, CLI-04-27, 61 NRC at 157-58. In a license-transfer proceeding, the NRC's financial qualifications rule is satisfied if the applicant provides a cost and revenue projection for the first five years of operation that predicts sufficient revenue to cover operating costs. GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 206-08 (2000), cited in Vermont Yankee Nuclear Power Corp., et al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 176 (2000).

The financial requirements for an ISFSI under 10 C.F.R. Part 72 require nonspecific financial assurances, which are not the same as the more exacting financial requirements for a reactor license under 10 C.F.R. Part 50. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 30-31 (2000).

The NRC's regulations [at 10 C.F.R. 72.22(e)] require the license applicant to provide "reasonable assurance" that it can cover the "estimated costs" of operating and decommissioning the facility. This regulation requires that costs be estimated. Private

Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-27, 61 NRC 145, 155 (2004). However, it does not impose a requirement that cost estimates be written into license conditions. Id. at 156.

A showing of reasonable assurance of estimating construction and operating costs for an ISFSI does not require that the applicant make the same showing of financial capability required under Part 50. Rather, reasonable financial assurance for an ISFSI applicant is provided through reasonable cost estimates based on plausible assumptions and forecasts. Assumptions seriously at odds with governing realities will not be acceptable. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-05-21, 62 NRC 248, 298-99 (2003).

Pursuant to 10 C.F.R. § 50.33(f)(2), applicants for a license transfer "shall submit estimates for total annual operating costs for each of the first five years of operation of the facility." The Commission has interpreted this rule as requiring "data for the first five 12-month periods after the proposed transfer." Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 131 (2001). If the submissions are deemed insufficient, this alone is not grounds for rejecting the application. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 131 (2001); citing Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 95-96 (1995), reconsid. denied, CLI-95-8, 41 NRC 386, 395 (1995). If the missing data concerning financial qualifications can easily be submitted for consideration at the adjudicatory hearing, the Presiding Officer need not reject the application. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 131 (2001).

The requirement that a party provide reasonable financial assurance does not require an ironclad guarantee of future business success. The mere casting of a doubt on some aspect of proposed funding plans is not in itself sufficient to defeat a finding of reasonable assurance. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 31 (2000) (citing Louisiana Energy Services (Claiborne Enrichment Center), CLI-97-15, 46 NRC 297 (1997); North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 222 (1999)).

A financial assurance plan should not be left for later resolution or a second round of hearings close to the time of operation. Hydro Resources, Inc., CLI-00-8, 51 NRC 227, 240 (2000).

In a proceeding concerning the adequacy of financial assurance for an ISFSI license, the Commission stated in dicta that in ruling on the acceptability of any given license condition, it (the Commission) does not intend to forestall the Board's ability to determine the acceptability of an alternative method of meeting NRC financial assurance requirements. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-27, 61 NRC 145, 153 n.28 (2004).

6.10 Generic Issues

A generic issue may be defined as one which is applicable to the industry as a whole or to all reactors or facilities or to all reactors or facilities of a certain type. Current regulations

do not deal specifically with generic issues or the manner in which they are to be addressed.

6.10.1 Consideration of Generic Issues in Licensing Proceedings

As a general rule, a true generic issue should not be considered in individual licensing proceedings but should be handled in rulemaking. See, e.g., Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-128, 6 AEC 399, 400, 401 (1973); Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-99, 6 AEC 53, 55-56 (1973). The Commission had indicated at least that generic safety questions should be resolved in rulemaking proceedings whenever possible. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 814-815, clarified, CLI-74-43, 8 AEC 826 (1974). An appellate court has indicated that generic proceedings "are a more efficient forum in which to develop issues without needless repetition and potential for delay." Natural Resources Defense Council v. NRC, 547 F.2d 633 (D.C. Cir. 1976), rev'd and remanded, 435 U.S. 519 (1978), on remand, 685 F.2d 459 (D.C. Cir. 1982), rev'd, 462 U.S. 87 (1983). To the same effect, see Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-380, 5 NRC 572 (1977). Nevertheless, it appears that generic issues may properly be considered in individual adjudicatory proceedings in certain circumstances.

For example, an Appeal Board has held that Licensing Boards should not accept, in individual licensing cases, any contentions which are or are about to become the subject of general rulemaking but apparently may accept so-called "generic issues" which are not (or are not about to become) the subjects of rulemaking. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79 (1974); Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-86-8, 23 NRC 182, 185-86 (1986). Moreover, if an issue is already the subject of regulations, the publication of new proposed rules does not necessarily suspend the effectiveness of the existing rules. Contentions under these circumstances need not be dismissed unless the Commission has specifically directed that they be dismissed during pendency of the rulemaking procedure.

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-1A, 15 NRC 43, 45 (1982); Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-86-8, 23 NRC 182,186 (1986). The basic criterion is safety and whether there is a substantial safety reason for litigating the generic issue as the rulemaking progresses. In some cases, such litigation probably should be allowed if it appears that the facility in question may be licensed to operate before the rulemaking can be completed. In such a case, litigation may be necessary as a predicate for required safety findings. In other cases, however, it may become apparent that the rulemaking will be completed well before the facility can be licensed to operate. In that kind of case, there would normally be no safety justification for litigating the generic issues and strong resource management reasons not to litigate. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-82-107A, 16 NRC 1791, 1809 (1982).

In an operating license proceeding, where a hearing is to be held to consider other issues, Licensing Boards are enjoined, in the absence of issues raised by a party, to determine whether the Staff's resolution of various generic safety issues applicable to the reactor in question is "at least plausible and…if proven to be of

substance…adequate to justify operation." Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1& 2), LBP-79-6, 9 NRC 291, 311 (1979). See Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-86-5, 23 NRC 89, 90 (1986).

A Licensing Board must refrain from scrutinizing the substance of particular explanations in the safety evaluation report (SER) justifying operation of a plant prior to the resolution of an unresolved generic safety issue. The Board should only look to see whether the generic issue has been taken into account in a manner that is at least plausible and that, if proven to be of substance, would be adequate to justify operation. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1559 (1982), citing Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-491, 8 NRC 245 (1978).

As a matter of policy, most evidentiary hearings in NRC proceedings are conducted in the general vicinity of the site of the facility involved. In generic matters, however, when the hearing encompasses distinct, geographically separated facilities and no relationship exists between the highly technical questions to be heard and the particular features of those facilities or their sites, the governing consideration in determining the place of hearing should be the convenience of the participants in the hearing. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-566, 10 NRC 527, 530-31 (1979).

A Licensing Board does not have to apply the same degree of scrutiny to uncontested generic unresolved safety issues as is applied to issues subject to the adversarial process. A Licensing Board is required to examine the Staff's presentation in the SER on such uncontested issues to determine whether a basis is provided to permit operation of the facility pending resolution of those issues. A Licensing Board need not make formal findings of fact on these matters as if they were contested issues, but it is required to determine that the relevant generic unresolved safety issues do not raise a "serious safety, environmental, or common defense and security matter" such as to require exercise of the Board's authority under 10 C.F.R. § 2.340 (formerly § 2.760a) to raise and decide such issues sua sponte. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 465 (1983), citing Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1110-13 (1983).

6.10.2 Effect of Unresolved Generic Issues

6.10.2.1 Effect of Unresolved Generic Issues in Construction Permit Proceedings

The existence of an unresolved generic safety question does not necessarily require withholding of construction permits since the Commission has available to it the provisions of 10 C.F.R. § 50.109 for backfitting and the procedures of 10 C.F.R. Part 2, Subpart B for imposing new requirements or conditions. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404 (1975).

While unresolved generic issues might not preclude issuance of a construction permit, those generic issues applicable to the facility in question must be considered

and information must be presented on whether (1) the problem has already been resolved for the reactor under study, (2) there is a reasonable basis for concluding that a satisfactory solution will be obtained before the reactor is put into operation, or (3) the problem will have no safety implications until after several years of reactor operation, and if there is no resolution by then, alternate means will be available to assure that continued operation, if permitted, will not pose an undue risk. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 775 (1977). See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-8219, 15 NRC 601, 614 (1982).

6.10.2.2 Effect of Unresolved Generic Issues in Operating License Proceedings

An unresolved safety issue cannot be disregarded in individual licensing proceedings merely because the issue also has generic applicability; rather, for an applicant to succeed, there must be some explanation why construction or operation can proceed although an overall solution has not been found.

Where issuance of an operating license is involved, the justification for allowing operation may be more difficult to come by than would be the case where a construction permit is involved. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-491, 8 NRC 245, 248 (1978).

Explanations of why an operating license should be issued despite the existence of unresolved generic safety issues should appear in the SER. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-491, 8 NRC 245, 249 (1978).

Where generic unresolved safety issues are involved in an operating license proceeding, for an application to succeed there must be some explanation why the operation can proceed even though an overall solution has not been found. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 472 (1983), aff'd, ALAB-788, 20 NRC 1102, 1135 n.187 (1984). A plant will be allowed to operate pending resolution of the unresolved issues when there is reasonable assurance that the facility can be operated without undue risk to the health and safety of the public. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 472 (1983), aff'd, ALAB-788, 20 NRC 1102, 1135 n.187 (1984).

6.11 Power Reactor License Renewal Proceeding

The NRC will conduct a hearing, if requested, on an application to renew a nuclear power reactor operating license. 10 C.F.R. § 54.27, 56 Fed. Reg. 64,943, 64,960-61 (Dec. 13, 1991). However, a formal "on-the-record" hearing in accordance with the Administrative Procedures Act (APA) is not required for reactor license renewal proceedings under Section 189 of the AEA. See Baltimore Gas and Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 342 (1998). The hearing will be limited to consideration of issues concerning (1) age-related degradation unique to license renewal and (2) compliance with NEPA requirements. 10 C.F.R. § 54.29(a), (b). The Commission may, at its discretion, admit an issue for resolution in the formal renewal hearing if the intervenor can demonstrate that the issue raises a concern

relating to adequate protection which would occur only during the renewal period. 10 C.F.R. § 54.29(c), § 2.335 (formerly § 2.758(b)(2)).

The "proximity presumption" used in reactor construction and operating license proceedings should also apply to reactor license renewal proceedings. For construction permit and operating license proceedings, the NRC recognizes a presumption that persons who live, work or otherwise have contact within the area around the reactor have standing to intervene if they live within close proximity of the facility (e.g., 50 miles). Reactor license extension cases should be treated similarly because they allow operation of a reactor over an additional period of time during which the reactor can be subject to some of the same equipment failure and personnel error as during operations over the original period of the license. Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 & 3), LBP-98-33, 48 NRC 381, 385 n.1 (1998).

The Commission's license renewal environmental regulations are based on NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (May 1996). License renewal regulations only require the agency to prepare a supplement to the generic environmental impact statement (GEIS) for each license renewal action. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 152-53 (2001).

For issues listed in Subpart A, Appendix B of 10 C.F.R. Part 51 as Category 1 issues, the Commission resolved the issues generically for all plants and those issues are not subject to further evaluation in any license renewal proceeding. See 61 Fed. Reg. 28, 467 (1996); see also, Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Station & Vermont Yankee Nuclear Power Stations), CLI-07-3, 65 NRC 13, 20 (2007) (stating that any contention on a Category 1 issue fundamentally amounts to a challenge to the Commission's regulation which bars challenges to generic environmental findings). Consequently, the Commission's license renewal regulations also limit the information that the applicant need include in its environmental report, see 10 C.F.R. 51.71(d), and the matters the agency need consider in draft and final supplemental environmental impact statements (SEISs) to the GEIS. See Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Station & Vermont Yankee Nuclear Power Stations), CLI-07-3, 65 NRC 13, 21 (2007) reconsid. denied, Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim & Vermont Yankee Nuclear Power Stations), CLI-07-13, 65 NRC 211 (2007); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 11 (2001); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 154 (2001); Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Station & Vermont Yankee Nuclear Power Stations), CLI-07-3, 65 NRC 13, 21 (2007) reconsid. denied, Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim & Vermont Yankee Nuclear Power Stations), CLI-07-13, 65 NRC 211 (2007). License renewal applicants are not required to consider mitigation of the adverse impacts of Category 1 issues. Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC __ (June 17, 2010) (slip op. at 30).

Even when a GEIS has resolved a Category 1 issue generically, the applicant must still provide additional analysis in its environmental report if new significant information may bear on the applicability of the Category 1 finding at the particular plant. The Commission has identified three methods by which petitioners can petition the NRC to address

significant new information that has arisen since the GEIS on Category 1 issues was finalized: (1) petitioners may seek a waiver to a rule if they possess information that may show that a generic rule would not serve its purpose at the specific plant; (2) petitioners may petition the NRC to initiate a new rulemaking process; or (3) petitioners may use the SEIS notice and comment process to request that the NRC forgo use of the suspect generic finding and suspend license renewal proceedings, pending a new rulemaking or update of the GEIS. However, the Commission treats all spent fuel accidents as generic, whatever their cause. There is to be no litigation of spent fuel accidents. Entergy Nuclear Generation Co. And Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-24, 64 NRC 257, 294-95 (2006), aff'd, CLI-07-3, 65 NRC 13 (2007).

10 C.F.R. Part 51, Subpart A, Appendix B, Category 2 issues are site specific and must be addressed by the applicant in its environmental report and by the NRC in its draft and final SEISs for the facility. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 153 (2001); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17), 54 NRC 3, 11 (2001).

Probabilistic risk assessments are not required for the renewal of an operating license. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 159-160 (2001).

Offsite radiological impacts are classified as a Category 1 issue in 10 C.F.R. 51, Subpart A, Appendix B and, therefore, are excluded from consideration in this renewal proceeding. See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 162 (2001).

Although 10 C.F.R. 51, Subpart A, Appendix B, Category 2 issues may be considered during the license renewal process, all the Category 2 groundwater conflict issues deal with the issue of withdrawal of groundwater by the applicant when there are competing groundwater uses. See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 164 (2001).

Issues involving the current licensing basis for the facility are not within the scope of review of license renewal. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 165 (2001); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 8-9 (2001); Entergy Nuclear Generation Co. And Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-24, 64 NRC 257, 276 (2006). Contentions related to terrorism, lack of a valid National Pollutant Discharge Elimination System permit, and emergency planning are not aging-related issues and, therefore, are outside the scope of license renewal hearings. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 NRC 631, 638-40 (2004).

"Terrorism contentions, are by their very nature, directly related to security," are unrelated to the detrimental effects of aging and, therefore, are "beyond the scope of, not 'material' to, and inadmissible in, a license renewal proceeding." AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007), aff'd sub nom., New Jersey Department of Environmental Protection v. NRC, 561 F.3d 132 (3rd Cir. 2009). Furthermore, NEPA imposes no legal duty upon the NRC to consider the environmental impacts of intentional malevolent acts in conjunction with commercial power reactor license renewal, and the NRC has already considered the environmental

impacts of a hypothetical terrorist attack on a nuclear plant and found that these impacts would be no worse than those caused by internally initiated events. CLI-07-8, 65 NRC at 29-131. The Third Circuit has upheld the Commission's view and rejected the holding of the Ninth Circuit. New Jersey Department of Environmental Protection, 561 F.3d at 143, 144. However, the Ninth Circuit has previously concluded that NEPA requires consideration of the environmental impacts of a terrorist attack. San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016, 1028-35 (2006). The Commission has indicated that it will continue to follow its normal practice outside the Ninth Circuit. AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128-29 (2007).

A request for the Commission to grant an exemption or waiver of 10 C.F.R. 50.47(a)(1), and thereby permit adjudication of emergency planning issues in a license renewal proceeding must meet the requirements of 10 C.F.R. § 2.335(b). Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 559-60 (2005). See infra Section 6.21.4 (discussing petitions for waiver).

With respect to technical issues, the renewal regulations, 10 C.F.R. Part 54, are footed on the principle that, with the exception of the detrimental effects of aging and a few other issues related to safety only during the period of extended operations, the agency's existing regulatory processes are sufficient to ensure that the licensing bases of operating plants provide an acceptable level of safety to protect the public health and safety. 60 Fed. Reg. 22,464; Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-08-22, 68 NRC 590, 598-600 (2008); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 7-8 (2001); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 152 (2001). The NRC's ongoing regulatory oversight process, which includes generic and plant-specific reviews, inspections, and enforcement actions, continuously assesses the adequacy of and compliance with the licensing basis. Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC __ (June 17, 2010) (slip op. at 4, 18, & n.76). The Commission has concluded that "the 'only issue' where the regulatory process may not maintain a plant's current licensing basis involves the potential "detrimental effects of aging on the functionality of certain systems, structures, and components in the period of extended operation." Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC __ (June 17, 2010) (slip op. at 4-5).

A petitioner in a license renewal proceeding must explain how an issue falls within the framework of license renewal, which "focuses on 'the potential impacts of an additional 20 years of nuclear power plant operation,' not on everyday operational issues." Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-06-4, 63 NRC 32, 37 (2006) (quoting Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 NRC 631, 637-38 (2004)); see also Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-08-22, 68 NRC 590, 598-600 (2008); Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 7 (2001)). Arguments concerning licensee compliance with radiological dose limits and other current licensing basis requirements are ongoing operational issues and go to the adequacy of the NRC's regulatory oversight process. Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC __ (June 17, 2010) (slip op. at 15). Such matters are outside the scope of license renewal. Id.

The scope of a safety review for license renewal is limited to (1) managing the effects of aging of certain systems, structures, and components; (2) review of time-limited aging evaluations; and (3) any matters for which the Commission itself has waived the application of these rules. Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-08-22, 68 NRC 590, 598-600 (2008); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 152 (2001). Entergy Nuclear Generation Co. And Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-24, 64 NRC 257, 276, 277 (2006). Three general categories of SSCs "fall within the 'initial focus'" of license renewal review as outlined in 10 C.F.R. § 54.4. Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC __ (June 17, 2010) (slip op. at 7). Section 54.21 provides standards for license renewal applicant to determine which of the components within the three general categories defined in § 54.4 require aging management review. Id. Only those SSCs that perform "an intended function" as defined by § 54.4 require aging management review. Id. With respect to each structure, system, or component requiring aging management review, "a license renewal applicant must demonstrate that the 'effects of aging will be adequately managed so that the *intended function(s)* [as defined in § 54.4] will be maintained consistent with the CLB for the period of extended operation.'" Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC __ (June 17, 2010) (slip op. at 8) (quoting 10 C.F.R. 54.21(a)(3)) (emphasis in original)). While some SSCs perform more than one function, the license renewal application is only required to provide reasonable assurance that SSCs "will perform such that the *intended functions*, as delineated in §54.4, are maintained consistent with the CLB." Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC __ (June 17, 2010) (slip op. at 17) (quoting License Renewal Rule, 60 Fed. Reg. 22,461, 22,479 (May 8, 1995)) (emphasis in original).

The scope of Commission review determines the scope of admissible contentions in a renewal hearing absent a Commission finding under 10 C.F.R. 2.335 (formerly 2.758). 60 Fed. Reg. 22,461, 22,482 n.2; Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 152 (2001). AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station) et al., CLI-08-23, 68 NRC 461, 466-68 (2008) (describing the scope of review for license renewal and the contents of a license renewal application).

Under 10 C.F.R. §§ 54.21(a) and (c), and 54.4, the scope of a proceeding on an operating license renewal is limited to a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses (TLAAs). Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-00-23, 52 NRC 327, 329 (2000). Amergen Energy Company, LLC (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 235 (2006). Aging management programs (AMPs) for SSCs identified by 10 C.F.R. § 54.4 are within the scope of license renewal proceedings. For those SSCs subject to aging management review that are not current licensing basis (CLB) issues, discussion of proposed inspection and monitoring details will come before this Board only as they are needed to demonstrate that the applicant's AMP does or does not achieve the desired goal of providing assurance that the intended function of relevant SSCs discussed herein will be maintained for the license renewal period. Entergy Nuclear Vermont Yankee, LLC and

Entergy Nuclear Operations Inc. (Vermont Yankee Nuclear Power Station), LBP-08-25, 68 NRC 763, 786 (2008); Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 81 (2008).

Pursuant to Section 54.21(a)(3), each application must contain an Integrated Plant Assessment ("IPA") for which specified components will, inter alia, demonstrate that the effects of aging will be adequately managed so that the intended function(s) will be maintained consistent with the CLB for the period of extended operation. A commitment to develop a program does not demonstrate that the effects of aging will be adequately managed. Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 86 (2008). The findings required by 10 C.F.R. § 54.29(a) are based upon both past and future actions—actions that "have been or will be taken." Entergy Nuclear Vermont Yankee, LLC and Energy Nuclear Operations, Inc., (Vermont Yankee Nuclear Power Station) CLI-10-17, 71 NRC __ (July 8, 2010) (slip op. 44). Similarly, 10 C.F.R. § 54.21(c)(1) permits demonstrations after issuance of the renewed licenses: "an applicant's use of an aging management program identified in the GALL Report constitutes reasonable assurance that it will manage the targeted aging effect during the renewal period." Id. (quoting AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 468 (2010)). The GALL Report "was prepared at [the Commission's] behest" and "provides that one way a license renewal applicant may demonstrate that an AMP will effectively manage the effects of aging during the period of extended operation is by stating that a program is 'consistent with' or 'based on' the GALL Report." Entergy Nuclear Vermont Yankee, LLC and Energy Nuclear Operations, Inc., CLI-10-17, 71 NRC __ (July 8, 2010) (slip op. 45).

Section 54.21(c)(1) focuses on TLAAs and requires that license renewal applications include an evaluation of TLAAs demonstrating either (i) that the analyses remain valid for the period of extended operation; (ii) the analyses have been projected to the end of the period of extended operation; or (iii) the effects of aging on the intended function(s) will be adequately managed for the period of extended operation. Options (i) and (ii) are distinct from option (iii) in that options (i) and (ii) require the applicant to demonstrate that the existing TLAAs in its CLB are either valid for the 20-year renewal term or have been projected to the end of that period. Option (iii), in contrast, does not rely on existing TLAAs in the applicant's CLB, but upon an aging management plan. Entergy Nuclear Vermont Yankee, LLC and Energy Nuclear Operations, Inc., CLI-10-17, 71 NRC __ (July 8, 2010) (slip op. at 19-20).

The Commission determined that it would be unnecessary and wasteful to require a full reassessment of issues that were thoroughly reviewed when the facility was first licensed and which are routinely monitored and assessed by agency oversight and mandated licensee programs. License renewal review focuses on "those potential detrimental effects of aging that are not routinely addressed by ongoing regulatory oversight programs." Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 7 (2001); Entergy Nuclear Generation Co. And Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-24, 64 NRC 257, 275-76 (2006).

"[B]road-based issues akin to safety culture – such as operational history, quality assurance, quality control, management competence, and human factors – [are] beyond the bounds of a license renewal proceeding. This is because these conceptual issues fall outside the bounds of the passive, safety related physical systems, structures and

components that form the scope of license renewal." Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI 10-27, __ NRC __ (slip op. at 10-11) (2010). Allowing inspection reports to "form the basis for a 'safety culture' contention could result in a potentially never-ending stream of mini-trials on operational issues." Id. at 11-12.

The aging of materials is important during the period of extended operation, since certain components may have been designed upon an assumed service life of forty years. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 7 (2001). Entergy Nuclear Generation Co. And Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-24, 64 NRC 257, 276 (2006). Part 54 requires license renewal applicants to demonstrate how they will manage the effects of aging during the period of extended operation. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 8 (2001). Applicants must demonstrate how their programs will manage the effects of aging in a detailed manner with respect to specific components and structures, rather than at a more generalized system level. Entergy Nuclear Generation Co. And Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-24, 64 NRC 257, 275 (2006). Before the NRC will grant a license renewal application, the applicant must reassess safety reviews or analyses made during the original license period that were based upon a presumed service life not exceeding the original license term. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 8 (2001). The reassessment must "(1) show that the earlier analysis will remain valid for the extended operation period; (2) modify and extend the analysis to apply to a longer term such as 60 years; or (3) otherwise demonstrate that the effects of aging will be adequately managed in the renewal term." Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 8 (2001) (citations omitted).

Sections 54.21 and 54.29 require that license renewal applications demonstrate by a preponderance of the evidence that aging management programs provide reasonable assurance that SSCs will continue to perform their intended functions consistent with the current licensing basis during the period of extended operation. Whether the reasonable assurance is met will be determined on a case-by-case basis using sound technical judgment. Reasonable assurance "is not susceptible to formalistic quantification (i.e., 95% confidence) or mechanistic application." AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-07-17, 66 NRC 327, 340 (2007), aff'd CLI-09-07, 69 NRC 235 (2009)

Review of environmental issues in a licensing renewal proceeding is limited in accordance with 10 C.F.R. §§ 51.71(d) and 51.95(c). Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Unit 3 & 4), CLI-00-23, 52 NRC 327, 329 (2000); Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations Inc. (Vermont Yankee Nuclear Power Station), LBP-08-25, 68 NRC 763, 785 (2008).

Apart from its policy of encouraging settlements, the Commission has an equally important policy of supporting prompt decisionmaking. This promptness policy carries extra weight in license renewal proceedings. Further, until a Licensing Board has addressed the threshold issues of standing and admissibility of contentions, the proceeding is too inchoate to call for aggressive Board encouragement of settlement. Millstone, CLI-05-24, 62 NRC at 568-70.

6.12 Masters in NRC Proceedings

For a discussion of the role of a "master" in NRC proceedings, see Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 759 (1975) and Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-290, 2 NRC 401 (1975). In ALAB-300, the Appeal Board ruled that parties to an NRC proceeding may voluntarily agree among themselves to have a master of their own choosing make certain discovery rulings by which they will abide. In effect, the master's rulings were like stipulations among the parties. The question as to whether the Licensing and Appeal Boards retained jurisdiction to review the master's discovery rulings was not raised in this case. Consequently, the Appeal Board did not reach a decision as to that issue. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 768 (1975).

10 C.F.R. Part 2 provides for the use of special assistants to Licensing Boards. Specifically, special assistants may be appointed to take evidence and prepare a record. With the consent of all parties, the special assistant may take evidence and prepare a report that becomes a part of the record, subject to appeal to the Licensing Board. 10 C.F.R. § 2.322 (formerly § 2.722).

It is within the discretion of the Special Master to hold information confidential if to do so would increase the likelihood of a fair and impartial hearing. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-81-50, 14 NRC 888, 894 (1981).

A Special Master's conclusions are considered as informed advice to the Licensing Board; however, the Board must independently arrive at its own factual conclusions. Where judgment is material to a particular conclusion, the Board must rely on its own collegial consensus. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-82-56, 16 NRC 281, 289 (1982). Pursuant to 10 C.F.R. § 2.322(a)(3), the regulations under which a Special Master may be appointed in NRC proceedings specify that Special Masters' reports are advisory only. The Board alone is authorized by statute, regulation and the notice of hearing to render the initial decision in proceedings. The decision must be rendered upon the Board's own understanding of the reliable, probative and substantial evidence of the record. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-82-56, 16 NRC 281, 288 (1982).

Where the Special Master's conclusions are materially affected by a witness' demeanor, the Licensing Board must give especially careful consideration to whether or not other more objective witness credibility standards are consistent with the Special Master's conclusions. However, the Licensing Board may afford weight to the Special Master's reported direct observations of a witness' demeanor. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-82-56, 16 NRC 281, 289 (1982)

6.13 SAMA Analysis in Reactor License Renewal

The scope of the draft and final SEIS is limited to the matters that 10 C.F.R. 51.33(c) requires the applicant to provide in its environmental report. These requirements do not include severe accident risks, but only "severe accident mitigation alternatives (SAMA)." 10 C.F.R. 51.53(c)(3)(ii)(L). The Commission, therefore, has left consideration of SAMAs as the only Category 2 issue with respect to severe accidents. Florida Power & Light Co.

(Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 160-161 (2001).

The purpose of a SAMA review is to ensure that any plant changes that have a potential for significantly improving severe accident safety performance are identified and addressed. Whether a SAMA must be analyzed in an environmental report hinges on whether it could potentially be cost-beneficial. Therefore, a petitioner must, at a minimum, address the approximate relative cost and benefit of the SAMA because without any notion of cost, it is difficult to assess whether a SAMA may be cost-beneficial and thus warrant serious consideration. Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 102 n.308 (2008). SAMAs are rooted in a cost-benefit assessment. Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-17, 56 NRC 1, 5 (2002), rev'g in part & aff'g in part LBP-02-04, 55 NRC 49 (2002); clarified, CLI-02-28, 56 NRC 373 (2002). Any number of possible SAMAs may be theoretically conceivable, but many will prove far too costly compared to the reduction in risk that they might provide. Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-17, 56 NRC 1, 12 (2002).

"NRC SAMA analyses are not a substitute for, and do not represent, the NRC NEPA analysis of potential impacts of severe accidents." Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC __ (Mar. 26, 2010) (slip op. at 37). The GEIS for License Renewal "provides a generic evaluation of severe accident impacts and the technical basis for the NRC's conclusion that 'the probability weight consequences of atmospheric releases, fallout onto open bodies of water, releases to groundwater, and societal and economic impacts from severe accidents are small for all plants.'" Id. at 38. The NRC's generic assessment of the environmental impacts of severe accidents for all existing plants during the license renewal term is bounding. Id. In contrast, SAMA analysis is site-specific mitigation analysis. Id. NEPA does not demand a "fully developed plan" or a "detailed examination of specific measures which will be employed" to mitigate adverse environmental effects. Id. (citing Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 431 and Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 353 (1989)). See also Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-22, 71 NRC __ (Aug. 27, 2010) (slip op. at 9). Accordingly, "unless it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated, no purpose would be served to further refine the SAMA analysis, whose goal is only to determine what safety enhancements are cost-effective to implement." CLI-10-11, 71 NRC __ (Mar. 26, 2010) (slip op. at 39).

With respect to modeling, the mere fact that a plume model may not affect all meteorological phenomena does not necessarily mean the SAMA cost-benefit conclusions are incorrect. Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-22, 71 NRC __ (Aug. 27, 2010) (slip op. at 9).

The Commission has endorsed the distinction drawn by a Licensing Board between the need to propose a SAMA and the more substantive question of risk associated with severe accidents. It has also stated unequivocally that SAMAs apply to reactor accidents,

not to spent fuel accidents. Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC __ (June 17, 2010) (slip op. at 22, 34-35 & n.145).

While the seismic SAMA methodology is outlined in the environmental report, a petitioner may assume that, because it cannot check all analysis details, the analysis is incomplete or incorrect. This is mere speculation and such speculation is insufficient to support the admissibility of this contention. A petitioner is not required to redo SAMA analyses in order to raise a material issue. Where a petitioner alleges that the SAMA was done, but that the analysis was significantly flawed due to the use of inaccurate factual assumptions, it may be used to support a contention. Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 102 (2008).

Onsite storage of spent fuel during the period of extended operation is a Category 1 issue and, therefore, has been found not to warrant any additional site-specific analysis of mitigation measures. Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC __ (June 17, 2010) (slip op. at 32).

6.14 Materials Licenses

Notwithstanding the absence of a hearing on an application for a materials license, the Commission's regulations require the Staff to make a number of findings concerning the applicant and its ability to protect the public health and safety before the issuance of a materials license. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-778, 20 NRC 42, 48 (1984). See 10 C.F.R. §§ 70.23, 70.31. Cf. South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895-96 (1981) (finding the regulatory scheme for issuance of materials licenses analogous to the regulatory scheme for the issuance of operating licenses under 10 C.F.R. § 50.57), aff'd sub nom. Fairfield United Action v. NRC, 679 F.2d 261 (D.C. Cir. 1982).

The production, processing and sale of uranium and uranium ore are controlled by the AEA, as amended. Homestake Mining Co. v. Mid-Continent Exploration Co., 282 F.2d 787, 791 (10th Cir. 1960). Natural uranium and ores bearing it in sufficient concentration constitute "source material" and, when enriched for fabrication into nuclear fuel, become "special nuclear material" within the meaning of the Act. (42 U.S.C. § 2014(z) and (aa), 2071, 2091.) Both are expressly subject to Commission regulation (42 U.S.C. § 2073, 2093). 10 C.F.R. Parts 40 and 70 specifically provide for the domestic licensing of source and SNM respectively.

In the special case of uranium enrichment facilities, Section 193 of the AEA "prescribes a one-step process, including a single adjudicatory hearing, that considers both construction and operation." Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 215-216 (2002); see 10 C.F.R. §§ 70.23a, 70.31(e).

The AEA is silent concerning any particular hearing or review requirements for the construction and operation of mixed oxide (MOX) fuel fabrication facilities. Thus, the Commission is free to establish a process to consider construction and operation of MOX facilities. Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 214-215 (2002). The key regulations governing a plutonium processing and fuel fabrication facility, 10 C.F.R. §§ 70.23(a)(7), 70.23(a)(8),

and 70.23(b), contemplate two approvals, construction and operation. Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 216 (2002). In the construction authorization phase, the NRC is examining issues related only to construction, and the review is aimed at the findings required by 10 C.F.R. § 70.23(b) for construction approval. Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 217 (2002).

A Part 40 license applicant need not provide as part of the application process the names of the individuals who will fill positions within its organization in order to demonstrate the technical qualifications of the applicant's personnel. A commitment to hire qualified personnel prior to operations suffices. Hydro Resources, Inc., CLI-00-12, 52 NRC 1, 4 (2000).

The NRC has granted a general license to acquire title to nuclear fuel without first obtaining a specific license. A general license is a license under the AEA that is granted by rule and may be used by anyone who meets the term of the rule, "without the filing of applications with the Commission or the issuance of licensing documents to particular persons." 10 C.F.R. § 70.18. NRC rules establish many general licenses, including a general license for NRC licenses to transport licensed nuclear material in NRC-approved containers. 10 C.F.R. § 71.12. State of New Jersey, CLI-93-25, 38 NRC 289, 293-94 (1993).

Persons may obtain title and own uranium fuel and are free to contract to receive title to such fuel without an NRC license or specific NRC regulatory control. Rochester Gas & Electric Corp. (Sterling Power Project, Nuclear Unit 1), ALAB-507, 8 NRC 551, 554-55 (1978). It is only when a person seeks to reduce its contractual ownership to actual possession that regulatory requirements on possession and use must be met and a specific materials license must be obtained. Sterling, supra, ALAB-507, 8 NRC at 555.

There would be no point to the NRC's general licensing scheme if a licensee's mere use of a general license triggered individual licensing proceedings. State of New Jersey, CLI-93-25, 38 NRC 289, 294 (1993).

6.14.1 Written Presentations in Materials Proceedings

After the hearing file is made available, intervenors may file a written presentation and may also present in writing, under oath or affirmation, arguments, evidence, and documentary data further explaining their concerns. They must describe any defect or omissions in the application; however, the applicant or licensee seeking the license from the NRC has the burden of proof with respect to the controversies placed into issue by the intervenors. Babcock & Wilcox Co. (Pennsylvania Nuclear Services Operations, Parks Township, PA), LBP-95-1, 41 NRC 1, 3 (1995).

Section 2.1208 (formerly 2.1233) of Subpart L provides for written presentations. It does not by its terms restrict the intervenors' written presentation to stating concerns falling within the area of concerns raised in the initial request. However, the overall scheme of Subpart L clearly anticipates that specific concerns set out in the written presentation must fall within the scope of the areas of concerns advanced by a petitioner in the request for hearing and accepted as issues in the hearing by the

presiding officer. Babcock and Wilcox Co. (Pennsylvania Nuclear Services Operations, Parks Township, PA), LBP-95-1, 41 NRC 1, 5 (1995).

Section 2.1208 (formerly 2.1233(a)) accords the Presiding Officer the discretion both to determine the sequence in which the parties present their arguments, documentary data, informational materials, and other supporting written evidence and to offer individual parties the opportunity to provide further data, material, and evidence in response to the Presiding Officer's questions. Curators of University of Missouri, CLI-95-1, 41 NRC 71, 117 (1995). Section 7(c) and the Administrative Procedure Act do not apply to informal hearings conducted pursuant to Subpart L.

The Commission's regulations and practice do not preclude an applicant from submitting post-application affidavits into the record of a materials licensing proceeding. Such affidavits fall within the types of documents that the Presiding Officer has the discretion to allow into the record pursuant to Section 2.1208 (formerly Section 2.1233(d)). The Commission practice of permitting the licensee to file such supplemental supporting evidence in a Subpart G proceeding applies equally well to a Subpart L proceeding. Curators of University of Missouri, CLI-95-1, 41 NRC 71, 114 (1995). Affidavits submitted during a hearing are explanatory material offered to aid in the understanding of the underlying applications; they do not constitute amendments to the applications. Id. at 114.

The Presiding Officer in a Subpart L proceeding has broad discretion to determine the point at which the intervenors have been accorded sufficient opportunity to respond to all issues of importance raised by the licensee. If the Presiding Officer needs information to compile an adequate record, he may obtain it by posing questions pursuant to Section 2.1208. Curators of University of Missouri, CLI-95-1, 41 NRC 71, 116-17 (1995). The Commission's intent in promulgating Subpart L was to decrease the cost and delay for the parties and the Commission and to empower presiding officers to manage and control the parties' written submissions. CLI-95-1, 41 NRC at 117, n.54.

6.14.2 Stays of Material Licensing Proceedings

A motion for a stay in a materials licensing proceeding must comply with the requirements of 10 C.F.R. § 2.1213 (formerly § 2.1263) which incorporate the four stay criteria of 10 C.F.R. § 2.342 (formerly § 2.788); the movant has the burden of persuasion on the criteria. Umetco Minerals Corp., LBP-92-20, 36 NRC 112, 115-116 (1992). See Section 5.7.1, "Requirements for a Stay Pending Review."

Although a hearing petition regarding a materials license amendment request generally can be filed as soon as an amendment application is submitted to the agency, a request for a stay of the amendment proceeding is not appropriate until the Staff has taken action to grant the amendment request and to make the approved licensing action effective. See 10 C.F.R. § 2.1213 (formerly § 2.1263); Babcock & Wilcox (Apollo, PA, Fuel Fabrication Facility), LBP-92-35, 36 NRC 355, 359 (1992), citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 468 (1991).

A license may be granted containing a condition, such as a requirement for subsequent testing, before material may be imported under the license. The condition does not

create a fresh opportunity for filing a request for a stay. Timeliness depends on when the amendment was issued and not on the fulfillment of subsequent conditions. International Uranium (USA) Corp. (Receipt of Material from Tonawanda, NY), LBP-98-19, 48 NRC 83, 84-85 (1998).

The Virginia Petroleum Jobbers criteria for granting a stay have been incorporated into the regulations at 10 C.F.R. § 2.342(e) (formerly § 2.788(e)). Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-680, 16 NRC 127, 130 (1982); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 100 (1994) (the Commission will decline a grant of petitioner's request to halt decommissioning activities where petitioner failed to meet the four traditional criteria for injunctive relief); Hydro Resources, Inc., LBP-98-5, 47 NRC 119, 120 (1998). Since that section merely codifies longstanding agency practice which parallels that of the courts, Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 170 (1978), prior agency case law delineating the application of the Virginia Petroleum Jobbers criteria presumably remains applicable.

Under the Virginia Petroleum Jobbers test, four factors are examined:

(1) has the movant made a strong showing that it is likely to prevail upon the merits of its appeal;
(2) has the movant shown that, without the requested relief, it will be irreparably injured;
(3) would the issuance of a stay substantially harm other parties interested in the proceeding;
(4) where does the public interest lie?

No one criterion is dispositive. International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-02-9, 55 NRC 227, 232 (2002), see Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-820, 22 NRC 743, 746 n.8 (1985); Babcock and Wilcox (Apollo, PA, Fuel Fabrication Facility), LBP-92-31, 36 NRC 255 (1992). The Commission has stated that the most important of these criteria is whether there is irreparable harm. International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-02-9, 55 NRC 227, 232 (2002), see also Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-90-3, 31 NRC 219, 258 (1990).

A presiding officer's determination to permit a hearing petition, concerning a licensing action, to be supplemented does not automatically extend the time for filing a stay request regarding that action. A litigant that wishes to extend the time for making a filing must do so by making an explicit request. See 10 C.F.R. § 2.307 (formerly § 2.711). Babcock & Wilcox (Apollo, PA, Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 262 (1992).

In addressing the stay criteria in a Subpart L proceeding, a litigant must come forth with more than general or conclusory assertions in order to demonstrate its entitlement to relief. Babcock & Wilcox (Apollo, PA, Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 263 (1992), citing United States Department of Energy (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 544 (1983).

6.14.3 Scope of Materials Proceedings/Authority of Presiding Officer

A nonadjudicatory request for relief under 10 C.F.R. § 2.206 generally is not a matter within the province of a presiding officer. Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-35, 36 NRC. 355, 359, n.11 (1992).

There is no reason to believe that the granting of an SNM license should be deferred until after the applicant shows its compliance with local laws. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-38, 18 NRC 61, 65 (1983).

The presiding officer may certify questions to the Commission pursuant to the authority of 10 C.F.R. § 2.319 (formerly § 2.1209(d)). Sequoyah Fuels Corp. (Gore, Oklahoma Site), LBP-03-7, 57 NRC 287, 291 (2003), certified questions accepted, CLI-03-6, 57 NRC 547 (2003).

6.14.4 Amendments to Material Licenses

An amendment to a Part 70 application gives rise to the same rights and duties as the original application. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-778, 20 NRC 42, 48 (1984). The Commission does not require that proposed safety procedures to protect health and minimize danger to life or property be included in a materials license amendment application if they have already been submitted to the Commission in previous applications associated with the same NRC license. Sections 70.21(a)(3) and 30.32(a) of the Commission's regulations expressly permit an applicant to incorporate by reference any information contained in previous applications, statements or reports filed with the Commission. Curators of University of Missouri, CLI-95-1, 41 NRC 71, 99 (1995).

A separate EIS is not required for an SNM license to receive fuel at a new facility. When an EIS has been done for an operating license application, including the delivery of fuel, there is no need for each component to be analyzed separately on the assumption that a plant may never be licensed to operate. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-38, 18 NRC 61, 65 (1983). Although the Commission's regulations do not require the licensee to submit emergency procedures as part of an amendment application, the Commission is free to consider a licensee's general emergency procedures when resolving risk issues. Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 398 (1995).

6.14.5 Materials License – Renewal

Pursuant to the former 10 C.F.R. § 40.42(e), a source material license may remain automatically in effect beyond its expiration date to allow a licensee to continue decommissioning and security activities authorized under the license. Section 40.42(e) has been superseded by a new automatic license extension provision, 10 C.F.R. § 40.42(c) which became effective Aug. 1994. Sequoyah Fuels Corp. (Gore, OK, site), CLI-95-2, 41 NRC 179, 183, n.10, 187 (1995).

The automatic license extension provision under 10 C.F.R. § 40.42(c) may extend a license regardless of the nature of the source material remaining on site. The "necessary" provision (which appears in both the former Section 40.42(e) and the new Section 40.42(c)) simply means that the limited regulatory license extension comes into play only when decommissioning cannot be completed prior to the license's expiration date. Sequoyah Fuels Corp. (Gore, OK, site), CLI-95-2, 41 NRC 179, 187-88 (1995).

The automatic license extension provision grants the licensee no sweeping powers, but permits only limited activities related to decommissioning and to control of entry to restricted areas. Such activities also must have been approved under the licensee's initial license. To implement an activity not previously authorized by its license, and thus not previously subject to challenge, the licensee must first obtain a license amendment. Sequoyah Fuels Corp. (Gore, OK, site), CLI-95-2, 41 NRC 179, 191 (1995).

Licensees need only submit the final radiological survey showing that the site or area is suitable for release in accordance with NRC regulations after decommissioning has been completed. Sequoyah Fuels Corp. (Gore, OK, site), CLI-95-2, 41 NRC 179, 189 (1995).

6.14.6 Termination of Material License

A materials licensee may not unilaterally terminate its license where continuing health and safety concerns remain. A license to receive, process, and transport radioactive waste to authorized land burial sites imposes a continuing obligation on the licensee to monitor and maintain the burial sites. The requirement of state ownership of land burial sites is intended to provide for the ultimate, long-term maintenance of the sites, not to shift the licensee's continuing responsibility for the waste material to the states. U.S. Ecology. Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), LBP-87-5, 25 NRC 98, 110-11 (1987), vacated, ALAB-866, 25 NRC 897 (1987).

6.15 Motions in NRC Proceedings

Provisions with regard to motions in general in NRC proceedings are set forth in 10 C.F.R. § 2.323 (formerly § 2.730).

A moving party has no right of reply to answers in NRC proceedings except as permitted by the presiding officer. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), LBP-82-72, 16 NRC 968, 971 (1982), citing 10 C.F.R. § 2.323 (formerly § 2.730); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 469 (1991). Further, parties who do not seek leave to file a reply are expressly denied the opportunity to do so. Sequoyah Fuels Corp. LBP-94-39, 40 NRC 314 (1994).

Commission Rules of Practice make no provision for motions for orders of dismissal for failing to state a legal claim. However, the Federal Rules of Civil Procedure do in Rule 12(b)(6), and Licensing Boards occasionally look to federal cases interpreting that rule for guidance. In the consideration of such dismissal motions, which are not generally viewed favorably by the courts, all factual allegations of the complaint are to be considered true and to be read in a light most favorable to the nonmoving party.

Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 365 (1994).

Although the Rules of Practice do not explicitly provide for the filing of either objections to contentions or motions to dismiss them, each presiding board must fashion a fair procedure for dealing with such objections to petitions as are filed. The cardinal rule of fairness is that each side must be heard. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979).

Prior to entertaining any suggestions that a contention not be admitted, the proponent of the contention must be given some chance to be heard in response, because they cannot be required to have anticipated in the contentions themselves the possible arguments their opponents might raise as grounds for dismissing them. Contentions and challenges to contentions in NRC licensing proceedings are analogous to complaints and motions to dismiss in federal court. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979).

A motion for "clarification" filed nearly three weeks after the Staff order at issue had been revised (and nine weeks after the initial Staff order was issued) was found to be inexcusably late, as Commission rules (10 C.F.R. § 2.323(a)) require motions to be filed no more than ten (10) days after "the occurrence or circumstance from which the motion arises" and petitioners showed no good cause for their delayed filing. FirstEnergy Nuclear Operating Co. (Beaver Valley Power Station, Units 1 & 2; Davis-Besse Power Station, Unit 1; Perry Nuclear Power Plant, Unit 1), CLI-06-2, 63 NRC 9, 18 n.36 (2006).

The Board declined to grant a motion to strike portions of petitioner's reply that raised new arguments supporting a contention. The Board recognized that a reply may only provide "legitimate amplification" to a contention and may not raise new arguments. Thus, the Board declined to consider any portions of a reply that did not provide legitimate amplification to proffered contentions. Nonetheless, out of an abundance of caution, the Board allowed the entire reply to remain in the record. PPL Susquehanna, LLC (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 299-302 (2007).

6.15.1 Form of Motion

The requirements with regard to the form and content of motions are set forth in 10 C.F.R. § 2.323(b) (formerly § 2.730(b)).

The Appeal Board expects the caption of every filing in which immediate affirmative relief is requested to reference that fact explicitly by adverting to the relief sought and including the word "motion." The movant will not be heard to assert that it has been prejudiced by the Board's failure to take timely action on the motion in the absence of such a reference. Duke Power Co. (Cherokee Nuclear Station, Units 1, 2, & 3), ALAB-457, 7 NRC 70, 71 (1978).

6.15.1.1 Consultation Requirement (10 C.F.R. § 2.323(b))

In dicta, one Board has stated that compliance with the 10 C.F.R. § 2.323(b) requirement that a movant make a "sincere effort to contact other parties in the proceeding and to resolve the issues raised in the motion" can only be determined

from the objective reasonableness of the movant's efforts, as shown by all the facts and circumstances, not by his or her subjective intent. Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 129 (2006).

Although it determined that a ruling on compliance with the 10 C.F.R. § 2.323(b) "attempt at resolution" requirement was not necessary to its decision, a Board noted that where a movant had 10 months to prepare a summary disposition motion, a consultation call to the opposing party on the last day the motion could be filed (in effect asking only if the intervenor wanted to agree to drop its contention) indicated a lack of a sincere effort to resolve the issues as required by § 2.323(b). Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 129-131 (2006).

Although it determined that a ruling on compliance with the 10 C.F.R. § 2.323(b) "attempt at resolution" requirement was not necessary to its decision, a Board noted that even if a party moving for summary disposition believes that consultation with an opposing party about such a motion might prove futile, the regulation requires some reasonable effort. Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 130-31 (2006).

A moving party must consult with other parties before filing a motion pursuant to 10 C.F.R. § 323(b). Had the moving party consulted with other parties, it would have learned the pending motion was moot. Therefore, the motion was dismissed. PPL Susquehanna, LLC (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 297-99 (2007).

6.15.2 Responses to Motions

6.15.2.1 Time for Filing Responses to Motions

Unless specific time limits for responses to motions are expressly set out in specific regulations or are established by the presiding adjudicatory board, the time within which responses to motions must be filed is set forth in 10 C.F.R. § 2.323 (formerly § 2.730).

If a document requiring a response within a certain time after service is served incompletely (e.g., only part of the document is mailed), 10 C.F.R. § 2.305 (formerly § 2.712) would indicate that the time for response does not begin to run. Implicit in this rule is that documents mailed are complete, otherwise service is not effective. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-235, 8 AEC 645, 649 n.7 (1974) (dictum).

6.15.3 Licensing Board Actions on Motions

Although an intervenor may have failed, without good cause, to timely respond to an applicant's motion to terminate the proceeding, a Board may grant the intervenor an opportunity to respond to the applicant's supplement to the motion to terminate. Public Service Co. of Indiana and Wabash Valley Power Ass'n (Marble Hill Nuclear Generating Station, Units 1 & 2), LBP-86-16, 23 NRC 789, 790 (1986).

If a Licensing Board decides to defer indefinitely a ruling on a motion of some importance, "considerations of simple fairness require that all parties be told of that fact." Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-417, 5 NRC 1442, 1444 (1977).

When an applicant for an operating license files a motion for authority to conduct low-power testing in a proceeding where the evidentiary record is closed but the Licensing Board has not yet issued an initial decision finally disposing of all contested issues, the Board is obligated to issue a decision on all outstanding issues (i.e., contentions previously litigated) relevant to low-power testing before authorizing such testing. See 10 C.F.R. § 50.57(c). Such a motion, however, does not automatically present an opportunity to file new contentions specifically aimed at low-power testing or any other phase of the operating license application. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 801 n.72 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-86-34, 24 NRC 549, 553 (1986), aff'd, ALAB-854, 24 NRC 783 (1986).

6.16 NEPA Considerations

By its terms, NEPA imposes procedural rather than substantive constraints upon an agency's decisionmaking process: The statute requires only that an agency undertake an appropriate assessment of the environmental impacts of its action without mandating that the agency reach any particular result concerning that action. See, e.g., Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); Babcock & Wilcox (Apollo, PA, Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 93 (1993); Louisiana Energy Services (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331, 341-42 (1996); Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 44 (2001).

NEPA requires the Commission to consider environmental factors in granting, denying or conditioning a construction permit. It does not give the Commission the power to order an applicant to construct a plant at an alternate site or to order a different utility to construct a facility. Nevertheless, the fact that the Commission is not empowered to implement alternatives does not absolve it from its duty to consider them. Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503 (1977).

NEPA imposes a procedural requirement on an agency's decisionmaking process by mandating that an agency consider the environmental impacts of a proposed action and inform the public that it has taken those impacts into account in making its decision. In other words, an agency must take a "hard look" at the environmental consequences of a proposed action before taking that action. Nuclear Fuel Servs., Inc., LBP-05-8, 61 NRC 202, 207 (2005) (citing Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 558 (1978) and quoting Balt. Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983)).

NEPA's requirement that federal agencies prepare an EIS serves an action-forcing function in two ways. First, it ensures that the agency will have available and will consider detailed environmental impact information. Second, it guarantees that the relevant

environmental information will be available to the wider audience that may play a role in the decisionmaking and in the implementation of the decision reached. Entergy Nuclear Generation Co. And Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-24, 64 NRC 257, 277 (2006).

NEPA does not require the use of best scientific technology. Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC __ (Mar. 26, 2010) (slip op. at 37). NEPA must be construed "in the light of reason if it is not to demand virtually infinite study and resources." Id. (quoting Natural Resources Defense Council v. Hodel, 865 F.2d 288, 294 (D.C. Cir. 1988)). An EIS is not intended to be a research document reflecting the latest technology, data, and methods. Id. at 37. Because there "will also be more data that could be gathered," agencies "must have some discretion to draw the line and move forward with decisionmaking." Id. (quoting Town of Winthrop v. FAA, 535 F.3d 1, 11-13 (1st Cir. 2008).

NEPA requirements apply to license amendment proceedings as well as to construction permit and operating license proceedings. In license amendment proceedings, however, a Licensing Board should not embark broadly upon a fresh assessment of the environmental issues which have already been thoroughly considered and which were decided in the initial licensing decision. Rather, the Board's role in the environmental sphere will be limited to assuring itself that the ultimate NEPA conclusions reached in the initial decision are not significantly affected by such new developments. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 393 (1978), citing Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404, 415 (1975).

NEPA does not mandate that environmental issues considered in the construction permit proceedings be considered again in the operating license hearing, absent new information. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), LBP-82-43A, 15 NRC 1423, 1459 (1982). With regard to license amendments, it has been held that the grant of a license amendment to increase the storage capacity of a spent fuel pool is not a major Commission action significantly affecting the quality of the human environment, and therefore, no EIS is required. Public Service Electric & Gas Company (Salem Nuclear Generating Station, Unit 1), LBP-80-27, 12 NRC 435, 456 (1980); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 264-268 (1979).

In System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-07-14, 65 NRC 216, 219 (2007), the EIS alternative analysis performed for the ESP proceeding assumed a power level of 2,000 megawatts electric (MWe). If a different reactor design, with a different MWe value, was chosen at a later proceeding, it would not necessarily require a full reanalysis of alternatives; however, a significance analysis would need to be performed to determine if the new value would affect the original EIS alternative analysis such that a full reanalysis of alternatives would be necessary. Id.

Under NEPA, when several proposals for actions that will have a cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. Sequoyah Fuels Corp. (Gore, OK, Site Decommissioning), LBP-99-46, 50 NRC 386 (1999). The term "synergistic" refers to the joint action of different parts – or sites – which, acting together, enhance the

effects of one or more individual sites. Sequoyah Fuels Corp. (Gore, OK, Site Decommissioning), LBP-99-46, 50 NRC 386 (1999).

After examining an agency action to determine its impact on the environment, the Council on Environmental Quality's (CEQ'S) regulations, 40 C.F.R. §§ 1500 et seq., suggest several basic options if it determines that a project will have potential adverse environmental consequences. Disapproval of a project may be warranted where the adverse impacts are too severe. However, an agency may decide that aspects of the project may be modified in order to reduce the adverse impacts to an acceptable level. An agency could then proceed to license the project, after a determination that the overall benefits of the project exceed environmental and other costs, and that there are no obviously superior alternatives of which the agency is aware. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-8, 55 NRC 171, 191 (2002). The Commission has stated that "the NRC as an independent regulatory agency can be bound by CEQ's NEPA regulations only insofar as those regulations are procedural or ministerial in nature. NRC is not bound by those portions of CEQ's NEPA regulations which have a substantive impact on the way in which the Commission performs its regulatory functions." 49 Fed. Reg. 9,352 (Mar. 12, 1984). But the Commission also has an "announced policy to take account of the [CEQ regulations] voluntarily, subject to certain conditions." 10 C.F.R. § 51.10(a).

"[T]he Commission is under a dual obligation: to pursue the objectives of the Atomic Energy Act and those of the National Environmental Policy Act. 'The two statutes and the regulations promulgated under each must be viewed in pari materia.'" Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 & 2), ALAB-506, 8 NRC 533, 539 (1978). (emphasis in original) In fulfilling its obligations under NEPA, the NRC may impose upon applicants and licensees conditions designed to minimize the adverse environmental effects of licensed activities. Such conditions may be imposed even on other federal agencies, such as TVA, which seek NRC licenses, despite the language of Section 271 of the AEA (42 U.S.C. § 2018) which states, in part, that nothing in the Act shall be construed to affect the authority of any federal, state or local agency with respect to the generation, sale, or transmission of electric power through the use of nuclear facilities licensed by the Commission. Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 & 2), ALAB-506, 8 NRC 533, 541-544 (1978). Unless it was explicitly made exclusive, the authority of other federal, state or local agencies or government corporations to consider the environmental consequences of a proposed project does not preempt the NRC's authority to condition its permits and licenses pursuant to NEPA. For example, TVA's jurisdiction over environmental matters is not exclusive where TVA seeks a license from a federal agency, such as the NRC, which also has full NEPA responsibilities. Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 & 2), LBP-77-14, 5 NRC 494 (1977). But see, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 667-68 (2007) (citing Dep't of Transp. v. Public Citizen, 541 U.S. 752, 770 (2004) (noting that agencies must only follow NEPA for discretionary actions because "an agency cannot be considered the legal 'cause' of an action that it has no statutory discretion not to take").

Pursuant to the Nuclear Waste Policy Act of 1982, the Department of Energy (DOE) has primary responsibility for evaluating the environmental impacts related to the development and operation of geologic repositories for high-level radioactive waste. In any proceeding for the issuance of a license for such a repository, the NRC will review and, to the extent practicable, adopt the EIS submitted by DOE with its license application. The NRC will

not adopt the EIS if: (1) the action which the NRC proposes to take is different from the action described in the DOE license application, and the difference may significantly affect the quality of the human environment; or (2) significant and substantial new information or new considerations render the EIS inadequate. 10 C.F.R. § 51.109(c). To the extent that the NRC adopts the EIS prepared by DOE, it has fulfilled all of its NEPA responsibilities. 10 C.F.R. § 51.109(d); 54 Fed. Reg. 27,864, 27,871 (July 3, 1989).

NEPA directs all federal agencies to comply with its requirements "to the fullest extent possible" (42 U.S.C. § 4332). The leading authorities teach that an agency is excused from those NEPA duties only "when a clear and unavoidable conflict in statutory authority exists." Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 & 2), ALAB-506, 8 NRC 533, 545 (1978).

While the authority of other federal or local agencies to consider the environmental effects of a project does not preempt the NRC's authority with regard to NEPA, the NRC, in conducting its NEPA analysis, may give considerable weight to action taken by another competent and responsible government authority in enforcing an environmental statute. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), LBP-78-28, 8 NRC281, 282 (1978).

NRC regulations pertaining to environmental assessments (EAs) do not require consultation with other agencies. They only require a "list of agencies and persons consulted, and identification of sources used." 10 C.F.R. § 51.30(a)(2). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 244-45 (1993).

The NRC cannot delegate to a local group the responsibility under NEPA to prepare an EA. The EA must be prepared by the NRC, not a local agency, although in preparing an EA the Staff may take into account site uses proposed by a local agency. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), LBP-96-21, 44 NRC 134, 136 (1996).

It is the Staff, not the applicant, that has the legal duty to perform a NEPA analysis and to issue appropriate NEPA documents (such as an EA), and the burden of any settlement with an intervenor on NEPA issues falls on the Staff. Pa'ina Hawaii, LLC, CLI-06-18, 64 NRC 1, 5 (2006) (citing Wetlands Action Network v. Army Corps of Eng'rs, 222 F.3d 1105, 1114 (9th Cir. 2000); USEC Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 474 & n.144 (2006)).

In contrast to safety questions, the environmental review at the operating license stage need not duplicate the construction permit review. 10 C.F.R. § 51.21. To raise an issue in an operating license hearing concerning environmental matters which were considered at the construction permit stage, there needs to be a showing either that the issue had not previously been adequately considered or that significant new information has developed after the construction permit review. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-10, 9 NRC 439, 465 (1979).

Consideration by the NRC in its environmental review is not required for the parts of the water supply system which will be used only by a local government agency; however, cumulative impacts from the jointly utilized parts of the system will be considered.

Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), LBP-82-43A, 15 NRC 1423, 1473, 1475 (1982).

Insofar as environmental matters are concerned, under NEPA there is no legal basis for refusing an operating license merely because some environmental uncertainties may exist. Where environmental effects are remote and speculative, agencies are not precluded from proceeding with a project even though all uncertainties are not removed. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), LBP-82-117A, 16 NRC 1964, 1992 (1982), citing State of Alaska v. Andrus, 580 F.2d 465, 473 (D.C. Cir. 1978), vacated in part sub nom. Western Oil and Gas Ass'n v. Alaska, 439 U.S. 922 (1982); NRDC v. Morton, 458 F.2d 827, 835, 837-838 (D.C. Cir. 1972).

NEPA provides no guarantee that federally approved projects will have no adverse environmental impacts. Nor does NEPA require agencies to select the most environmentally advantageous or benign option available. Hydro Resources, Inc., CLI-06-29, 64 NRC 417, 429 (2006).

Environmental uncertainties raised by intervenors in NRC proceedings do not result in a per se denial of the license, but rather are subject to a rule of reason. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), LBP-82-117A, 16 NRC 1964, 1992 (1982). When intervenors failed to show a deficiency in the Staff's Cultural Resources Management Plan, then their NEPA claims were without merit. Hydro Resources, Inc., LBP-99-9, 49 NRC 136, 144 (1999).

Contentions alleging that global warming may affect water availability are not admissible where they do not challenge specific information in the application and when they are not accompanied by specific support for the issues raised. Luminant Generation Co., LLC (Comanche Peak Nuclear Power Plant, Units 3 & 4), LBP-09-17, 70 NRC __ (Aug. 6, 2009) (slip op. at 59); South Texas Project Nuclear Operating Co. (South Texas Project, Units 3 & 4), LBP-09-25, 70 NRC __ (Sep. 29, 2009) (slip op. at 14).

Contentions related to replacement power costs may be material to a combined license applicant's SAMDA analysis, which is material to the NRC's NEPA analysis. South Texas Project Nuclear Operating Co. (South Texas Project, Units 3 & 4), LBP-10-14, 72 NRC __, (July 2, 2010) (slip op. at 32).

The Commission's regulations categorically exclude from NEPA review all amendments for the use of radioactive materials for research and development. The purpose of an environmental report is to inform the Staff's preparation of an EA and, where appropriate, an EIS. Where the Staff is categorically excused from preparing an EA or EIS, a licensee need not submit an environmental report. Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 396 (1995).

The fact that a particular license transfer may have antitrust implications does not remove it from the NEPA categorical exclusion. In any event, because the AEA does not require, and arguably, does not even allow, the Commission to conduct antitrust evaluations of license transfer application, any "failure" of the Commission to conduct such an evaluation cannot constitute a federal action warranting a NEPA review. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, n.55 (2000), quoting Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151,

167-68 (2000); Vermont Yankee Nuclear Power Corp., et al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 168 (2000). See also Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999); Final Rule, Antitrust Review Authority: Clarification, 65 Fed. Reg. 44,649 (July 19, 2000).

The Commission may reject a petitioner's request for an EIS on the ground that the scope of the proceeding does not include the new owners' operation of the plant – but includes only the transfer of their operating licenses. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 309 (2000).

Termination of an operating license application gives rise to a need, pursuant to 10 C.F.R. § 51.21, for an EA to consider the impacts of the termination. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), LBP-96-21, 44 NRC 134, 136 (1996).

Because a construction permit termination would appear to have impacts that encompass operating license termination impacts, one EA would appear to suffice for both actions. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), LBP-96-21, 44 NRC 134, 136 (1996).

6.16.1 Environmental Impact Statements

The activities for which environmental statements need be prepared and the procedures for preparation are covered generally in 10 C.F.R. Part 51. For a discussion of the scope of an NRC/NEPA review when the project addressed by that review is also covered by a broader overall programmatic EIS prepared by another federal agency, see USERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976).

Neither the AEA, NEPA, nor the Commission's regulations require that there be a hearing on an EIS. Public hearings are held on an EIS only if the Commission finds such hearings are required in the public interest. 10 C.F.R. § 2.104. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 625 (1981), citing Vermont Yankee Nuclear Power Corp. v. NRC, 435 U.S. 519 (1978). Entergy Nuclear Generation Co. And Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-24, 64 NRC 257, 298 (2006).

It is premature to entertain a contention calling for issuance of an EIS where the Staff has not yet issued an EA determining that no EIS is required. Pacific Gas & Electric Company (Diablo Canyon Nuclear Plant, Units 1 & 2), LBP-93-9, 37 NRC 433 (1993).

Under the plain terms of NEPA, the EA of a particular proposed federal action coming within the statutory reach may be confined to that action together with, inter alia, its unavoidable consequences. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 48 (1978).

The environmental review mandated by NEPA is subject to a rule of reason and as such need not include all theoretically possible environmental effects arising out of an action, but may be limited to effects which are shown to have some likelihood of occurring. This conclusion draws direct support from the judicial interpretation of the

statutory command imposing the obligation to make reasonable forecasts of the future. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 48, 49 (1978); Hydro Res., Inc., LBP-04-23, 60 NRC 441, 447 (2004), review declined, CLI-04-39, 60 NRC 657 (2004). In other words, the Staff is excused from conducting a NEPA analysis of "remote and speculative" impacts or "worst case" scenarios. Nuclear Fuel Servs., Inc., LBP-05-8, 61 NRC 202, 208 (2005) (quoting Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348-49 (2002)). See also Prairie Island, ALAB-455, 7 NRC at 48, 49.

Where a factor may be difficult or impossible to assess in quantitative terms, license applicants and Staff are expected to assess that factor in qualitative terms. Pacific Gas and Electric Company (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 521 (2008) (quoting 10 C.F.R. § 51.45(a)) (holding that a Staff member's expert opinion on the low possibility of terrorist attack should not be discounted because it was based on a qualitative and not quantitative assessment).

An agency can fulfill its NEPA responsibilities in the preparation of an EIS if it:

(1) reasonably defines the purpose of the proposed Federal action. The agency should consider congressional intent and views as expressed by statute as well as the needs and goals of the applicants seeking agency approval;
(2) eliminates those alternatives that would not achieve the purpose as defined by the agency; and
(3) discusses in reasonable detail the reasonable alternatives which would achieve the purpose of the proposed action.

Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195-98 (D.C. Cir. 1991).

Underlying scientific data and inferences drawn from NEPA through the exercise of expert scientific evaluation may be adopted by the NRC from the NEPA review done by another federal agency. The NRC must exercise independent judgment with respect to conclusions about environmental impacts based on interpretation of such basic facts. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), LBP-82-43A, 15 NRC 1423, 1467-1468 (1982), citing FTC v. Texaco, 555 F.2d 862, 881 (D.C. Cir. 1977), cert. denied, 431 U.S. 974 (1977); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-785, 20 NRC 848, 868 n.65 (1984). However, to the extent possible, the NRC will adopt the EIS prepared by DOE to evaluate the environmental impact related to the development and operation of a geologic repository for high-level radioactive waste. 10 C.F.R. § 51.109, 54 Fed. Reg. 27,864, 27,870-71 (July 3, 1989).

NEPA requires that a federal agency make a "good faith" effort to predict reasonably foreseeable environmental impacts and that the agency apply a "rule of reason" after taking a "hard look" at potential environmental impacts. But an agency need not have complete information on all issues before proceeding. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), LBP-78-26, 8 NRC 102, 141 (1978).

NEPA requires only that the NRC consider "reasonably foreseeable" indirect effects of a proposed licensing action. A Licensing Board's reluctance to assume or speculate about far-reaching and large-scale changes required to find significant long-term adverse impacts was not unreasonable. Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-06-15, 63 NRC 687, 698 (2006).

In order to advance a claim under NEPA, the intervenor must allege with adequate support that the NRC Staff has failed to take a "hard look" at one or more significant environmental questions, that is, that the Staff has unduly ignored or minimized pertinent environmental effects of the proposed action. Pacific Gas and Electric Company (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 514 (2008); Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 431 (2003).

The "rule of reason" means that, in an EIS, there is no need to consider impractical alternatives or alternatives that could only be implemented after significant changes in governmental policy or legislation. Also, it is sufficient to consider an appropriate range of alternatives, rather than every available alternative. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-03-30, 58 NRC 454, 463 and 479 (2003).

An adequate FEIS for a nuclear facility necessarily includes the lesser impacts attendant to low-power testing of the facility and removes the need for a separate EIS focusing on questions such as the costs and benefits of low-power testing. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1& 2), ALAB-728, 17 NRC 777, 795 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

An EIS should include a statement on the alternatives to the proposed action, including the no-action alternative. Louisiana Energy Services (National Enrichment Facility), CLI-04-03, 59 NRC 10, 22 (2004).

Section 102(2)(E) of NEPA requires agencies to "study, develop, and describe appropriate alternatives to the recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." But the NRC regulations explicitly excuse an applicant from this analysis at the early site permit stage of the proceeding. Rather, this analysis should be conducted at the construction permit or combined license application stage. Exelon Generation Co., Inc. (Early Site Permit for Clinton ESP Site), LBP-06-28, 64 NRC 460, 486 (2006).

There may, of course, be mistakes in an EIS, but it is the intervenor's burden to show their materiality and significance. If the EIS "comes to grips with all important considerations," nothing more need be done. Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 811 (2005).

When Staff is preparing an EIS, it may rely on an environmental report prepared by the applicant, but Staff is ultimately responsible for all information used in the EIS and so must independently evaluate any information it uses for this purpose. Exelon Generation Company (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 155 (2005).

6.16.1.1 Need to Prepare an EIS

Federal agencies are required to prepare an EIS for every major federal action significantly affecting the quality of the human environment. NEPA 102(2)(C); 42 U.S.C 4332(2)(C). An agency's decision not to exercise its statutory authority does not constitute a major federal action. Cross-Sound Ferry Services. Inc. v. ICC, 934 F.2d 327, 334 (D.C. Cir. 1991), citing Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1245-46 (D.C. Cir. 1980). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 70 (1991), reconsid. denied, CLI-91-8, 33 NRC 461 (1991); Pacific Gas and Electric Company (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 514 (2008).

The purpose of an applicant's environmental report is to inform the Staff's preparation of an EA and, where appropriate, an EIS. Where the Staff is categorically excused from preparing an EA or EIS, an applicant need not submit an environmental report. Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 396 (1995).

An agency's refusal to prepare an EIS is not by itself a final agency action which requires the preparation of an EIS. Public Citizen v. Office of the U.S. Trade Representative, 970 F.2d 916, 918-919 (D.C. Cir. 1992), citing Foundation on Economic Trends v. Lyng, 943 F.2d 79, 85 (D.C. Cir. 1991). An agency is not required to prepare an EIS where it is only contemplating a particular course of action, but has not actually taken any final action. Public Citizen, supra, 970 F.2d at 920.

License transfers fall within a categorical exclusion for which EISs are not required, and the fact that a particular license transfer may have implications does not remove it from the categorical exclusion. Vermont Yankee Nuclear Power Corp., et al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 167-168 (2000). See also 10 C.F.R. § 51.22(c)(21).

It is possible that for a petitioner to raise an admissible contention with respect to a Finding of No Significant Impact (FONSI), the petitioner need not show that there will be a significant environmental impact. Instead, the petitioner must allege facts which, if proven, show that the proposed federal action may significantly impact the environment. U.S. Army (Jefferson Proving Ground Site), LBP-06-27, 64 NRC 438, 458 (2006).

The granting of conditional approval of a power authority's plan for barge shipments of irradiated fuel does not constitute a "major federal action" by an agency and, thus, NEPA does not require that agency to perform an EA or EIS. New Jersey v. Long Island Power Authority, 30 F.3d 403, 415 (3d Cir. 1994).

Where a nonfederal party voluntarily informs a federal agency of its intended activities to ensure compliance with law and regulation, and to facilitate the agency's monitoring of activities for safety purposes, the agency's review of the plan does not constitute a "major federal action" requiring an EIS pursuant to NEPA. New Jersey v. Long Island Power Authority, 30 F.3d 403, 416 (3d Cir. 1994).

An agency cannot skirt NEPA or other statutory commands by essentially exempting a licensee from regulatory compliance and then simply labeling its decision "mere oversight" rather than a major federal action. To do so is manifestly arbitrary and capricious. Citizens Awareness Network v. NRC, 59 F.3d 284, 293 (1st Cir. 1995).

Although the determination as to whether to prepare an EIS falls initially upon the Staff, that determination may be made an issue in an adjudicatory proceeding. Consumers Power Co. (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 120 (1979).

In the final analysis, the significance of the impact of the project – in large part an evidentiary matter – will determine whether a statement must be issued. Consumers Power Co. (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 120 (1979).

In the case of licensing nuclear power plants, adverse impacts include the impacts of the nuclear fuel cycle. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-82-76, 16 NRC 1029, 1076 (1982), citing Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 539 (1978).

In determining whether a license amendment is a major action significantly affecting the quality of the human environment, it is relevant to determine if prior activities "in actuality have given rise to environmental harm such as Petitioners fear." International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-02-19, 56 NRC 113, 117 (2002).

The test of whether benefits of a proposed action outweigh its costs is distinct from the primary question of whether an EIS is needed because the action is a major federal action significantly affecting the environment. Virginia Electric Power Co. (Surry Nuclear Power Station, Units 1 & 2), CLI-80-4, 11 NRC 405 (1980).

The Commission has consistently taken the position that individual fuel exports are not "major Federal actions." Westinghouse Electric Corp. (Exports to Philippines), CLI-80-15, 11 NRC 672 (1980).

The fact that risks of other actions or no action are greater than those of the proposed action does not show that risks of the proposed action are not so significant as to require an EIS. Where conflict in the scientific community makes determination of significance of environmental impact problematical, the preferable course is to prepare an EIS. Virginia Electric Power Co. (Surry Nuclear Power Station, Units 1 & 2), CLI-80-4, 11 NRC 405 (1980).

For an analysis of when an EA rather than an EIS is appropriate, see Commonwealth Edison Co. (Zion Station, Units 1 & 2), LBP-80-7, 11 NRC 245, 249-50 (1980).

The NRC Staff is not required to prepare a complete EIS if, after performing an initial EA, it determines that the proposed action will have no significant environmental impact. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-790, 20 NRC 1450, 1452 n.5 (1984); Curators of University of Missouri, CLI-95-1, 41 NRC 71, 124 (1995).

In a situation where an EIS is neither required nor categorically excluded, a contention seeking an EIS, filed prior to the Staff's issuance of an EA, is premature. After Staff issuance of an EA, a late-filed contention may be submitted (assuming the EA does not call for an EIS). Pacific Gas & Electric Co. (Diablo Canyon Nuclear Plant, Units 1 & 2), LBP-93-1, 37 NRC 5, 36 (1993).

To find that the agency's hearing notice that determined that a categorical exclusion applied to an application prevented challenges authorized by 10 C.F.R. § 51.22 to the use of such categorical exclusions would be tantamount to ruling that the agency need not comply with its own regulations. Pa'ina Hawaii, LLC, LBP-06-4, 63 NRC 99, 109 n.38 (2006) (citing, e.g., Fort Stewart Schools v. Fed. Labor Relations Auth., 495 U.S. 641, 654 (1990)).

A Board admitted a contention based on the argument that NEPA analysis requires an explanation of the applicability of a categorical exclusion where a petitioner has alleged special circumstances necessitating an environmental review; the Staff and applicant had not negated the contention because they did not explain the applicability of that categorical exclusion in the specified circumstances, or provide a basis to conclude that the alleged circumstances were actually considered as part of the adoption of the categorical exclusion. Pa'ina Hawaii, LLC, LBP-06-4, 63 NRC 99, 108-112 & 108 n.36 (2006) (citing Alaska Center for the Environment v. U.S. Forest Service, 189 F.3d 851, 859 (9th Cir. 1999); Jones v. Gordon, 792 F.2d 821, 828 (9th Cir. 1986); Steamboaters v. Fed. Energy Reg. Comm'n, 759 F.2d 1382 (9th Cir. 1985); Wilderness Watch & Public Employees for Envi. Responsibility v. Mainella, 375 F.3d 1085, 1096 (11th Cir. 2004)).

An operating license amendment to recapture the construction period and allow for operation for 40 full years is not an action which requires the preparation of an EIS or an environmental report. A construction period recapture amendment only requires the Staff to prepare an EA. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 97 (1990).

A separate EIS is not required for an SNM license. When an EIS has been done for an operating license application, including the delivery of fuel, there is no need for each component to be analyzed separately on the assumption that a plant may never be licensed to operate. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-38, 18 NRC 61, 65 (1983).

The NRC's obligation under NEPA does not end following initial approval of an action. Even beyond that stage, NEPA requires that the agency take a "hard look" at the environmental effects of the proposal. Hydro Res., Inc., LBP-04-23, 60 NRC 441, 447-48 (2004), review declined, CLI-04-39, 60 NRC 657 (2004) (citing Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 374 (1989)). Similar to the determination to prepare an EIS in the first place, agency decisions regarding whether to supplement an FEIS are also governed by the rule of reason. Hydro Res., Inc., LBP-04-23, 60 NRC at 448 (citing Marsh, 490 U.S. at 373-74).

Not every change requires a supplemental EIS; only those changes that cause effects that are significantly different from those already studied. The new circumstance must reveal a seriously different picture of the environmental impact of

the proposed project. Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 52 (2001); Hydro Resources, Inc., CLI-04-39, 60 NRC 657, 659 (2004); Hydro Res., Inc., LBP-04-23, 60 NRC 441, 448 (2004), review declined, CLI-04-39, 60 NRC 657 (2004).

A supplemental EIS is needed where new information "raises new concerns of sufficient gravity such that another, formal in-depth look at the environmental consequences of the proposed action is necessary." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 28 (2006) (quoting Wisconsin v. Weinberger, 745 F.2d 412, 418 (7th Cir. 1984); Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 374 (1989).

The question whether some new information or circumstance is significant (and would consequently require supplementation of an FEIS) ordinarily raises a factual dispute. Hydro Res., Inc., LBP-04-23, 60 NRC 441, 448 (2004), review declined, CLI-04-39, 60 NRC 657 (2004) (citing Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 376-77 (1989); Friends of the Bow v. Thompson, 124 F.3d 1210, 1218 (10th Cir. 1997)).

An SEIS or an EIA does not have to be prepared prior to the granting of authorization for issuance of a low-power license. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 634 (1983).

The issuance of a possession-only license need not be preceded by the submission of any particular environmental information or accompanied by any NEPA review related to decommissioning. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-1, 33 NRC 1, 6-7 (1991).

When the environmental effects of full-term, full-power operation have already been evaluated in an EIS, a licensing action for limited operation under a 10 C.F.R. § 50.57(c) license that would result in lesser impacts need not be accompanied by an additional impact statement or an impact appraisal. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-81-5, 13 NRC 226 (1981), and ALAB-728, 17 NRC 777, 795 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983). The Commission authorized the issuance of a low-power operating license for Limerick Unit 2, even though, pursuant to a federal court order, Limerick Ecology Action v. NRC, 869 F.2d 719 (3rd Cir. 1989), there was an ongoing Licensing Board proceeding to consider certain severe accident mitigation design alternatives. Since the existing EIS was valid except for the failure to consider the design alternatives, and low-power operation presents a much lower risk of a severe accident than does full-power operation, the Commission found that the existing EIS was sufficient to support the issuance of a low-power license. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), CLI-89-10, 30 NRC 1, 5-6 (1989), reconsid. denied and stay denied, CLI-89-15, 30 NRC 96, 101-102 (1989).

It is well-established NEPA law that separate environmental statements are not required for intermediate, implementing steps such as the issuance of a low-power license where an EIS has been prepared for the entire proposed action and there have been no significant changed circumstances. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-9, 19 NRC 1323, 1326 (1984),

on certification from ALAB-769, 19 NRC 995 (1984). See Environmental Defense Fund, Inc. v. Andrus, 619 F.2d 1368, 1377 (1980).

The principle stated in the Shoreham and Diablo Canyon cases, supra, is applicable even where an applicant may begin low-power operation and it is uncertain whether the applicant will ever receive a full-power license. In Shoreham, the fact that recent court decisions in effect supported the refusal by the state and local governments to participate in the development of emergency plans was determined not to be a significant change of circumstances which would require the preparation of a supplemental EIS to assess the costs and benefits of low-power operation. Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-85-12, 21 NRC 1587, 1589 (1985). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-875, 26 NRC 251, 258-59 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-89-8, 29 NRC 399, 418-19 (1989).

The NRC Staff is not required to prepare an EIS to evaluate the "resumed operation" of a facility or other alternatives to a licensee's decision not to operate its facility. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-90-8, 32 NRC 201, 207-208 (1990), reconsid. denied, CLI-91-2, 33 NRC 61 (1991), reconsid. denied, CLI-91-8, 33 NRC 461, 470 (1991); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-91-17, 33 NRC 379, 390 (1991); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-91-30, 34 NRC 23, 26, 27 (1991); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 135 (1992). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-9135, 34 NRC 163, 169 (1991).

A contention attempting to raise an issue of the lack of long-term spent fuel storage is barred as a matter of law from operating license and operating license amendment proceedings. 10 C.F.R. §§ 51.23(1), 51.53(a). Pacific Gas & Electric Co. (Diablo Canyon Nuclear Plant, Units 1 & 2), LBP-93-1, 37 NRC 5, 29-30 (1993).

Environmental review of the storage of spent fuel in reactor facility storage pools for at least 30 years beyond the expiration of reactor operating licenses is not required based upon the Commission's generic determination that such storage will not result in significant environmental impacts. Dairyland Power Coop. (La Crosse Boiling Water Reactor), LBP-88-15, 27 NRC 576, 580 (1988), citing 10 C.F.R. § 51.23.

An EIS need not be prepared with respect to the expansion of the capacity of a spent fuel pool if the EIA prepared for the project had an adequate basis for concluding that the expansion of a spent fuel pool would not cause any significant environmental impact. Consumers Power Co. (Big Rock Point Plant), LBP-82-78, 16 NRC 1107 (1982).

When a licensee seeks to withdraw an application to expand its existing low-level waste burial site, the granting of the request to withdraw does not amount to a major federal action requiring a NEPA review. This is true even though, absent an expansion, the site will not have the capacity to accept additional low-level waste. Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 161-163 (1980).

It must at least be determined that there is significant new information before the need for a supplemental environmental statement can arise. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 & 3), LBP-83-36, 18 NRC 45, 49 (1983), citing Warm Springs Task Force v. Gribble, 621 F.2d 1017, 1023-36 (9th Cir. 1981); Hydro Resources, Inc., CLI-06-29, 64 NRC 417, 419 (2006).

A supplemental EIS may be necessary if new information raises a previously unknown environmental concern, but not necessarily when it amounts to mere additional evidence supporting one side or the other of a disputed environmental effect. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 28 (2006).

A supplemental environmental statement need not necessarily be prepared and circulated even if there is new information. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 & 3), LBP-83-36, 18 NRC 45, 49-50 (1983), citing California v. Watt, 683 F.2d 1253, 1268 (9th Cir. 1982). See 40 C.F.R. § 1502.9(c); Hydro Resources, Inc., CLI-99-22, 50 NRC 3, 14 (1999).

The proponent of the need for an evidentiary hearing bears the burden of establishing that need, but the Staff bears the ultimate burden to demonstrate its compliance with NEPA in its determination that an EIS is not necessary on a proposed license amendment. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 249 (2001).

Once an intervenor crosses the admissibility threshold relative to its environmental contention, the ultimate burden in a Subpart K proceeding then rests with the proponent of the NEPA document – the Staff (and the applicant to the degree it becomes a proponent of the Staff's EIS-related action) – to establish the validity of that determination on the question whether there is an EIS preparation trigger. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 249 (2001).

However, it is not unreasonable to ask an intervenor to come forward with support for a request to supplement an FEIS. This burden is akin to a petitioner's initial obligation to come forward with a sufficient basis for a contention and imposition of such burden does not improperly shift the "burden of proof" on factual evidence to the intervenor. Hydro Resources, Inc., CLI-04-39, 60 NRC 657, 659-60 (2004).

The standard for issuing a supplemental EIS is set forth in 10 C.F.R. § 51.92: There must be either substantial changes in the proposed action that are relevant to environmental concerns, or significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 269 (1996); Hydro Resources, Inc., CLI-99-22, 50 NRC 3, 14 (1999). The fact that a supplement to an FEIS would have been distributed to additional members of the public if such a supplement had in fact been prepared, is not a persuasive argument that the supplement should have been prepared in the first instance. Decisions on whether to supplement an FEIS are made pursuant to 10 C.F.R. 51.92. HRI, CLI-04-39, 60 NRC at 661.

For NEPA purposes, the "major federal action" triggering the EIS is issuing the license, not adjudicating the license. Until a license issues, the Commission must entertain motions to reopen the adjudicatory record, albeit under the strict standards of the Commission's reopening regulations. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 24 (2006) (citing 10 C.F.R. § 2.326; Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 & n.19 (2005)).

In LBP-04-23, the Presiding Officer stated in dicta that the supplementation requirement of NEPA and the agency's environmental regulations is not abrogated by the Commission's practice rule authorizing the Staff to issue a license before the adjudication is commenced or completed. Hydro Res., Inc., LBP-04-23, 60 NRC 441, 450 n.45 (2004), review declined, CLI-04-39, 60 NRC 657 (2004) (referencing 10 C.F.R. § 2.1205(m) [now 10 C.F.R. § 2.103(a)]).

The Supreme Court has found that a cumulative EIS must be prepared only when "several proposals for actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency." Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-14, 55 NRC 278, 294 (2002), citing Kleppe v. Sierra Club, 427 U.S. 390 (1976). The Court further stated agencies need not consider "possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions." The Commission reads post-Kleppe rulings to indicate that to bring NEPA into play a possible future action must at least constitute a "proposal" pending before the agency (i.e., ripeness), and must be in some way interrelated with the action that the agency is actively considering. Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-14, 55 NRC 278, 295 (2002).

6.16.1.2 Scope of EIS

The scope of the environmental statement or appraisal must be at least as broad as the scope of the action being taken. Duke Power Co. (Oconee/McGuire), LBP-80-28, 12 NRC 459, 473 (1980).

An agency may authorize an individual, sufficiently distinct portion of an agency plan without awaiting the completion of a comprehensive EIS on the plan so long as the environmental treatment under NEPA of the individual portion is adequate and approval of the individual portion does not commit the agency to approval of other portions of the plan. Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 265 (1982), aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983); Peshlakai v. Duncan, 476 F.Supp. 1247, 1260 (D.D.C. 1979); Conservation Law Foundation v. GSA, 427 F.Supp. 1369, 1374 (D.R.I. 1977).

In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551 (1978), the U.S. Supreme Court embraced the doctrine that EISs need not discuss the environmental effects of alternatives which are "deemed only remote and speculative possibilities." The same has been held with respect to remote and speculative environmental impacts of the proposed project itself. Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650,

14 NRC 43 (1981); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75 (1981). Moot or farfetched alternatives need not be considered under NEPA. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), LBP-82-117A, 16 NRC 1964, 1992 (1982), citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978); Natural Resources Defense Council v. Morton, 458 F.2d 827, 837-838 (D.C. Cir. 1972); Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974).

NEPA does not require certainty or precision, but, rather, an estimate of anticipated (not unduly speculative) impacts. An assessment of the estimated impacts at one or more representative or reference sites can be sufficient. In this type of analysis, the impacts for a range of potential facilities or locations having one or more common site or design features can be bounded. Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005).

The scope of a NEPA environmental review in connection with a facility license amendment is limited to a consideration of the extent to which the action under the amendment will lead to environmental impacts beyond those previously evaluated. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-81-14, 13 NRC at 677, 684-685 (1981), citing Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC at 312 (1981).

An environmental review of the decommissioning of a nuclear facility supplements the operating license environmental review and is only required to examine any new information or significant environmental change associated with the decommissioning of the facility or the storage of spent fuel. 10 C.F.R. § 51.53(b). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 134 (1992).

When major federal actions are involved, if related activities taken abroad have a significant effect within the U.S., those effects are within NEPA's ambit. However, remote and speculative possibilities need not be considered under NEPA. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-562, 10 NRC 437, 446 (1979).

The Atomic Safety and Licensing Board found that an intervenor's assertions regarding sabotage risk did not provide a litigable basis for a NEPA contention. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-19, 52 NRC 85, 97 (2000).

Generally, NEPA does not require a terrorism review, and an EIS is not the appropriate format in which to address the challenges of terrorism. Amergen Energy Company, LLC (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007) aff'd sub nom., New Jersey Department of Environmental Protection v. NRC, 561 F.3d 132 (3rd Cir. 2009); see also System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144, 145-47 (2007); Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 & 3), LBP-08-21, 68 NRC 554, 566-568 (2008). But, the Ninth Circuit has concluded that NEPA requires consideration of the environmental impacts of a terrorist attack. San Luis Obispo Mothers for Peace v. NRC, 449 F.3d

1016, 1028-35 (2006); reversing Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-1, 57 NRC 1, 6-7 (2003); Public Citizen v. NRC, 573 F.3d 916 (9th Cir. 2009). In New Jersey Department of Environmental Protection v. NRC, the Third Circuit rejected the Ninth Circuit's holding. The Third Circuit, consistent with the Commission's views, held that NEPA's proximate cause principles preclude terrorism consideration. New Jersey Department of Environmental Protection v. NRC, 561 F.3d 132 (3rd Cir. 2009)

In other cases, the Commission has consistently held that NEPA does not impose a legal duty to consider intentional malevolent acts. Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC 358 (2002), rev'g certified questions, LBP-02-4, 55 NRC 49 (2002). Nor is the NEPA process an appropriate forum for addressing the challenges of terrorism for four interlocking reasons: (1) the likelihood and nature of a postulated terrorist attack are speculative and are not proximately caused by an NRC licensing decision; (2) the risk of terrorist attack cannot be meaningfully determined by NRC Staff; (3) NEPA does not require a "worst case" analysis and such an analysis would not enhance an agency's decisionmaking process as the appropriate test is what is "reasonably foreseeable" from the consequence of the licensed action and not a terrorist attack; and (4) a terrorism review is incompatible with the public character of the NEPA process. Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC 358, 365 (2002), reviewing certified questions, LBP-02-4, 55 NRC 49 (2002); see also Nuclear Management Co., LLC (Palisades Nuclear Plant), CLI-07-9, 65 NRC 139 (2007) (NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 353 (2002), aff'g LBP-01-37, 54 NRC 476 (2001). As a practical matter, Staff resources are better utilized to address prevention of a terrorist attack at licensed facilities than assessing the impact of an attack during the renewal period. Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC 358, 365 (2002), rev'g certified questions, LBP-02-4, 55 NRC 49 (2002).

Moreover, excluding safeguards data pertaining to anti-terrorism from the NEPA process is "not simply a policy choice" but is mandated by Section 147 of the AEA. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 355 (2002), aff'g LBP-01-37, 54 NRC 476 (2001). In this regard, confidentiality in this area can be equated with the NEPA definition of an "essential consideration of national policy" and protects against "risks to health and safety" and avoids "undesirable and unintended consequences." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 355 (2002), aff'g LBP-01-37, 54 NRC 476 (2001). Finally, it should be noted that the Commission has not stated that an environmental report should never consider anti-terrorism issues as they have been addressed in considerable detail in generic studies – only that they should not be required as part of the NEPA process. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 354 (2002), aff'g LBP-01-37, 54 NRC 476 (2001).

In a case where petitioners challenged an export license to export weapons-grade plutonium oxide to France and argued that the applicant DOE's associated EIS

failed to address post-September 11, 2001 terrorism threats, the Commission stated that NRC case law does not require a NEPA-based review of terrorism; however, DOE has discretion to review terrorism in the NEPA context. No hearing was warranted for additional NEPA review on terrorism, as DOE had taken the requisite "hard look" in its EIS and "NEPA does not override [the Commission's] concern for making sure that sensitive security-related information ends up in as few hands as practicable." U.S. Dep't of Energy, CLI-04-17, 59 NRC 357, 371-72 (2004) (quoting Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 347 (2002)).

NEPA does not require the NRC to investigate or enforce tribal leadership's promises to spend lease payments collected from an applicant prudently, legally, or in a manner otherwise to the satisfaction of the entire tribe, even where such promises are cited in the FEIS. There would be no end to the NRC's environmental review if the agency had to follow and scrutinize ongoing contract payments and the actions of tribal leaders. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-9, 59 NRC 120, 125 (2004).

Environmental issues identified as "Category 1," or "generic," issues in 10 C.F.R. Part 51, Subpart A, Appendix B, are not within the scope of a license renewal proceeding. On these issues, the Commission found that it could draw generic conclusions that are applicable to nuclear power plants generally. The Commission was not able to make generic environmental findings on issues identified as "Category 2," or "plant specific," issues in 10 C.F.R. Part 51, Subpart A, Appendix B, and thus these issues are within the scope of license renewal, and applicants must provide a plant-specific review of them. PPL Susquehanna, LLC, (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 309-12 (2007). Absent a waiver pursuant to 10 C.F.R. § 2.335, Category 1 issues cannot be addressed in a license renewal proceeding. Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 67 (2008). An applicant is required to address new and significant information for either Category 1 or Category 2 issues in its environmental report for a license renewal application. Id. at 189.

Spent fuel pool fires are Category 1 environmental issues and, therefore, are addressed generically in the GEIS for license renewals. A petition for rulemaking that addresses issues related to spent fuel pool fires would be a more appropriate venue to seek relief for resolving generic concerns about spent fuel fires than a site-specific contention in an adjudication. Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC 43, 186 (2008).

There is no need for a review of emergency planning issues in the context of license renewal. Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 149 (2008).

6.16.2 Role of EIS

A NEPA analysis of the Government's proposed licensing of private activities is necessarily more narrow than a NEPA analysis of proposed activities which the Government will conduct itself. The former analysis should consider issues which could preclude issuance of the license or which could be affected by license conditions.

Kleppe v. Sierra Club, 427 U.S. 390 (1976). It should focus on the proposal submitted by the private party rather than on broader concepts. It must consider other alternatives, however, even if the agency itself is not empowered to order that those alternatives be undertaken. Were there no distinction in NEPA standards between those for approval of private actions and those for federal actions, NEPA would, in effect, become directly applicable to private parties. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503 (1977).

The impact statement does not simply "accompany" an agency recommendation for action in the sense of having some independent significance in isolation from the deliberative process. Rather, the impact statement is an integral part of the Commission's decision. It forms as much a vital part of the NRC's decisional record as anything else, such that for reactor licensing, for example, the agency's decision would be fundamentally flawed without it. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), CLI-80-31, 12 NRC 264, 275 (1980). The principal goals of an EIS are twofold: to compel agencies to take a hard look at the environmental consequences of a proposed project, and to permit the public a role in the agency's decisionmaking process. Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87 (1998).

Where an applicant has submitted a specific proposal, the statutory language of NEPA's Section 102(2)(C) only requires that an EIS be prepared in conjunction with that specific proposal, providing the Staff with a "specific action of the known dimensions" to evaluate. A single approval of a plan does not commit the agency to subsequent approvals; should contemplated actions later reach the stage of actual proposals, the environmental effects of the existing project can be considered when preparing the comprehensive statement on the cumulative impact of the proposals. Offshore Power Systems (Floating Nuclear Power Plants), LBP-79-15, 9 NRC 653, 658-660 (1979).

6.16.3 Circumstances Requiring Redrafting of Final Environmental Impact Statement

In certain instances, a final environmental impact statement (FEIS) may be so defective as to require redrafting, recirculation for comment and reissuance in final form. Possible defects which could render an FEIS inadequate are numerous and are set out in a long series of NEPA cases in the federal courts. See, e.g., Brooks v. Volpe, 350 F.Supp. 269 (W.D. Wash. 1972) (FEIS inadequate when it suffers from a serious lack of detail and relies on conclusions and assumptions without reference to supporting objective data); Essex City Preservation Ass'n v. Campbell, 536 F.2d 956, 961 (1st Cir. 1976) (new FEIS required when there is significant new information or a significant change in circumstances upon which original FEIS was based); NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (existence of unexamined but viable alternative could render FEIS inadequate). A new FEIS may be necessary when the current situation departs markedly from the positions espoused or information reflected in the FEIS. Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671 (1975); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-3, 21 NRC 244, 256 (1985).

In an adjudicatory hearing, to the extent that any environmental findings by the Presiding Officer (or the Commission) differ from those in the FEIS, the FEIS is

deemed modified by the decision. Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 53 (2001).

Even though an FEIS may be inadequate in certain respects, ultimate NEPA judgments with respect to any facility are to be made on the basis of the entire record before the adjudicatory tribunal. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163 (1975). Previous regulations explicitly recognized that evidence presented at a hearing may cause a Licensing Board to arrive at conclusions different from those in an FEIS, in which event the FEIS is simply deemed amended pro tanto. Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671 (1975); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1571 n.20 (1982). Since findings and conclusions of the licensing tribunal are deemed to amend the FEIS where different there from, amendment and recirculation of the FEIS is not always necessary, particularly where the hearing will provide the public ventilation that recirculation of an amended FEIS would otherwise provide. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163 (1975). Defects in an FEIS can be cured by the receipt of additional evidence subsequent to issuance of the FEIS. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 & 3), LBP-83-36, 18 NRC 45, 47 (1983). See Ecology Action v. AEC, 492 F.2d 998, 1000-02 (2d Cir. 1974); Florida Power & Light Co. (Turkey Point Nuclear Generating Station, Units 3 & 4), ALAB-660, 14 NRC 987, 1013-14 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 195-97 (1975).

Such modification of the FEIS by Staff testimony or the Licensing Board's decision does not normally require recirculation of the FEIS. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 372 (1975), unless the modifications are truly substantial. Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671 (1975); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), LBP-84-31, 20 NRC 446, 553 (1984); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-3, 21 NRC 244, 252, 256 (1985).

Two Courts of Appeals have approved the Commission's rule that the FEIS is deemed modified by subsequent adjudicatory tribunal decisions. Citizens for Safe Power v. NRC, 524 F.2d 1291, 1294 n.5 (D.C. Cir. 1975); Ecology Action v. AEC, 492 F.2d 998, 1001-02 (2nd Cir. 1974); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 29 n.43 (1978). See also New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 94 (1st Cir. 1978); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 705-07 (1985), citing 10 C.F.R. § 51.102 (1985).

If the changes contained in an errata document for an FEIS do not reveal an obvious need for a modification of plant design or a change in the outcome of the cost-benefit analysis, the document need not be circulated or issued as a supplemental FEIS. Nor is it necessary to issue a supplemental FEIS when timely comments on the draft environmental impact statement (DEIS) have not been adequately considered. The Licensing Board may merely effect the required amendment of the FEIS through its initial decision. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), LBP-77-21, 5 NRC 684 (1977); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 & 3), LBP-83-36, 18 NRC 45, 47 (1983).

The NRC Staff is not required to respond to comments identified in an intervenor's dismissed contention concerning the adequacy of the FEIS, where the Staff has prepared and circulated for public comment a supplemental FEIS which addresses and evaluates the matters raised by the comments on the FEIS. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-35, 30 NRC 677, 698 (1989), vacated and reversed on other grounds, ALAB-944, 33 NRC 81 (1991).

Similarly, there is no need for a supplemental impact statement and its circulation for public comment where the changes in the proposed action which would be evaluated in such a supplement mitigate the environmental impacts, although circulation of a supplement may well be appropriate or necessary where the change has significant aggravating environmental impacts. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 28-29 (1978).

NEPA does not require the staff of a federal agency conducting a NEPA review to consider the record, as developed in collateral state proceedings, concerning the environmental effects of the proposed federal action. Failure to review the state records prior to issuing an FEIS, therefore, is not grounds for requiring preparation and circulation of a supplemental FEIS. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), LBP-77-21, 5 NRC 684 (1977).

A proposed shift in ownership of a plant with no modification to the physical structure of the facility does not by itself cast doubt on the benefit to be derived from the plant such as to require redrafting and recirculating the EIS. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 184 (1978).

The Staff's environmental evaluation is not deficient merely because it contains only a limited discussion of facility decommissioning alternatives. There is little value in considering at the operating license stage what method of decommissioning will be most desirable many years in the future in light of the knowledge which will have been accumulated by that time. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 178 n.32 (1974).

Incorporation by reference. While an agency may not reflexively rubber-stamp an analysis performed by others, actually redoing incorporated calculations would be a duplication of resources not required by law. Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-05-28, 62 NRC 721, 730 (2005).

6.16.3.1 Effect of Failure to Comment on Draft Environmental Impact Statement

Where an intervenor received and took advantage of an opportunity to review and comment on a DEIS and where his comments did not involve the Staff's alternate site analysis and did not bring sufficient attention to that analysis to stimulate the Commission's consideration of it, the intervenor will not be permitted to raise and litigate, at a late stage in the hearings, the issue as to whether the Staff's alternate site analysis was adequate, although he may attack the conclusions reached in the FEIS. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-366, 5 NRC 39, 66-67 (1977), aff'd as modified, CLI-77-8, 5 NRC 503 (1977).

Since the public is afforded early opportunity to participate in the NEPA review process, imposition of a greater burden for justification for changes initiated by untimely comments is appropriate. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503, 539 (1977).

6.16.3.2 Stays Pending Remand for Inadequate EIS

Where judicial review disclosed inadequacies in an agency's EIS prepared in good faith, a stay of the underlying activity pending remand does not follow automatically. Whether the project need be stayed essentially must be decided on the basis of (1) a traditional balancing of the equities and (2) a consideration of any likely prejudice to further decisions that might be called for by the remand. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 784-785 (1977).

6.16.4 Alternatives

NEPA requires an agency to consider alternatives to its own proposed action which may significantly affect the quality of the human environment. An agency should not consider alternatives to the applicant's stated goals. Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 199 (D.C. Cir. 1991).

Although an applicant may limit its purpose to production of baseload power, a contention that an environmental report must consider alternative energy as part of a baseload power generation system (combination in another alternative energy source) may be admissible. Luminant Generation Co., LLC (Comanche Peak Nuclear Power Plant, Units 3 & 4), LBP-09-17, 70 NRC 311, 353 (2009).

Perhaps the most important environmentally related task the Staff has under NEPA is to determine whether an application should be turned down because there is some other site at which the plant ought to be located. No other environmental question is both so significant in terms of the ultimate outcome and so dependent upon facts particular to the application under scrutiny. Consequently, the Appeal Board expects the Staff to take unusual care in performing its analysis and in disclosing the results of its work to the public. Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit 2), ALAB-435, 6 NRC 541, 543, 544 (1977).

"In the context of the environmental impact statement drafting process, when a reasonable alternative has been identified it must be objectively considered by the evaluating agency so as not to fall victim to 'the sort of tendentious decisionmaking that NEPA seeks to avoid.'" Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-34, 54 NRC 293, 302 (2001), citing I-291 Why? Association v. Burns, 372 F.Supp. 223, 253 (D. Conn. 1974), aff'd 517 F.2d 1077 (2d Cir. 1975).

A hard look for a superior alternative is a condition precedent to a licensing determination that an applicant's proposal is acceptable under NEPA. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 513 (1978). When NEPA requires an EIS, the Commission is obliged to take a harder look at alternatives than if the proposed action were inconsequential. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-660, 14 NRC 987, 1005-1006 (1981), citing Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263 (1979). In fact, the NEPA mandate that alternatives to the

proposed licensing action be explored and evaluated does not come into play where the proposed action will neither (1) entail more than negligible environmental impacts, nor (2) involve the commitment of available resources respecting which there are unresolved conflicts. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 265-266 (1979).

NEPA was not intended merely to give the appearance of weighing alternatives that are in fact foreclosed. Pending completion of sufficient comparison between an applicant's proposed site and others, in situations where substantial work has already taken place, the Commission can preserve the opportunity for a real choice among alternatives only by suspending outstanding construction permits. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-14, 7 NRC 952, 958-959 (1978).

Despite the importance of alternate site considerations, where all parties have proceeded since the inception of the proceeding on the basis that there was no need to examine alternate sites beyond those referred to in the FEIS, a party cannot insist at the "eleventh hour" that still other sites be considered in the absence of a compelling showing that the newly suggested sites possess attributes which establish them to have greater potential as alternatives than the sites already selected as alternatives. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-495, 8 NRC 304, 306 (1978).

A party seeking consideration at an advanced stage of a proceeding of a site other than the alternate sites already explored in the proceeding must at least provide information regarding the salient characteristics of the newly suggested sites and the reasons why these characteristics show that the new sites might prove better than those already under investigation. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-499, 8 NRC 319, 321 (1978).

The fact that a possible alternative is beyond the Commission's power to implement does not absolve the Commission of any duty to consider it, but that duty is subject to a "rule of reason." Factors to be considered include distance from site to load center, institutional and legal obstacles, and the like. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 486 (1978).

Under NEPA, there is no need for Boards to consider economically better alternatives, which are not shown to also be environmentally preferable. No study of alternatives is needed under NEPA unless the action significantly affects the environment (§ 102(2)(c)) or involves an unresolved conflict in the use of resources (§ 102(2)(e)). Where an action will have little environmental effect, an alternative could not be materially advantageous. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 456-458 (1980); Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), LBP-85-34, 22 NRC 481, 491 (1985).

Pursuant to NEPA § 102(2)(e), the Staff must analyze possible alternatives, even if it believes that such alternatives need not be considered because the proposed action does not significantly affect the environment. A Board is to make the determination, on the basis of all the evidence presented during the hearing, whether other alternatives must be considered. "Some factual basis (usually in the form of the Staff's

environmental analysis) is necessary to determine whether a proposal 'involves unresolved conflicts concerning alternative uses of available resources' – the statutory standard of Section 102(2)(E)." Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), LBP-85-34, 22 NRC 481, 491 (1985), quoting Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 332 (1981). See also Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 449-50 (1988), reconsid., LBP-89-6, 29 NRC 127, 134-35 (1989), rev'd on other grounds, ALAB-919, 30 NRC 29 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990).

Where a Licensing Board is required by regulation to consider reasonable alternatives pursuant to NEPA, the fact that the hearing notice does not refer to this consideration of reasonable alternatives does not excuse the Board from conducting this required analysis. Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), CLI-05-17, 62 NRC 5, 46 (2005).

NEPA does not require the NRC to choose the environmentally preferred site. NEPA is primarily procedural, requiring the NRC to take a hard look at environmental consequences and alternatives. Rochester Gas & Electric Corp. (Sterling Power Project, Nuclear Unit 1), CLI-80-23, 11 NRC 731, 736 (1980).

The application of the Commission's "obviously superior" standard for alternative sites (see Section 6.15.4.1 infra) does not affect the Staff's obligation to take the hard look. The NRC's "obviously superior" standard is a reasonable exercise of discretion to insist on a high degree of assurance that the extreme action of denying an application is appropriate in view of inherent uncertainties in benefit-cost analysis. Rochester Gas & Electric Corp. (Sterling Power Project, Nuclear Unit 1), CLI-80-23, 11 NRC 731, 735 (1980).

Whether or not the parties to a particular licensing proceeding may agree that none of the alternatives (at Seabrook, alternative sites) to the proposal under consideration is preferable, based on a NEPA cost-benefit balance, it remains the Commission's obligation to satisfy itself that that is so. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-557, 10 NRC 153, 155 (1979).

The scope of a NEPA environmental review in connection with a facility license amendment is limited to a consideration of the extent to which the action under the amendment will lead to environmental impacts beyond those previously evaluated. The consideration of alternatives in such a case does not include alternatives to the continued operation of the plant, even though the amendment might be necessary to continued reactor operation. Florida Power & Light Co. (Turkey Point Nuclear Generating, Units 3 & 4), LBP-81-14, 13 NRC 677, 684-85 (1981), citing Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312 (1981).

Issues concerning alternative energy sources in general may no longer be considered in operating license proceedings. Dairyland Power Coop. (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 527 (1982). In general, the NRC's environmental evaluation in an operating license proceeding will not consider need for power, alternative energy sources, or alternative sites. 10 C.F.R. §§ 51.95, 51.106.

The FEIS must include a statement on the alternatives to the proposed action. See 42 U.S.C. § 4332(2)(C)(iii). Generally, this includes a discussion of the agency alternative of "no action" (see 40 C.F.R. § 1502.14(d)), which is most easily viewed as maintaining the status quo. Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 97 (1998); Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 54 (2001).

With regard to the proposed alternatives in an EIS, there need not be much discussion for the "no action" alternative. It is most simply viewed as maintaining the status quo. Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 54 (2001).

Agencies need only discuss those alternatives that are reasonable and will bring about the ends of the proposed action. When the purpose of the action is to accomplish one thing, it makes no sense to consider alternative ways by which another thing might be achieved. When reviewing a discrete license application filed by a private applicant, a federal agency may appropriately accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project. The agency thus may take into account the economic goals of the project's sponsor. Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 55 (2001); Nuclear Management Co., LLC (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 753 (2005). See also USEC, Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 467-68 (2006); Exelon Generation Company (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 156-57 (2005).

While an agency must not craft a set of alternatives so narrowly as to render it a foregone conclusion that the proposed action will be deemed superior, agencies may still limit the alternatives they consider to those that are reasonable. Where the agency action in question is a decision on a license or permit application submitted by a private party, the agency may consider the applicant's purposes and goals when determining which alternatives are reasonable. Exelon Generation Company (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 158 n.77 (2005).

"Demand-side management," or energy efficiency, is not a reasonable alternative that would advances the goals of the applicant, which has a limited purpose, selling electricity. Neither the NRC nor the applicant has the mission (or power) to implement a general societal interest in energy efficiency. Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 806 (2005); see also Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 205 (2008).

A Licensing Board's consideration of reasonable alternatives is substantially different when it is adjudicating an application for a license for an actual facility, such as a uranium enrichment facility, than when it is adjudicating an early site permit application. For the early site permit application, consideration of reasonable alternatives looks at only alternative sites; for the license application, the analysis of reasonable alternatives would be substantially broader. Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), CLI-05-17, 62 NRC 5, 48 (2005).

NEPA does not require an applicant to look at every conceivable alternative, but rather requires only consideration of feasible, nonspeculative, reasonable alternatives. The reasonable alternatives for license renewal proceedings are limited to discrete

electrical power generation sources that are feasible technically and available commercially. Section 8.2 of the GEIS addressed the need to consider energy conservation for the "no-action" alternative. Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 205 (2008).

6.16.4.1 Obviously Superior Standard for Site Selection

The standard for approving a site is acceptability, not optimality. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503 (1977). Due to the more extensive environmental studies made of the proposed site in comparison to alternate sites, more of the environmental costs of the selected site are usually discovered. Upon more extensive analysis of alternate sites, additional cost will probably be discovered. Moreover, a Licensing Board can do no more than accept or reject the application for the proposed site; it cannot ensure that the applicant will apply for a construction permit at the alternate site. For these reasons, a Licensing Board should not reject a proposed site unless an alternate site is "obviously superior" to the proposed site. CLI-77-8, 5 NRC at 526. Standards of acceptability, instead of optimality, apply to approval of plant designs as well. CLI-77-8, 5 NRC at 526. In view of all of this, an applicant's selection of a site may be rejected on the grounds that a preferable alternative exists only if the alternative is "obviously superior." Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-435, 6 NRC 541 (1977). For a further discussion of the "obviously superior" standard with regard to alternatives, see Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 67, 78 (1977).

The Commission's obviously superior standard for alternate sites has been upheld by the Court of Appeals for the First Circuit. The Court held that, given the necessary imprecision of the cost-benefit analysis and the fact that the proposed site will have been subjected to closer scrutiny than any alternative, NEPA does not require that the single best site for environmental purposes be chosen. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 95 (1st Cir. 1978).

A Licensing Board determination that none of the potential alternative sites surpasses a proposed site in terms of providing new generation for areas most in need of new capacity cannot of itself serve to justify a generic rejection of all those alternative sites on institutional, legal, or economic grounds. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 491 (1978).

To establish that no suggested alternative sites are "obviously superior" to the proposed site, there must be either (1) an adequate evidentiary showing that the alternative sites should be generically rejected or (2) sufficient evidence for informed comparisons between the proposed site and individual alternatives. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 498 (1978).

It is not enough for rejection of all alternative sites to show that a proposed site is a rational selection from the standpoint solely of system reliability and stability. For the comparison to rest on this limited factor, it would also have to be shown that the alternative sites suffer so badly on this factor that no need existed to compare the

sites from other standpoints. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 497 (1978).

For application of the "obviously superior" standard, see Rochester Gas and Electric Corporation (Sterling Power Project, Nuclear Unit 1), ALAB-502, 8 NRC 383, 393-399 (1978), particularly at 8 NRC 397 where the Appeal Board equates "obviously" to "clearly and substantially."

6.16.4.2 Standards for Conducting Cost-Benefit Analysis Related to Alternatives

If, under NEPA, the Commission finds that environmentally preferable alternatives exist, then it must undertake a cost-benefit balancing to determine whether such alternatives should be implemented. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-660, 14 NRC 987, 1004 (1981), citing Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155 (1978). But if there are no preferable environmental alternatives, such cost-benefit balancing does not take place. Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 & 3), LBP-08-21, 68 NRC 554, 576 (2008) (quoting Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 162 (1978)).

Neither the NRC Staff nor a Licensing Board is limited to reviewing only those alternate sites unilaterally selected by the applicant. To do so would permit decisions to be based upon "sham" alternatives elected to be identified by an applicant and would often result in consideration of something less than the full range of reasonable alternatives that NEPA contemplates. The adequacy of the alternate site analysis performed by the Staff remains a proper subject of inquiry by the Licensing Board, notwithstanding the fact that none of the alternatives selected by the applicant proves to be "obviously superior" to the proposed site. Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 & 2), LBP-77-60, 6 NRC 647, 659 (1977). Nevertheless, the NEPA evaluation of alternatives is subject to a "rule of reason" and application of that rule "may well justify exclusion or but limited treatment" of a suggested alternative. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 100 (1977), citing CLI-77-8. 5 NRC 503, 540 (1977).

In Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503 (1977), the Commission set forth standards for determining whether, in connection with conducting a second cost-benefit analysis to consider alternate sites, the Licensing Board should account for nontransferable investments made at the previously approved site. Where the earlier environmental analysis of the proposed site had been soundly made, the projected costs of construction at the alternate site should take into account nontransferable investments in the proposed site. Where the earlier analysis lacked integrity, prior expenditures in the proposed site should be disregarded. CLI-77-8, 5 NRC at 533-536.

Population is one – but only one – factor to be considered in evaluating alternative sites. All other things being equal, it is better to place a plant farther from population concentrations. The population factor alone, however, usually cannot justify dismissing alternative sites which meet the Commission's regulations. Public

Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 510 (1978).

In alternative site considerations, the presence of an existing reactor at a particular site where the proposed reactor might be built is significant, but not dispositive. Rochester Gas & Electric Corporation (Sterling Power Project, Nuclear Unit 1), ALAB-502, 8 NRC 383, 394-395 (1978).

In assessing the environmental harm associated with land clearance necessary to build a nuclear facility, one must look at what is being removed – not just how many acres are involved. Rochester Gas & Electric Corporation (Sterling Power Project, Nuclear Unit 1), ALAB-502, 8 NRC 383, 395 (1978).

In considering the economic costs of building a facility at an alternative site, the costs of replacement power which might be required by reason of the substitution at a late date of an alternate site for the proposed site may be considered. Rochester Gas & Electric Corp. (Sterling Power Project, Nuclear Unit 1), ALAB-502, 8 NRC 383, 394 (1978). However, where no alternative site is "obviously superior" from an environmental standpoint, there is no need to consider this "delay cost" factor. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503, 533-536 (1977); Rochester Gas & Electric Corp. (Sterling Power Project, Nuclear Unit 1), ALAB-502, 8 NRC 383, 398 (1978). Indeed, unless an alternative site is shown to be environmentally superior, comparisons of economic costs are irrelevant. Rochester Gas & Electric Corp. (Sterling Power Project, Nuclear Unit 1), ALAB-502, 8 NRC 383, 395 n.25 (1978).

6.16.5 Need for Facility

NEPA does not foreclose reliance, in resolution of "need-of-power" issues, on the judgment of local regulatory bodies that are charged with the responsibility to analyze future electrical demand growth, at least where the forecasts are not facially defective, are explained on a detailed record, and a principal participant in the local proceeding has been made available for examination in the NRC proceeding. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1–4), ALAB-490, 8 NRC 234, 241 (1978).

The general rule applicable to cases involving differences or changes in demand forecasts is not whether the utility will need additional generating capacity but when. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), LBP-80-30, 12 NRC 683, 691 (1980).

The standard for judging the "need-for-power" is whether a forecast of demand is reasonable and additional or replacement generating capacity is needed to meet that demand. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-490, 8 NRC 234, 237 (1978).

For purposes of NEPA, need-for-power and alternative energy source issues are not to be considered in operating license proceedings for nuclear power plants. Dairyland Power Coop. (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 527-528 (1982); Carolina Power & Light Co. & North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 544-546 (1986).

In general, the NRC's environmental evaluation in an operating license proceeding will not consider need for power, alternative energy sources, or alternative sites. 10 C.F.R. §§ 51.95, 51.106.

NEPA does not require NRC Staff, when preparing an EIS for an offsite ISFSI, to consider whether or not the nation as a whole "needs" the facility. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 40 (2004).

6.16.6 Cost-Benefit Analysis Under NEPA

The NEPA cost-benefit analysis considers the costs and benefits to society as a whole. Rather than isolate the costs or benefits to a particular group, overall benefits are weighed against overall costs. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 391 (1978); Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998).

A cost-benefit analysis should include the consideration and balancing of qualitative as well as quantitative impacts. Those factors which cannot reasonably be quantified should be considered in qualitative terms. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-84-42, 20 NRC 1296, 1329-1330 (1984), citing Statement of Considerations for 10 C.F.R. Part 51, 49 Fed. Reg. 9,363 (March 12, 1984); Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998).

NEPA requires a weighing of the environmental costs of a project against its benefits to society at large; however, while economic benefits are properly considered in an EIS, NEPA does not transform the financial costs and benefits into environmental costs and benefits. Thus, the Commission rejected an intervenor's request to reopen a proceeding and supplement an EIS where it found that the resulting difference in the NEPA analysis would be primarily financial (i.e., an increase in the licensee's expenses, reducing the project's economic benefits). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 30 (2006).

Where a Licensing Board is required by regulation (e.g., by 10 C.F.R. § 51.105(a)(3)) to weigh costs versus benefits pursuant to NEPA, the fact that the hearing notice does not refer to this weighing of costs and benefits does not excuse the Board from conducting this required analysis. Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), CLI-05-17, 62 NRC 5, 46 (2005).

In weighing the costs and benefits of a facility, adjudicatory boards must consider the time and resources that have already been invested if the facility has been partially completed. Money and time already spent are irrelevant only where the NEPA comparison is between completing the proposed facility on the one hand and abandoning that facility on the other. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-392, 5 NRC 759 (1977). In comparing the costs of completion of a facility at the proposed site to the costs of building the facility at an alternate site, the Commission may consider the fact that costs have already been incurred at the proposed site. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 95-96 (1st Cir. 1978).

Unless a proposed nuclear unit has environmental disadvantages when compared to alternatives, differences in financial cost are of little concern. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), LBP-78-26, 8 NRC 102, 161 (1978); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), LBP-82-117A, 16 NRC 1964, 1993 (1982), citing Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 162 (1978). Only after an environmentally superior alternative has been identified do economic considerations become relevant. Dairyland Power Coop. (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 527 (1982). The Commission is not in the business of regulating the market strategies of licensees. Under NEPA, determination of economic benefits and costs that are tangential to environmental consequences are within a wide area of agency discretion. Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-05-28, 62 NRC 721, 726 (2005).

A reasonably foreseeable, nonspeculative, substantial reduction in benefits should trigger the need, under NEPA, to reevaluate the cost-benefit balance of a proposed action before further irreversible environmental costs are incurred. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 630-31 (1983).

The NRC considers need-for-power and alternative energy sources (e.g., a coal plant) as part of its NEPA cost-benefit analysis at the construction permit stage for a nuclear power reactor. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 & 2), LBP-83-27A, 17 NRC 971, 972 (1983). See Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), 1 NRC 347, 352-72 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503, 522 (1977). In the operating license environmental analysis, however, need-for-power and alternative energy sources are not considered and contentions which directly implicate need-for-power projections and comparisons to coal are barred by the regulations; correlatively, such comparative cost savings may not be counted as a benefit in the Staff's NEPA cost-benefit analysis. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 & 2), LBP-83-27A, 17 NRC 971, 974 (1983).

Even if the cost-benefit balance for a plant is favorable, measures may be ordered to minimize particular impacts. Such measures may be ordered without awaiting the ultimate outcome of the cost-benefit balance. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), LBP-83-11, 17 NRC 413, 419 (1983).

While the balancing of costs and benefits of a project is usually done in the context of an EIS prepared because the project will have significant environmental impacts, at least one court has implied that a cost-benefit analysis may be necessary for certain federal actions which, of themselves, do not have a significant environmental impact. Specifically, the court opined that an operating license amendment derating reactor power significantly could upset the original cost-benefit balance and, therefore, require that the cost-benefit balance for the facility be reevaluated. Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1084-85 (D.C. Cir. 1974).

In assessing how economic benefits are portrayed, a key consideration of several courts has been whether the economic assumptions of the FEIS were so distorted as

to impair fair consideration of the project's adverse environmental effects. Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998).

Sunk costs are as a matter of law not appropriately considered in an operating license cost-benefit balance. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-82-63, 16 NRC 571, 586-87 (1982), citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503, 534 (1977); Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-82-95, 16 NRC 1401, 1404-1405 (1982).

An adequate FEIS for a nuclear facility necessarily includes the lesser impacts attendant to low-power testing of the facility and removes the need for a separate focusing on questions such as the costs and benefits of low-power testing. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 795 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

When Licensing Boards, pursuant to NEPA, are considering the environmental impacts of licensing a facility, they must weigh the costs of constructing and operating the facility versus the benefits of doing so. Yet, where the proceeding concerns merely an early site permit application, the Board should not attempt to weigh costs and benefits. That weighing process must be postponed until the review of an actual license application to build a facility at the site in question, because until then there would not be enough specific information about the project to permit a proper and meaningful cost-benefit analysis. Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), CLI-05-17, 62 NRC 5, 46-47 (2005); see also System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-07-14, 65 NRC 216, 218-19 (2007) ("The effects of short-term damage to the environment cannot be meaningfully assessed at the ESP stage because such an inquiry requires weighing the short-term damage against long-term benefits of the project, and the long-term benefits cannot be assessed until the construction permit or COL stage"); Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 236 (2007) (Because certain environmental effects simply could not be meaningfully assessed at the ESP stage, the Staff's decision to defer consideration of those effects until a time when they can be accurately assessed was consistent with NEPA's requirements).

Under NRC regulations (10 C.F.R. § 52.18), an EIS for an early site permit application does not need to assess the benefits of the project. Exelon Generation Company (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 167 (2005); System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), LBP-07-1, 65 NRC 27, 99 (2007) (The NRC Staff's EIS analysis for the ESP need not include an assessment of the benefits).

Analysis of the costs of alternative power generation technologies and the costs of constructing and operating the proposed nuclear facility were deemed unnecessary by the Board where it had not been shown that a reasonable alternative to the proposed nuclear facility would be environmentally preferable. Clinton ESP, LBP-05-19, 62 NRC at 176-79.

There is a difference between an "environmental impact" and a purely economic benefit discussed in an EIS. NEPA's cost-benefit analysis requires the agency to weigh economic benefits against environmental impacts. This does not, however,

transform those economic benefits into environmental impacts. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 147-48 (2004).

Congress's alleged preference for onsite storage of high-level radioactive waste, as expressed in the Nuclear Waste Policy Act, is neither an economic nor an environmental cost or benefit of the proposed licensing action that must be considered as part of NEPA's cost-benefit analysis. Congressional preferences are not necessarily the most environmentally benign nor the most economically beneficial. PFS, CLI-04-22, 60 NRC at 152.

6.16.6.1 Consideration of Specific Costs Under NEPA

When water quality decisions have been made by the U.S. Environmental Protection Agency (EPA) pursuant to the Federal Water Pollution Control Act (FWPCA) Amendments of 1972 and these decisions are raised in NRC licensing proceedings, the NRC is bound to take EPA's considered decisions at face value and simply to factor them into the NEPA cost-benefit analysis. Carolina Power & Light Co. (H.B. Robinson, Unit 2), ALAB-569, 10 NRC 557, 561-62 (1979).

The environmental and economic costs of decommissioning necessarily comprise a portion of the cost-benefit analysis which the Commission must make. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), LBP-79-6, 9 NRC 291, 313 (1979).

Alternative methods of decommissioning do not have to be discussed. All that need be shown is that the estimated costs do not tip the balance against the plant and that there is reasonable assurance that an applicant can pay for them. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), LBP-79-6, 9 NRC 291, 314 (1979).

6.16.6.1.1 Cost of Withdrawing Farmland from Production

(Also see Section 3.8.3.5.1)

6.16.6.1.2 Socioeconomic Costs as Affected by Increased Employment and Taxes from Proposed Facility

Increased employment and tax revenue cannot be included on the benefit side in striking the ultimate NEPA cost-benefit balance for a particular plant. But the presence of such factors can certainly be taken into account in weighing the potential extent of the socioeconomic impact which the plant might have upon local communities. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 509 n.58 (1978).

6.16.7 Consideration of Class 9 Accidents/"Remote and Speculative" Accidents in an EIS

The emergency core cooling system (ECCS) Final Acceptance Criteria as set forth in 10 C.F.R. § 50.46 and Appendix K to 10 C.F.R. Part 50 assume that the ECCS will operate during an accident. On the other hand, Class 9 accidents postulate the failure

of the ECCS. Thus, on its face, consideration of Class 9 accidents would appear to be a challenge to the Commission's regulations. However, the Commission has squarely held that the regulations do not preclude the use of inconsistent assumptions about ECCS failure for other purposes. Thus, the prohibition of challenges to the regulations in adjudicatory proceedings does not preclude the consideration of Class 9 accidents and a failure of ECCS related thereto in EISs and proceedings thereon. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 221 (1978). The Commission no longer relies on the accident classification scale in conducting environmental reviews. Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 725 (3rd Cir. 1989).

Because the law does not require consistency in treatment of two parties in different circumstances, the Staff does not violate principles of fairness in considering Class 9 accidents in EISs for floating but not land-based plants. The Staff need only provide a reasonable explanation why the differences justify a departure from past agency practice. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 222 (1978).

In proceedings instituted prior to June 1980, serious (Class 9) accidents need be considered only upon a showing of "special circumstances." Dairyland Power Coop. (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 529 (1982); 45 Fed. Reg. 40,101 (June 13, 1980). The subsequent Commission requirement that NEPA analysis include consideration of Class 9 accidents (45 Fed. Reg. 40,101) cannot be equated with a health and safety requirement. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-82106, 16 NRC 1649, 1664 (1982). The fact that a nuclear power plant is located near an earthquake fault and in an area of known seismic activity does not constitute a special circumstance. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-781, 20 NRC 819, 826-828 (1984), aff'g in part, LBP-82-70, 16 NRC 756 (1982) (full-power license for Unit 1). See also Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 795-796 (1983).

Absent new and significant safety information, Licensing Boards may not act on proposals concerning Class 9 accidents in operating reactors. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-86-21, 23 NRC 849, 870 (1986), citing 50 Fed. Reg. 32,144, 32,144-45 (Aug. 8, 1985). Licensing Boards may not admit contentions which seek safety measures to mitigate or control the consequences of Class 9 accidents in operating reactors. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 846-47 (1987), aff'd in part and rev'd in part, ALAB-869, 26 NRC 13, 30-31 (1987), reconsid. denied, ALAB-876, 26 NRC 277 (1987); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 443-45, 446 (1988), reconsid., LBP-89-6, 29 NRC 127, 132-35 (1989), rev'd, ALAB-919, 30 NRC 29, 45-47 (1989), vacated in part and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990). See also Public Service Co. of New Hampshire (Seabrook Station, Units & 2), LBP-89-3, 29 NRC 51, 54 (1989), aff'd on other grounds, ALAB-915, 29 NRC 427 (1989). However, pursuant to their NEPA responsibilities, Licensing Boards may consider the risks of such accidents. Vermont Yankee Nuclear Power Corp., LBP-87-17, 25 NRC 838, 854-55 (1987), aff'd in part and rev'd in part, ALAB-869, 26 NRC 13, 31 n.28 (1987), reconsid. denied, ALAB-876, 26 NRC 277, 285

(1987). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-89-6, 29 NRC 127, 132-35 (1989) (citing Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988) and the NRC's Severe Accident Policy Statement, 50 Fed. Reg. 32,138 (Aug. 8, 1985)), rev'd, ALAB-919, 30 NRC 29 (1989), vacated in part and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990).

In Diablo Canyon and Vermont Yankee, the licensees applied for license amendments which would permit the expansion of each facility's spent fuel pool storage capacity. The intervenors submitted contentions, based on hypothetical accident scenarios, and requested the preparation of environmental impact statements. The Appeal Board rejected the contentions after determining that the hypothetical accident scenarios were based on remote and speculative events, and thus were Class 9 or beyond-design-basis accidents which could not provide a proper basis for admission of the contentions. The Appeal Board has made it clear that: (1) NEPA does not require the preparation of an EIS on the basis of an assertion of a hypothetical accident that is a Class 9 or beyond-design-basis accident, citing San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986), cert. denied, 479 U.S. 923 (1986); and (2) the NEPA Policy Statement, 45 Fed. Reg. 40,101 (June 13, 1980), which describes the circumstances under which the Commission will consider, as a matter of discretion, the environmental impacts of beyond design-basis accidents, does not apply to license amendment proceedings. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 283-85 (1987); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-877, 26 NRC 287, 293-94 (1987); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-880, 26 NRC 449, 458-460 (1987), aff'g, LBP-87-24, 26 NRC 159 (1987), remanded on other grounds sub nom. Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 443-45, 446 (1988), reconsid., LBP-89-6, 29 NRC 127, 132-35 (1989), rev'd, ALAB-919, 30 NRC 29, 47-51 (1989), vacated in part and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990). See also Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-lOA, 27 NRC 452, 458-59 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988).

NRC Staff can make a determination without a full probabilistic risk assessment analysis about whether a postulated accident sequence is "remote and speculative" (so as not to require an analysis of its impact in an EIS) based on existing materials available to it, probabilistic and otherwise, supplemented by additional information it might obtain from the applicant in an environmental report or through requests for additional information. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 252 (2001).

The Atomic Safety and Licensing Board interprets the Commission's intent to be firmly directed to deciding what is "remote and speculative" by examining the probabilities inherent in a proposed accident scenario. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-19, 52 NRC 85, 97 (2000).

6.16.8 Power of NRC Under NEPA

The Licensing Board is not obliged under NEPA to consider all issues which are currently the subject of litigation in other forums and which may someday have an impact on the amount of effluent available. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), LBP-82-45, 15 NRC 1527, 1528, 1530 (1982).

The Commission is not required by NEPA to hold formal hearings on site preparation activities because NEPA did not alter the scope of the Commission's jurisdiction under the AEA. United States Dep't of Energy et al. (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 421 (1982), citing Gage v. AEC, 479 F.2d 1214, 1220 n.19 (D.C. Cir. 1972); 39 Fed. Reg. 14,506, 14,507 (Apr. 24, 1979). "While NEPA clearly mandates that an agency fully consider environmental issues, it does not itself provide for a hearing on those issues." Kelley v. Selin, 42 F.3d 1501, 1511 (6th Cir. 1995), citing Union of Concerned Scientists v. NRC, 920 F.2d 50, 56 (D.C. Cir. 1990).

NEPA requires that the Commission prepare an EIS only for major actions significantly affecting the environment. United States Dep't of Energy et al. (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 424 (1982).

A federal agency may consider separately under NEPA the different segments of a proposed federal action under certain circumstances. Where approval of the segment under consideration will not result in any irreversible or irretrievable commitments to remaining segments of the proposed action, the agency may address the activities of that segment separately. United States Dep't of Energy et al. (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 424 (1982).

An agency will consider the following factors to determine if it should confine its environmental analysis under NEPA to the portion of the plan for which approval is being sought: (1) whether the proposed portion has substantial independent utility; (2) whether approval of the proposed portion either forecloses the agency from later withholding approval of subsequent portions of the overall plan or forecloses alternatives to subsequent portions of the plan; and (3) if the proposed portion is part of a larger plan, whether that plan has become sufficiently definite such that there is high probability that the entire plan will be carried out in the near future. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 & 2), LBP-85-43, 22 NRC 805, 810 (1985), citing Swain v. Brinegar, 542 F.2d 364, 369 (7th Cir. 1976) (en banc). Applying these criteria, the Board determined that it was not required to assess the environmental impacts of possible future construction and operation of transmission lines pursuant to an overall grid system long-range plan when considering a presently proposed part of the transmission system (operation of the Braidwood nuclear facility). Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 & 2), LBP-85-43, 22 NRC 805, 810-12 (1985).

The NRC Staff may, if it desires, perform a more complete review than the minimum legally required. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), LBP-82-72, 16 NRC 968, 972 (1982).

In some limited cases, NRC Staff review of a licensee's preliminary environmental document may satisfy the requirement for an EA. Portland General Electric Co. (Trojan Nuclear Power Station), CLI-95-13, 42 NRC 125 (1995).

Compliance with the National Historic Preservation Act does not preclude the need to comply with NEPA with regard to impacts on historic and cultural aspects of the environment. Therefore, noise impacts on proposed historic districts must be evaluated and, if necessary, mitigation measures undertaken. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), LBP-83-11, 17 NRC 413, 435 (1983). See also Hydro Resources, Inc., LBP-05-26, 62 NRC 442, 472 (2005) (To comply with NEPA in this regard, "an agency must reasonably (1) consider the historic and cultural resources in the affected area; (2) assess the impact of the proposed action, and reasonable alternatives to that action, on cultural resources; (3) disseminate the relevant facts and assessments for public comment; and (4) respond to legitimate concerns.").

NEPA does not require the Commission to reveal sensitive government security information regarding the agency's environmental analysis, and the Commission will not do so when no compelling policy reason exists. Pacific Gas and Electric Company (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 514 (2008); see also Pacific Gas and Electric Company (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 20 (2008).

6.16.8.1 Powers in General

The Commission may prescribe such regulations, orders and conditions as it deems necessary under any activity authorized pursuant to the AEA, and NEPA requires the Commission to exercise comparable regulatory authority in the environmental area. Wisconsin Electric Power Co. (Point Beach, Unit 2), ALAB-82, 5 AEC 350, 352 (1972).

Where necessary to assure that NEPA is complied with and its policies protected, Licensing Boards can and must ignore stipulations among the parties to that effect. Consolidated Edison Co. (Indian Point Nuclear Generating Unit 3), CLI-75-14, 2 NRC 835 (1975). Beyond this, Licensing Boards have independent responsibilities to enforce NEPA and may raise environmental issues sua sponte. Tennessee Valley Authority (Hartsville Nuclear Power Plant, Units 1A, 2A, 1B & 2B), ALAB-380, 5 NRC 572 (1977).

In addressing the question as to the degree to which NEPA allows the NRC to preempt state and local regulation with respect to nuclear facilities, the Appeal Board held that the federal doctrine of preemption invalidates local zoning decisions that substantially obstruct or delay the effectuation of an NRC license condition imposed by the Commission pursuant to NEPA. Consolidated Edison Co. (Indian Point Nuclear Generating Unit 2), ALAB-399, 5 NRC 1156, 1169-70 (1977). However, the Appeal Board also indicated that, where a question is presented as to whether state or local regulations relating to alteration of a nuclear power plant are preempted under NEPA, the NRC should refrain from ruling on that question until regulatory action has been taken by the state or local agency involved. ALAB-399 at 1170. To the same effect in this regard is Consolidated Edison Co. (Indian Point

Nuclear Generating Unit 2), ALAB-453, 7 NRC 31, 35 (1978), wherein the Appeal Board reiterated that federal tribunals should refrain from ruling on questions of federal preemption of state law where a state statute has not yet been definitively interpreted by the state courts or where an actual conflict between federal and state authority has not ripened.

A state or political subdivision thereof may not substantially obstruct or delay conditions imposed upon a plant's operating license by the NRC pursuant to its NEPA responsibilities, as such actions would be preempted by federal law. However, a state may refuse to authorize construction of a nuclear power plant on environmental or other grounds and may prevent or halt operation of an already built plant for some valid reason under state law. Consolidated Edison Co. (Indian Point Nuclear Generating Unit 2), ALAB-453, 7 NRC 31, 34-35 (1978).

When another agency has yet to resolve a major issue pertaining to a particular nuclear facility, the NRC may allow construction to continue at that facility only if the NRC's NEPA analysis encompasses all likely outcomes of the other agency's review. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-14, 7 NRC 952, 957 (1978).

A Licensing Board may rule on the adequacy of the FEIS once it is introduced into evidence and may modify it if necessary. A Licensing Board's authority to issue directions to the NRC Staff regarding the performance of its independent responsibilities to prepare a draft environmental statement is limited. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), LBP-80-18, 11 NRC 906, 909 (1980).

Neither NEPA nor the AEA applies to activities occurring in foreign countries and subject to their sovereign control. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-562, 10 NRC 437, 445-46 (1979).

6.16.8.2 Transmission Line Routing

Consistent with its interpretation of the Commission's NEPA authority (see Wisconsin Electric Power Co. (Point Beach, Unit 2), ALAB-82, 5 AEC 350 (1972)), the Appeal Board has held that the NRC has the authority under NEPA to impose conditions (i.e., require particular routes) on transmission lines, at least to the extent that the lines are directly attributable to the proposed nuclear facility. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-247, 8 AEC 936, 939 (1974). In addition, the Commission has legal authority to review the offsite environmental impacts of transmission lines and to order changes in transmission routes selected by an applicant. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 83 (1977). Two federal circuits have upheld this view. Public Service Company of New Hampshire v. NRC, 582 F.2d 77 (1st Cir. 1978); Detroit Edison Power Co. v. NRC, 630 F.2d 450, 451 (6th Cir. 1980); but see, Limited Work Authorizations for Nuclear Power Plants, 72 Fed. Reg. 57,416, 57,442 (Oct. 9, 2007) (indicating that construction activities do not include building transmission lines and hence no LWA permit is required for such activities). See also Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 667-68 (2007) (citing Dep't of Transp. v. Public Citizen, 541 U.S. 752, 770 (2004) (noting that agencies must only follow NEPA for discretionary actions

because "an agency cannot be considered the legal 'cause' of an action that it has no statutory discretion not to take").

6.16.8.3 Pre-LWA Activities/Offsite Activities

NEPA and the Commission's implementing regulations proscribe environmentally significant construction activities associated with a nuclear plant, including activities beyond the site boundary, without prior Commission approval. A "site," in the context of the Commission's NEPA responsibilities, includes land where the proposed plant is to be located and its necessary accouterments, including transmission lines and access ways. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1 (1977). See Section 6.20 on activities prior to issuance of an LWA or construction permit.

6.16.8.4 Relationship to EPA with Regard to Cooling Systems

The NRC may accept and use without independent inquiry EPA's determination of the magnitude of the marine environmental impacts from a cooling system in striking an overall cost-benefit balance for the facility. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 23-24 (1978). For a discussion of the statutory framework governing the relationship between the NRC and EPA in this area, see CLI-78-1, 7 NRC at 23-26. That relationship may be described thusly: EPA determines what cooling system a nuclear power facility may use and the NRC factors the impacts resulting from use of that system into the NEPA cost-benefit analysis. CLI-78-1, 7 NRC at 26.

The NRC's acceptance and use, without independent inquiry, of EPA's determination as to the aquatic impacts of the Seabrook Station was upheld in New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 98 (1st Cir. 1978), aff'g Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1 (1978).

The Commission may rely on final decisions of EPA prior to completion of judicial review of such decisions. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-17, 8 NRC 179, 180 (1978).

Although an adverse environmental impact on water quality resulting from a cooling system discharge is an important input in the NEPA cost-benefit balance, a Licensing Board cannot require alteration of a facility's cooling system if that system has been approved by EPA. Carolina Power & Light Co. (H.B. Robinson, Unit 2), LBP-78-22, 7 NRC 1052, 1063-64 (1978).

The NRC need not relitigate the issue of environmental impacts caused by a particular cooling system when it is bound to accept that cooling system authorized by EPA. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), LBP-82-72, 16 NRC 968, 970 (1982), citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 24 (1978).

6.16.8.5 NRC Power Under NEPA re the Federal Water Pollution Control Act

Section 511(c)(2) of the FWPCA does not change a licensing agency's obligation to weigh degradation of water quality in its NEPA cost-benefit balance, but the substantive regulation of water pollution is in EPA's hands. Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 & 2), ALAB-515, 8 NRC 702, 712-13 (1978).

The Commission and the Appeal Board have stated that Section 511(c)(2) of the FWPCA requires that the NRC accept EPA's determinations on effluent limitations at face value and prohibits the NRC from undertaking any independent analysis. Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 387 (2007); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Unit 3), ALAB-532, 9 NRC 279, 282 (1979).

Section 511(c)(2) of the Clean Water Act does not preclude the NRC from considering noise impacts of the cooling water system on the surrounding environment. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), LBP-83-11, 17 NRC 413, 419 (1983).

When water quality decisions have been made by EPA pursuant to the FWPCA Amendments of 1972 and these decisions are raised in NRC licensing proceedings, the NRC is bound to take EPA's considered decisions at face value and simply to factor them into the NEPA cost-benefit analysis. Carolina Power & Light Co. (H.B. Robinson, Unit 2), ALAB-569, 10 NRC 557, 561-62 (1979).

6.16.8.6 Environmental Justice

The NRC integrates environmental justice considerations into its NEPA review process. See Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040 (Aug. 24, 2004). The policy statement reflects principles established by the Commission in adjudications. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 153 (2002), rev'g LBP-02-8, 55 NRC 171 (2002); Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 100-10 (1998). See also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-09, 59 NRC 120 (2004); Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 64 (2001).

The purpose of Executive Order 12898, 3 C.F.R. 859 (1995) is to "underscore certain provision[s] of existing law that can help ensure that all communities and persons across the nation live in a safe and healthful environment." It does not create any new legal rights or remedies. Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 102 (1998); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 35-36 (1998); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 153 (2002), rev'g LBP-02-8, 55 NRC 171 (2002); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-9, 59 NRC 120, 123 (2004).

An agency inquiry into a license applicant's supposed discriminatory motives or acts would be far removed from NEPA's core interest in protecting the physical environment. Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 102 (1998)

"Disparate impact" analysis is the principal tool for advancing environmental justice under NEPA. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-8, 55 NRC 171, 190 (2002). The NRC's goal is to identify and adequately weigh or mitigate effects on low-income and minority communities that become apparent only by considering factors peculiar to those communities. Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 100 (1998); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36 (1998). The Commission has focused on addressing any disproportionately high and adverse effects in these communities. Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 64 (2001).

The NRC will not focus investigations on which subgroups within a minority community may obtain special benefits as compared to others. Claims of financial or political corruption do not belong in the NRC hearing process under the rubric of environmental justice or NEPA. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 156-57 (2002), rev'g LBP-02-8, 55 NRC 171 (2002). Contentions that focus on the impact of a facility on the elderly are not admissible as environmental justice contentions, because such contentions must focus on minority and low-income populations. PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385, 414 (2009).

Petitioners may not file for a hearing using Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (1994) when the case concerns itself with an amendment for a site that has already been licensed. International Uranium Corp. (White Mesa Uranium Mill), LBP-97-12, 46 NRC 1, 8 (1997). Executive Order 12898, which directed agencies to take into account environmental justice issues in exercising their statutory duties, created no new substantive right. This executive order is relevant only to the Commission's actions under NEPA and not under any other statutory duty; therefore, the Commission only takes into account "disproportionate adverse effects" of a project that peculiarly affect an environmental justice community and have some nexus to factors properly within the scope of NEPA. System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005).

Editing NEPA documents is not a function of the Commission's hearing process. Busy Licensing Boards do not sit to parse and fine-tune EISs. Grand Gulf, CLI-05-4, 61 NRC at 19.

Environmental justice reviews are necessarily case specific, and the methods and forms of Staff review, including decisions about whether to hold discussions with knowledgeable community and governmental representatives, will be left up to the informed discretion of the Staff. Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 242-43 (2007).

NEPA, which mandates a hard look at the environmental impact of proposed federal actions, is the only legal grounds for an admissible contention relating to environmental justice matters. Under NEPA, the purpose of an environmental justice review is to insure that the Commission considers and publicly discloses environmental factors peculiar to minority or low-income populations that may cause them to suffer harm disproportionate to that suffered by the general population. The goals of NEPA are to inform federal agencies and the public about the environmental effects of proposed projects. Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC 43, 199 (2008).

6.16.8.7 Relationship of NRC Environmental Reviews to State Law

When the monitoring of contaminants in effluents is regulated through a state permit, the DEIS must address this monitoring, but compliance with state requirements is, in the first instance, a matter for the state. Louisiana Energy Services, L.P. (National Enrichment Facility), LBP-05-13, 61 NRC 385, 419 (2005).

6.16.8.8 NEPA Disclosure Provisions

NEPA claims are governed by NEPA's own specific nondisclosure provision, not the more general provisions in the AEA or in NRC regulations. Pacific Gas and Electric Company (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 522 (2008), citing Weinburger v. Catholic Action League, 454 U.S. 139 (1981). Under NEPA, the agency may withhold from public disclosure any information that is exempt under the Freedom of Information Act (FOIA). Id. at 523.

The Staff releases all documents with FOIA-exempt information redacted, which provides all the information in the environmental assessment that is suitable for public dissemination. Nothing in the agency's procedural hearing rules requires greater disclosure of the agency's environmental analysis. Pacific Gas and Electric Company (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 523 (2008).

6.16.9 Spent Fuel Pool Proceedings

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.

A Licensing Board is not required to consider in a spent fuel pool expansion case the environmental effects of all other spent fuel pool capacity expansions. Because pending or past licensing actions affecting the capacity of other spent fuel pools could neither enlarge the magnitude nor alter the nature of the environmental effects directly attributable to the expansion in question, there is no occasion to take into account any such pending or past actions in determining the expansion application at bar. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 267-68 (1979).

The attempt, in a licensing proceeding for an individual pool capacity expansion, to challenge the absence of an acceptable generic long-term resolution of the waste

management question was precluded in Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41 (1978), remanded sub nom. Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979), restating the Commission's policy that for the purposes of licensing actions, the availability of offsite spent fuel repositories in the relatively near term should be presumed. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 267-68 (1979); see also Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 853-54 (1987) (Licensing Board rejected a contention which sought to examine the possibilities or effects of long-term or open-ended storage), aff'd in part and rev'd in part, ALAB-869, 26 NRC 13 (1987), reconsid. denied, ALAB-876, 26 NRC 277 (1987).

The Licensing Board need not consider alternatives to pool capacity expansion in a proposed expansion proceeding, where the environmental effects of the proposed action are negligible. The NEPA mandate that alternatives to the proposed licensing action be explored and evaluated does not come into play where the proposed action will neither (1) entail more than negligible environmental impacts nor (2) involve the commitment of available resources respecting which there are unresolved conflicts. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 265-66 (1979); Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981). See Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-LOA, 27 NRC 452, 459 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988).

The Atomic Safety and Licensing Board found that an intervenor's assertions regarding sabotage risk to an expanded spent fuel pool did not provide a litigable basis for a NEPA contention. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-19, 52 NRC 85, 97 (2000).

In a license amendment proceeding to expand a spent fuel pool, the environmental review for such amendment need not consider the effects of continued plant operation where the environmental status quo will remain unchanged. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 326 (1981), citing Committee for Auto Responsibility v. Solomon, 603 F.2d 992 (D.C. Cir. 1979), cert. denied, 445 U.S. 915 (1980).

After analyzing the regulatory history, it was confirmed that 10 C.F.R. § 50.68(b)(2), (4), (7) contemplate the use of enrichment, burnup and soluble boron as criticality control measures. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 260 (2000).

There is no requirement under 10 C.F.R. 50.68(b)(4) that K-effective must be kept at or below .95 under all conditions, including the scenario involving a fresh fuel assembly misplacement concurrent with the loss of soluble boron. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 269 (2000).

In a spent fuel pool proceeding, compliance with 10 C.F.R. § 50.55a affords compliance with Appendix B of Part 50. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 272 (2000).

6.16.10 Certificate of Compliance/Gaseous Diffusion Plant

No EA or EIS is required for the issuance, amendment, modification, or renewal of a certificate of compliance for gaseous diffusion enrichment facilities, pursuant to 10 C.F.R. § 51.22(c)(19). Although NRC regulations do not require a general review of the environmental impacts associated with the issuance of certificates of compliance, an environmental assessment of the impacts of compliance plan approval is required. U.S. Enrichment Corp., CLI-96-12, 44 NRC 231, 238-39 (1996).

6.16.11 Waste Confidence Rule (NEPA)

The waste confidence rule's restriction on considering "environmental impacts" at 10 C.F.R. § 51.23(b) does not expressly address how the NRC evaluates a project's potential economic benefits. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 148 (2004). The waste confidence provisions were designed to limit the scope of the environmental inquiry to exclude looking at long-term effects as if there were no prospect for permanent disposal of waste. They were not designed to prevent the NRC from considering the very benefits for which a facility license is sought. Id.

6.16.12 Greenhouse Gases

We expect the Staff to include consideration of carbon dioxide and other greenhouse gas emissions in its environmental reviews for major licensing actions under NEPA. The Staff's analysis for reactor applications should encompass emissions from the uranium fuel cycle as well as from construction and operation of the facility to be licensed. The Staff should ensure that these issues are addressed consistently in agency NEPA evaluations and, as appropriate, update Staff guidance documents to address greenhouse gas emissions. Duke Energy Carolinas, LLC (Combined License Application for William States Lee III Nuclear Station, Units 1 & 2); Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 & 4), CLI-09-21, 70 NRC 927, 931 (2009).

6.17 NRC Staff

6.17.1 Staff Role in Licensing Proceedings

The NRC Staff generally has the final word in all safety matters, not placed into controversy by parties, at the operating license stage. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-680, 16 NRC 127, 143 (1982), citing South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1156 n.31 (1981).

The NRC Staff has a continuing responsibility to assure that all regulatory requirements are met by an applicant and continue to be met throughout the operating life of a nuclear power plant. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-680, 16 NRC 127, 143, 143 n.23 (1982).

The NRC Staff has the primary responsibility for reviewing all safety and environmental issues prior to the award of any operating license. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-82-91, 16 NRC 1364, 1369 (1982).

An operating license may not be issued until the NRC makes the findings specified in 10 C.F.R. § 50.57. It is the Staff's duty to ensure the existence of an adequate basis for each of that section's determinations. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), ALAB-678, 15 NRC 1400, 1420 n.36 (1982), citing South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895-896 (1981).

The fact that an application for an operating license is uncontested does not mean that an operating license automatically issues. An operating license may not issue unless and until the NRC Staff makes the findings specified in 10 C.F.R. 50.57, including the ultimate finding that such issuance will not be inimical to the health and safety of the public. Washington Public Power Supply System (WPPSS Nuclear Project 2), ALAB-722, 17 NRC 546, 553 n.8 (1983), citing South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895-96 (1981). The same procedure applies under 10 C.F.R. § 70.23, 70.31 in the case of an application for a materials license. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-778, 20 NRC 42, 48 (1984).

In early site permit proceedings, it is appropriate for NRC Staff to prioritize facts that it will independently verify based on criteria such as those "involving first-of-a-kind analysis, use of new modeling techniques, application of new or revised review guidance, areas of higher significance based upon risk-informed reviews, or where the Staff's independent analysis or technical experience and judgment does not support the analysis results of the Applicant." Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-07-12, 65 NRC 203, 208 (2007)

In a contested operating license proceeding, a Licensing Board may authorize the Director of Nuclear Reactor Regulation to issue a license for fuel loading and precriticality testing in order to avoid delaying these activities pending a decision on the issuance of a full-power license. If the Board determines that any of the admitted contentions is relevant to fuel loading and precriticality testing, the Board must resolve the contention and make the related findings pursuant to 10 C.F.R. § 50.57(a) for the issuance of a license. The Director is still responsible for making the other § 50.57(a) findings. If there are no relevant contentions, the Board may authorize the Director to make all the § 50.57(a) findings. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 & 2), LBP-86-31, 24 NRC 451, 453-54 (1986), citing 10 C.F.R. § 50.57(c). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-86-34, 24 NRC 549, 553, 555-56 (1986), aff'd, ALAB-854, 24 NRC 783, 790 (1986) (a Licensing Board is required to make findings concerning the adequacy of onsite emergency preparedness, pursuant to 10 C.F.R. § 50.47(d), only as to matters which are in controversy); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-892, 27 NRC 485, 49093 (1988) (to authorize low-power operation pursuant to 10 C.F.R. § 50.57(c), a Board need only resolve those matters in controversy involving low-power, as opposed to full power, operation); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-88-20, 28 NRC 161, 166-67 (1988), aff'd, ALAB-904, 28 NRC 509, 511 (1988).

One of a number of Licensing Boards in the Shoreham operating license proceeding, having dismissed the government intervenors from the proceeding, found that the applicant's motion for 25% power operation was unopposed. Pursuant to

10 C.F.R. § 50.57(c), the Board authorized the Director of Nuclear Reactor Regulation to make the required findings under 10 C.F.R. § 50.57(a) and to issue a 25% power license. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-30, 28 NRC 644, 648-49 (1988). The Appeal Board found that the Licensing Board's decision did not give due regard to the rights of the government intervenors. Although the government intervenors had been dismissed by the Shoreham OL-3 Licensing Board, they still retained full party status before the Shoreham OL-5 Licensing Board. The Appeal Board believed that 10 C.F.R. § 50.57(c) gave the government intervenors the opportunity to be heard on the 25% power request to the extent that any of its contentions which might be admitted by the Shoreham OL-5 Board were relevant. The Appeal Board certified the case to the Commission. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-908, 28 NRC 626, 633-35 (1988). The Commission directed certification of the appeals to the Commission for decision and agreed with the Licensing Board, dismissed the intervenors and ordered the Staff to review any unresolved contentions, make the necessary § 50.57 findings, and wait for a Commission vote to authorize operation above 5% power. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-2, 29 NRC 211 (1989).

The NRC Staff may not deny an application without giving the reasons for the denial and indicating how the application failed to comply with statutory and regulatory requirements. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-3, 21 NRC 244, 250 (1985), citing SEC v. Chenery Corp., 318 U.S. 80, 94 (1943), Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), ALAB-770, 19 NRC 1163, 1168-69 (1984), 5 U.S.C. § 555(e), 10 C.F.R. § 2.103(b).

In general, the Staff does not occupy a favored position at hearing. It is, in fact, just another party to the proceeding. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 532 (1973). The Staff's views are in no way binding upon the Board and they cannot be accepted without being subjected to the same scrutiny as those of other parties. Consolidated Edison Co. (Indian Point Nuclear Generating Units 2 & 3), ALAB-304, 3 NRC 1, 6 (1976); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-268, 1 NRC 383, 399 (1975); Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., CLI-92-6, 35 NRC 86, 88-89 (1992). In the same vein, the Staff must abide by the Commission's regulations just as an applicant or intervenor must do. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-194, 7 AEC 431, 435 (1974); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-801, 21 NRC 479, 484 (1985). On the other hand, in certain situations, as where the Staff prepares a study at the express direction of the Commission, the Staff is an arm of the Commission and the primary instrumentality through which the NRC carries out its regulatory responsibilities, and its submissions are entitled to greater consideration. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-76-17, 4 NRC 451 (1976).

In a construction permit proceeding, the NRC Staff has a duty to produce the necessary evidence of the adequacy of the review of unresolved generic safety issues. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 806 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

After an order authorizing the issuance of a construction permit has become final agency action, and prior to the commencement of any adjudicatory proceeding on any

operating license application, the exclusive regulatory power with regard to the facility lies with the Staff. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-381, 5 NRC 582 (1977). Under such circumstances an adjudicatory board has no authority with regard to the facility or the Staff's regulation of it. In the same vein, after a full-term, full-power operating license has issued and the order authorizing it has become final agency action, no further jurisdiction over the license lies with any adjudicatory board. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-451, 6 NRC 889, 891 n.3 (1977); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-408, 5 NRC 1383, 1386 (1977); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386, aff'd, ALAB-470, 7 NRC 473 (1978).

Prior to issuing an operating license, the Director of Nuclear Reactor Regulation must find that Commission regulations, including those implementing NEPA, have been satisfied and that the activities authorized by the license can be conducted without endangering the health and safety of the public. Pennsylvania Power & Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-693, 16 NRC 952, 956 n.7 (1982), citing 10 C.F.R. § 50.40(d); 10 C.F.R. § 50.57; Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 44 (1978), remanded on other grounds sub nom., Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979).

Licensing Boards lack the power to direct the Staff in the performance of its independent responsibilities and, under the Commission's regulatory scheme, Boards cannot direct the Staff to suspend review of an application or prepare an EIS or work, studies, or analyses being conducted or planned as part of the Staff's evaluation of an application. New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 278-79 (1978). Cf. U.S. Army (Jefferson Proving Ground), LBP-05-9, 61 NRC 218, 222 (2005) (in a materials license proceeding, where the Staff delayed its technical review of a decommissioning-related proposal pending a licensee's submission of relevant information requested by the Staff, a presiding officer found that he was foreclosed from either calling upon the Staff to justify its approach or directing the licensee to furnish a full explanation regarding its default in furnishing to the Staff the information sought from it).

The Staff produces, among other documents, the SER and DEIS and FEIS. The studies and analyses which result in these reports are made independently by the Staff, and Licensing Boards have no role or authority in their preparation. The Board does not have any supervisory authority over that part of the application review process that has been entrusted to the Staff. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 & 3), LBP-83-36, 18 NRC 45, 48-49 (1983), citing New England Power Co. (NEP Units 1 & 2), LBP-78-9, 7 NRC 271 (1978). See Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 206-07 (1978); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-785, 20 NRC 848, 865 n.52 (1984); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 56 (1985), citing Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-80-12, 11 NRC 514, 516-17 (1980).

Although the establishment of a local public document room is an independent Staff function, the presiding officer in an informal proceeding has directed the Staff to establish such a room in order to comply with the requirements of proposed regulations

which had been made applicable to the proceeding. However, the presiding officer acknowledged that he lacked the authority to specify the details of the room's operation. Alfred J. Morabito (Senior Operator's License), LBP-88-5, 27 NRC 241, 243-44 & n.1 (1988).

Although the Licensing Boards and the NRC Staff have independent responsibilities, they are "partners" in implementation of the Commission's policy that decisionmaking should be "both sound and timely," and thus they must coordinate their operations in order to achieve this goal. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 203 (1978).

In an operating license proceeding (with the exception of certain NEPA issues), the applicant's license application is in issue, not the adequacy of the Staff's review of the application. An intervenor thus is free to challenge directly an unresolved generic safety issue by filing a proper contention but it may not proceed on the basis of allegations that the Staff has somehow failed in its performance. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83 32, 18 NRC 1309 (1983); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 55-56 (1985). See Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 186 (1989); Curators of the University of Missouri, LBP-91-31, 34 NRC 29, 108-109 (1991), clarified, LBP-91-34, 34 NRC 159 (1991). Furthermore, although the Commission expects its Staff to thoroughly consider all its licensing decisions, the issue for decision in adjudications is not whether the Staff performed its duty well, but instead whether the license application raises health and safety concerns. Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 396 (1995).

The adequacy of the manner in which the Staff conducts its review of a technical or safety matter is outside the scope of Commission proceedings. Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-03-11, 58 NRC 47, 66 (2003).

The general rule that the applicant carries the burden of proof in licensing proceedings does not apply with regard to alternate site considerations. For alternate sites, the burden of proof is on the Staff and the applicant's evidence in this regard cannot substitute for an inadequate analysis by the Staff. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-479, 7 NRC 774, 794 (1978). The Staff plays a key role in assessing an applicant's qualifications. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-577, 11 NRC 18, 34 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

The Staff is assumed to be fair and capable of judging a matter on its merits. Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4 (1980). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-89-4, 29 NRC 62, 73 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds sub nom. Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991).

When conducting its review of the issues, the Staff should acknowledge differences of opinion among Staff members and give full consideration to views which differ from the

official Staff position. Such discussion can often contribute to a more effective treatment and resolution of the issues. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 580-582 n.6 (1985).

An early appraisal of an applicant's capability does not foreclose the Staff from later altering its conclusions. Such an early appraisal would aid the public and the Commission in seeing whether a hearing is warranted. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-577, 11 NRC 18, 33-34 (1980), reconsid., ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

The Commission will not be drawn into contractual disputes between regulated parties, absent a concern for the public health and safety or the common defense and security or a need to enforce its orders, licenses, or regulations. CBS Corporation (Waltz Mill Facility), CLI-07-15, 65 NRC 221, 234 (2007).

6.17.1.1 Staff Demands on Applicant or Licensee

While the Commission, through the Regulatory Staff, has a continuing duty and responsibility under the AEA to assure that applicants and licensees comply with the applicable requirements, Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 627 (1973), the Staff may not require an applicant to do more than the regulations require without a hearing. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Power Station), ALAB-191, 7 AEC 431, 445, 447 n.32 (1974). The Staff can require a general licensee to comply with public health and safety conditions which are more stringent than the Commission's regulatory requirements applicable to general licensees. Wrangler Laboratories, ALAB-951, 33 NRC 505, 516-18 (1991). Because the law does not require consistency in treatment of two parties in different circumstances, the Staff does not violate principles of fairness in considering Class 9 accidents in EISs for floating but not land-based plants. The Staff need only provide a reasonable explanation why the differences justify a departure from past agency practice. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 222 (1978).

The scope of the NRC regulatory authority does not extend to all questions of fire safety at licensed facilities; instead, the scope of agency regulatory authority with respect to fire protection is limited to the hazards associated with nuclear materials. Thus, while the agency's radiological protection responsibility requires it to consider questions of fire safety, this does not convert the agency into the direct enforcer of local codes, Occupational Safety and Health Administration regulations, or national standards on fire, occupational, and building safety that it has not incorporated into its regulatory scheme. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC 364, 388 (2000), citing Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 393 (1995); Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 159 (1995).

Only statutes, regulations, orders, and license conditions can impose requirements on applicants and licenses. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC 364, 390 (2000), citing Curators of the University of Missouri, CLI-95-1, 41 NRC at 41, 98.

6.17.1.2 Staff Witnesses

Except in extraordinary circumstances, a Licensing Board may not compel the Staff to furnish a particular named individual to testify – i.e., the Staff may select its own witnesses. 10 C.F.R. § 2.709(a) (formerly § 2.720(h)(2)(i)). However, once a certain individual has appeared as a Staff witness, he may be recalled and compelled to testify further. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 391 (1974). A Board may require Staff witnesses to update their previous testimony on a relevant issue in light of new analyses and information which have been developed on the same subject. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1094-1095 n.13 (1984).

The Commission's rules provide that the Executive Director for Operations generally determines which Staff witnesses shall present testimony. An adjudicatory board may nevertheless order other NRC personnel to appear upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-715, 17 NRC 102, 104-05 (1983), citing 10 C.F.R. § 2.709(a) (formerly § 2.720(h)(2)(i)); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-802, 21 NRC 490, 500-501 (1985) (mere disagreement among NRC Staff members is not an exceptional circumstance); Carolina Power & Light Co. et al. (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 811 (1986). See Safety Light Corp. (Bloomsburg Site Decontamination), LBP-92-3A, 35 NRC 110, 111-112 (1992). See generally Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-613, 12 NRC 317, 323 (1980).

6.17.1.3 Posthearing Resolution of Outstanding Matters by the Staff

As a general proposition, issues should be dealt with in the hearings and not left over for later, and possibly more informal, resolution. The posthearing approach should be employed sparingly and only in clear cases, for example, where minor procedural deficiencies are involved. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103 (1983), citing Consolidated Edison Co. (Indian Point Nuclear Generating Unit 2), CLI-74-23, 7 AEC 947, 951 n.8, 952 (1974).

On the other hand, with respect to emergency planning, the Licensing Board may accept predictive findings and posthearing verification of the formulation and implementation of emergency plans. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), LBP-84-2, 19 NRC 36, 212, 251-52, citing Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103-04 (1983).

Completion of the minor details of emergency plans is a proper subject for posthearing resolution by the NRC Staff. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-26, 20 NRC 53, 61-62 (1984), citing Louisiana

Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076 (1983).

A Licensing Board may refer minor matters which in no way pertain to the basic findings necessary for issuance of a license to the Staff for posthearing resolution. Such referral should be used sparingly, however. Consolidated Edison Co. (Indian Point Nuclear Generating Unit 2), CLI-74-23, 7 AEC 947, 951-52 (1974); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1159 (1984). Since delegation of open matters to the Staff is a practice frowned upon by the Commission and the Appeal Board, a Licensing Board properly decided to delay issuing a construction permit until it had reviewed a loan guarantee from the Rural Electrification Administration rather than delegating that responsibility to the Staff for posthearing resolution. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 318 (1978).

Posthearing resolution of licensing issues must not be employed to obviate the basic findings prerequisite to a license, including a reasonable assurance that the facility can be operated without endangering the health and safety of the public. Hydro Res., Inc. (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-1, 63 NRC 1, 4 (2006) (citing Consol. Edison Co. of New York (Indian Point Nuclear Generating Unit 2), CLI-74-23, 7 AEC 947, 951-52 (1974)).

A Licensing Board has delegated to the Staff responsibility for reviewing and approving changes to a licensee's plan for the design and operation of an onsite waste burial project. The Board believed that such a delegation was appropriate where the Board had developed a full and complete hearing record, resolved every litigated issue, and reviewed the project plan which the licensee had developed, at the Board's request, to summarize and consolidate its testimony during the hearing concerning the project. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), LBP-87-11, 25 NRC 287, 298 (1987).

The mere pendency of confirmatory Staff analyses regarding litigated issues does not automatically foreclose Board resolution of those issues. The question is whether the Board has adequate information, prior to the completion of the Staff analyses, on which to base its decision. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1171 (1984).

In a materials licensing proceeding, the Commission rejected an intervenor's argument that because the licensee might not adhere to the methodology in its license, the intervenor should therefore have rights to an adjudicatory hearing on future determinations made in connection with particular license conditions. This argument would transmogrify license proceedings into open-ended enforcement actions; Licensing Boards would be required to keep license proceedings open for the entire life of the license so intervenors would have a continuing, unrestricted opportunity to raise charges of noncompliance. If the intervenors subsequently have cause to believe that the licensee is not following the relevant procedures, they can petition the Staff for enforcement action. Hydro Res., Inc. (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-1, 63 NRC 1, 5-6 (2006).

In order to conduct an expeditious hearing, without having to wait for the completion of confirmatory tests by a licensee and analysis of the test results by the Staff, a Licensing Board may decide to conduct a hearing on all matters ripe for adjudication and to grant an intervenor an opportunity to request an additional hearing limited to matters, within the scope of the admitted contentions, which arise subsequent to the closing of the record. The intervenor must be given timely access to all pertinent information developed by the licensee and the Staff after the close of the hearing with respect to the confirmatory tests. General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-14, 23 NRC 553, 560-61 (1986), citing Commonwealth Edison Co. (Zion Station, Units 1 & 2), LBP-73-35, 6 AEC 861, 865 (1973), aff'd, ALAB-226, 8 AEC 381, 400 (1974). Although the intervenor will not be required to meet the usual standards for reopening a record, the intervenor must indicate in the motion to reopen that the new test data and analyses are so significant as to change the result of the prior hearing. General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-17, 23 NRC 792, 797 (1986).

The Licensing Board must determine that the analyses remaining to be performed will merely confirm earlier Staff findings regarding the adequacy of the plant. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-85-32, 22 NRC 434, 436 & n.2, 440 (1985), citing Consolidated Edison Co. (Indian Point Nuclear Generating Unit 2), CLI-74-23, 7 AEC 947, 951 (1974), which cites, Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), CLI-73-4, 6 AEC 6 (1973) (the mechanism of posthearing findings is not to be used to provide a reasonable assurance that a facility can be operated without endangering the health and safety of the public); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-729, 17 NRC 814 (1983) (posthearing procedures may be used for confirmatory tests); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-811, 21 NRC 1622 (1985) (once a method of evaluation had been used to confirm that one of two virtually identical units had met the standard of a reasonable assurance of safety, it was acceptable to exclude from hearings the use of the same evaluation method to confirm the adequacy of the second unit). Staff analyses which are more than merely confirmatory because a further evaluation is necessary to demonstrate compliance with regulatory requirements in light of negative findings of the Licensing Board regarding certain equipment and that relate to contested issues should be retained with the Board's jurisdiction until a satisfactory evaluation is produced. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1& 2), ALAB-841, 24 NRC 64, 79-80 (1986).

Posthearing issue resolution involving confirmatory analysis by the Staff is acceptable with respect to soil cement testing when the Staff action involves verification only. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-03-8, 57 NRC 293, 328-329 (2003).

At the same time, it is entirely appropriate for the Staff to resolve matters not at issue in an operating license or amendment proceeding. In such proceedings, once a Licensing Board has resolved any contested issues and any issues which it raises sua sponte, the decision as to all other matters which need be considered prior to issuance of an operating license is the responsibility of the Staff alone. Consolidated Edison Co. (Indian Point Nuclear Generating Units 1, 2 & 3),

ALAB-319, 3 NRC 188, 190 (1976); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-181, 7 AEC 207, 209 n.7 (1974); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-854, 24 NRC 783, 790-91 (1986). The Licensing Board is neither required nor expected to pass upon all items which the Staff must consider before the operating license is issued. Consolidated Edison Co. (Indian Point Nuclear Generating Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976).

The Commission will not be drawn into contractual disputes between regulated parties, absent a concern for the public health and safety or the common defense and security or a need to enforce its orders, licenses, or regulations. CBS Corporation (Waltz Mill Facility), CLI-07-15, 65 NRC 221, 234 (2007).

6.17.2 Status of Staff Regulatory Guides

(See Section 6.21.3)

6.17.3 Status of Staff Position and Working Papers

Staff position papers have no legal significance for any regulatory purpose and are entitled to less weight than an adopted regulatory guide. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-268, 1 NRC 383 (1975); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244 (1974). Similarly, an NRC Staff working paper or draft report neither adopted nor sanctioned by the Commission itself has no legal significance for any NRC regulatory purpose. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397 (1976); Consolidated Edison Co. (Indian Point Nuclear Generating Unit 2), ALAB-209, 7 AEC 971, 973 (1974). But see Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 857-60 (1987) (the Licensing Board admitted contentions that questioned the sufficiency of an applicant's responses to an NRC Staff guidance document which provided guidelines for Staff review of spent fuel pool modification applications), aff'd in part and rev'd in part, ALAB-869, 26 NRC 13, 34 (1987), reconsid. denied, ALAB-876, 26 NRC 277 (1987).

Nonconformance with regulatory guides or Staff positions does not mean that General Design Criteria (GDC) are not met; applicants are free to select other methods to comply with the GDC. The GDC are intended to provide engineering goals rather than precise tests by which reactor safety can be gauged. Petition for Emergency & Remedial Action, CLI-78-6, 7 NRC 400, 406 (1978).

6.17.4 Status of Standard Review Plan

Where the applicant used criteria "required" by the Staff's Standard Review Plan (NUREG-75/087, § 2.2.3) in determining the probability of occurrence of a postulated accident, it is not legitimate for the Staff to base its position on a denigration of the process which the Staff itself had promulgated. Public Service Electric & Gas (Hope Creek Generating Station, Units 1 & 2), ALAB-518, 9 NRC 14, 29 (1979).

6.17.5 Conduct of NRC Employees

(RESERVED)

6.18 Orders of Licensing Boards and Presiding Officers

6.18.1 Compliance with Board Orders

Compliance with orders of an NRC adjudicatory board is mandatory unless such compliance is excused for good cause. Thus, a party may not disregard a board's direction to file a memorandum without seeking leave of the board after setting forth good cause for requesting such relief. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187, 190-91 (1978). Similarly, a party seeking to be excused from participation in a prehearing conference ordered by the board should present its justification in a request presented before the date of the conference. ALAB-488, 8 NRC at 191. A Licensing Board may deny an intervention petition as a sanction for the petitioner's failure to comply with a Board order to appear at a prehearing conference. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), LBP-91-13, 33 NRC 259, 262-63 (1991).

A Licensing Board is not expected to sit idly by when parties refuse to comply with its orders. Pursuant to 10 C.F.R. § 2.319 (formerly § 2.718), a Licensing Board has the power and the duty to maintain order, to take appropriate action to avoid delay and to regulate the course of the hearing and the conduct of the participants. Furthermore, pursuant to 10 C.F.R. § 2.320 (formerly § 2.707), the refusal of a party to comply with a Board order relating to its appearance at a proceeding constitutes a default for which a Licensing Board may make such orders in regard to the failure as are just. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982).

A party may not simply refuse to comply with a direct Board order, even if it believes the Board decision to have been based upon an erroneous interpretation of the law. A Licensing Board is to be accorded the same respect as a court of law. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1930 & n.5 (1982). See 10 C.F.R. § 2.314(a) (formerly § 2.713(a)).

When parties, for whatever reason, fail to respond or otherwise comply with Board requests, the Board has the authority to take appropriate action in accordance with its power and duty to maintain order, to avoid delay, and to regulate the course of the hearing and the conduct of the participants. Washington Public Power Supply System (Washington Nuclear Project No. 1), LBP-00-18, 52 NRC 9, 13 (2000) (citing Private Fuel Storage, L.L.C. (Independent Fuel Storage Installation), LBP-00-5, 51 NRC 64, 67 (2000) and Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982)).

When an issue is admitted into a proceeding in an order of the Board, it becomes part of the law of that case. Parties may use the prior history of a case to interpret ambiguities in a Board order, but no party may challenge the precedential authority of a Board's decision other than in a timely motion for reconsideration. Cleveland Electric

Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-18, 17 NRC 501, 504 (1983).

Under 10 C.F.R. § 2.314 (formerly § 2.707), Licensing Boards have broad discretion to sanction willful, prejudicial, and bad-faith behavior. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 7 (2001), citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-902, 28 NRC 423 (1988), review denied, CLI-88-11, 28 NRC 603 (1988).

6.19 Precedent and Adherence to Past Agency Practice

Legal determinations made on appeal in a case are controlling precedent, becoming the "law of the case." A prior decision should be followed unless (1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial. Hydro Resources, Inc., CLI-06-11, 63 NRC 483, 488-89 (2006).

Application of the "law of the case" doctrine is a matter of discretion. When an administrative tribunal finds that its declared law is wrong and would work an injustice, it may apply a different rule of law in the interests of settling the case before it correctly. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 260 (1978).

That the law of the case doctrine does not apply in a particular circumstance does not mean that the prior decision is wholly without precedential value, only that it is limited to its power to persuade. Hydro Res., Inc., LBP-06-1, 63 NRC 41, 59 (2006), aff'd, CLI-06-14, 63 NRC 510 (2006).

An Appeal Board does not give stare decisis effect to affirmation of Licensing Board conclusions on legal issues not brought to it by way of an appeal. Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 & 3), ALAB-482, 7 NRC 979, 981 n.4 (1978).

A Licensing Board is required to give stare decisis effect only to an issue of law which was heard and decided in a prior proceeding. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-924, 30 NRC 331, 358-59 & n.112 (1989), citing EEOC v. Trabucco, 791 F.2d 1, 4 (1st Cir. 1986), and 1B Moore's Federal Practice 0.402[2], at 30.

A determination of fact in an adjudicatory proceeding which is necessarily grounded wholly in a non-adversary presentation is not entitled to be accorded generic effect, even if the determination relates to a seemingly generic matter rather than to some specific aspect of the facility in question. Washington Public Power Supply System (WPPSS Nuclear Projects Nos. 3 & 5), ALAB-485, 7 NRC 986, 988 (1978).

Because the law does not require consistency in treatment of two parties in different circumstances, the Staff does not violate principles of fairness in considering Class 9 accidents in EISs for floating but not land-based plants. The Staff need only provide a reasonable explanation why the differences justify a departure from past agency practice. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 222 (1978).

6.20 Pre-Construction Permit Activities

The Commission adopted in 2007 significant changes to 10 C.F.R. 50.10 and related regulations governing the definition of construction and the LWA process. See 72 Fed. Reg. 57,416 (Oct. 9, 2007). As part of this rulemaking, the special definition of construction in former § 50.10(c) applicable to nuclear power reactors has been removed. The former § 50.10(b) definition of construction has been slightly modified, redesignated as paragraph (a), and as reconstituted now applies to all production and utilization facilities. An LWA is now required only for certain foundation work, including the driving of piles, placement of engineered backfill, and the construction of structural foundations. The environmental impacts review necessary for issuance of an LWA may be limited, at the applicant's request, to the environmental impacts associated with the activities to be conducted under the LWA. Much of the earlier NRC case law on LWA applies in the context of the prohibition on construction as defined in § 50.10(c), and will not be directly applicable to LWAs under the revised LWA rule.

The Commission's regulations proscribe environmentally significant construction activities associated with a nuclear plant, including activities beyond the site boundary, without prior Commission approval. A "site" in this context includes land where the proposed plant is to be located and its necessary accouterments, including transmission lines and access ways. 10 C.F.R. § 50.10(c), which broadly prohibits any substantial action which would adversely affect the environment of the site prior to Commission approval, can clearly be interpreted to bar, for example, road and railway construction leading to the site, at least where substantial clearing and grading are involved. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1 (1977). The Commission may authorize certain site-related work prior to issuance of a construction permit pursuant to 10 C.F.R. § 50.10(c) and (e).

The LWA procedure under 10 C.F.R. § 50.10(e)(1) and (2) and the 10 C.F.R. § 50.12(b) exemption procedure are independent avenues for applicants to begin site preparation in advance of receiving a construction permit. DOE (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 423 (1982).

A request for an exemption from any Commission regulation in 10 C.F.R. Part 50, including the general prohibition on commencement of construction in 10 C.F.R. § 50.10(c), may be granted under 10 C.F.R. § 50.12(a). DOE (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 418 (1982).

The Commission may apply 10 C.F.R. § 50.12 to a first of a kind project. There is no indication in 10 C.F.R. § 50.12 that exemptions for conduct of site preparation activities are to be confined to typical, commercial light water nuclear power reactors. Commission practice has been to consider each exemption request on a case-by-case basis under the applicable criteria in the regulations. There is no indication in the regulations or past practice that an exemption can be granted only if an LWA-1 can also be granted or only if justified to meet electrical energy needs. DOE (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 419 (1982).

In determining whether to grant an exemption pursuant to 10 C.F.R. § 50.12 to allow pre-permit activities, the Commission considers the totality of the circumstances and evaluates the exigency of the circumstances in that overall determination. Exigent

circumstances have been found where: (1) further delay would deny the public currently needed benefits that would have been provided by timely completion of the facility but were delayed due to external factors, and would also result in additional otherwise avoidable costs; and (2) no alternative relief has been granted (in part) or is imminent. The Commission will weigh the exigent circumstances offered to justify an exemption against the adverse environmental impacts associated with the proposed activities. Where the environmental impacts of the proposed activities are insignificant, but the potential adverse consequences of delay may be severe and an exemption will litigate the effects of that delay, the case is strong for granting an exemption that will preserve the option of realizing those benefits in spite of uncertainties in the need for prompt action. DOE (Clinch River Breeder Reactor Plant), CLI-83-1, 17 NRC 1, 4-6 (1983), citing Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), CLI-74-22, 7 AEC 938 (1974); Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), CLI-76-20, 4 NRC 476 (1976); Washington Public Power Supply System (WPPSS Nuclear Project Nos. 3 & 5), CLI-77-11, 5 NRC 719 (1977).

Use of the exemption authority under 10 C.F.R. § 50.12 has been made available by the Commission only in the presence of exceptional circumstances. A finding of exceptional circumstances is a discretionary administrative finding which governs the availability of an exemption. A reasoned exercise of such discretion should take into account the equities of each situation. These equities include the stage of the facility's life, any financial or economic hardships, any internal inconsistencies in the regulation, the applicant's good faith effort to comply with the regulation from which the exemption is sought, the public interest in adherence to the Commission's regulations, and the safety significance of the issues involved. These equities do not, however, apply to the requisite findings on public health and safety and common defense and security. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154, 1156 n.3 (1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-45, 20 NRC 1343, 1376-1377 (1984). The costs of unusually heavy and protracted litigation may be considered in evaluating financial or economic hardships as an equity in assessing the propriety of an exemption. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-45, 20 NRC 1343, 1378-1379 (1984).

The public interest criterion for granting an exemption from 10 C.F.R. § 50.10 under 10 C.F.R. § 50.12(b) is a stringent one: exemptions of this sort are to be granted sparingly and only in extraordinary circumstances. United States Dep't of Energy, et al. (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 426 (1982), citing Washington Public Power Supply System (WPPSS Nuclear Power Projects Nos. 3 & 5), CLI-77-11, 5 NRC 719 (1977).

6.20.1 Pre-LWA Activity

Under 10 C.F.R. § 50.10, as revised by the Commission (72 Fed. Reg. 57,416 (Oct. 9, 2007)), the NRC no longer asserts jurisdiction over the pre-LWA activities which NRC defined as "construction" under former 10 C.F.R. § 50.10(c), and any entity may perform those pre-construction activities without NRC approval. Accordingly, the de minimis standard, see, e.g., Washington Public Power Supply System (WPPS Nuclear Projects 3 and 5), CLI-77-11, 5 NRC 719 (1977), is no longer relevant to proceedings involving the construction of a new utilization and production facility.

6.20.2 Limited Work Authorization

In those situations where the Commission does approve offsite (through an LWA or CP) or pre-permit (through an LWA) activities, conditions may be imposed to minimize adverse impacts. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1 (1977).

An LWA allows preliminary construction work to be undertaken at the applicant's risk, pending completion of later hearings covering radiological health and safety issues. United States Dep't of Energy et al. (Clinch River Breeder Reactor Plant), ALAB-688, 16 NRC 471, 473 n.1 (1982) (citing 10 C.F.R. § 50.10(e)(1)); Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-573, 10 NRC 775, 778 (1979).

Applicants are not required to have every permit in hand before an LWA can be granted. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), LBP-78-26, 8 NRC 102, 123, 129 (1978).

The Board may conduct a separate hearing and issue a partial decision on issues pursuant to NEPA, general site suitability issues specified by 10 C.F.R. § 50.10(e), and certain other possible issues for an LWA. DOE (Clinch River Breeder Reactor Plant), LBP-83-8, 17 NRC 158, 161 (1983), vacated as moot, ALAB-755, 18 NRC 1337 (1983).

Although the LWA and construction permit aspects of the case are simply separate phases of the same proceeding, Licensing Boards have the authority to regulate the course of the proceeding and limit an intervenor's participation to issues in which it is interested. DOE (Clinch River Breeder Reactor Plant), ALAB-761, 19 NRC 487, 492 (1984) (citing 10 C.F.R. § 2.319 (formerly § 2.718)).

6.20.2.1 LWA Status Pending Remand Proceedings

It has been held that, where a partial initial decision on a construction permit is remanded to the Licensing Board for further consideration, an outstanding LWA may remain in effect pending resolution of the construction permit issues provided that little consequential environmental damage will occur in the interim. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-335, 3 NRC 830 (1976). On appeal of this decision, however, the Court of Appeals stayed the effectiveness of the LWA pending alternate site consideration by the Licensing Board on the grounds that it is anomalous to allow construction to take place at one site while the Board is holding further hearings on other sites. Hodder v. NRC, 589 F.2d 1115 (D.C. Cir. 1978).

6.21 Regulations

The proper test of the validity of a regulation is whether its normal and fair interpretation will deny persons their statutory rights. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1047 (1983), citing American Trucking Association v. United States, 627 F.2d 1313, 1318-19 (D.C. Cir. 1980).

6.21.1 Compliance with Regulations

All participants in NRC adjudicatory proceedings, whether lawyers or laymen, have an obligation to familiarize themselves with the NRC Rules of Practice. The fact that a party may be a newcomer to NRC proceedings will not excuse that party's noncompliance with the rules. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 467 n.24 (1985), citing Duke Power Co. (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-615, 12 NRC 350, 352 (1980); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-609, 12 NRC 172, 173 n.1 (1980).

Applicants and licensees must, of course, comply with the Commission's regulations, but the Staff may not compel an applicant or licensee to do more than the regulations require without a hearing. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-194, 7 AEC 431, 445, 447 n.32 (1974).

The power to grant exemptions from the regulations has not been delegated to Licensing Boards, and such Boards, therefore, lack the authority to grant exemptions. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-77-35, 5 NRC 1290, 1291 (1977).

6.21.2 Commission Policy Statements

A Commission policy statement is binding upon the Commission's adjudicatory boards. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-704, 16 NRC 1725, 1732 n.9 (1982), citing Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 51 (1978), remanded on other grounds sub nom. Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 695 (1985), citing Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 82-83 (1974).

6.21.3 Regulatory Guides and Other Guidance Documents

Staff regulatory guides are not regulations and do not have the force of regulations. When challenged by an applicant or licensee, they are to be regarded merely as the views of one party, although they are entitled to considerable prima facie weight. See Section 6.16.2 and cases cited therein. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562, 568 and n.10 (1983)

Guidance documents, such as NUREGs or the Standard Review Plan, do not have the force of legally binding regulations. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001). Where the NRC has developed guidance documents assisting in compliance with applicable regulations, they are entitled to special weight. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001). See also Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 375 n.26 (2005) (discussing the contents of a Standard Review Plan). Guidance documents such as NUREGs do not purport to establish enforceable requirements, so nonconformance with such guides does not equate to noncompliance. While an NRC guidance document sets forth one way in which compliance might be obtained, other

approaches to such compliance might prove just as acceptable. FMRI, Inc. [formerly Fansteel, Inc.], LBP-04-8, 59 NRC 266, 270 (2004).

A regulatory guide, however, only presents the Staff's view of how to comply with the regulatory requirements. Such a guide is advisory, not obligatory and, as the guide itself states at the bottom of the first page: "Regulatory Guides are not substitutes for regulations, and compliance with them is not required." Louisiana Energy Services (Claiborne Enrichment Center), LBP-96-7, 43 NRC 142 (1996).

Staff documents (NUREGs) are intended as guidance, compliance with which is not required. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-03-4, 57 NRC 69, 92 (2003), review declined, CLI-03-5, 57 NRC 279 (2003). See also Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-29, 60 NRC 417, 424 (2004), reconsid. denied, CLI-04-37, 60 NRC 646 (2004) ("Guidance documents are, by nature, only advisory. They need not apply in all situations and do not themselves impose legal requirements on licensees.").

In the absence of other evidence, adherence to regulatory guidance may be sufficient to demonstrate compliance with regulatory requirements. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1299 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983); see Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406-407 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983). Generally speaking, however, such guidance is treated simply as evidence of legitimate means for complying with regulatory requirements, and the Staff is required to demonstrate the validity of its guidance if it is called into question during the course of litigation. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1299 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983); see Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 811 (1974); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 737 (1985).

Interpretation from NRC guidance documents and history "may not conflict with the plain meaning of the wording used in [a] regulation," which in the end "of course must prevail." See Long Island Lighting Co. (Shoreham Nuclear Station, Unit 1), ALAB-900, 28 NRC 275, 288-90 (1988), review declined, CLI-88-11, 28 NRC 603 (1988); Graystar, Inc., LBP-01-7, 53 NRC 168, 187 (2001).

Nonconformance with regulatory guides or Staff positions does not mean that the GDC are not met; applicants are free to select other methods to comply with the GDC. The GDC are intended to provide engineering goals rather than precise tests by which reactor safety can be gauged. Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406 (1978).

A licensee is free either to rely on NUREGs and regulatory guides or to take alternative approaches to meet its legal requirements (as long as those approaches have the approval of the Commission or NRC Staff). Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 398 (1995). Methods and solutions different from those set out in the guides will be acceptable if they provide a basis for the findings requisite to the issuance or continuance of a permit or license by the Commission. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616

(1983), citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1299 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983).

While it is clear that regulatory guides are not regulations, are not entitled to be treated as such, need not be followed by applicants, and do not purport to represent the only satisfactory method of meeting a specific regulatory requirement, they do provide guidance as to acceptable modes of conforming to specific regulatory requirements. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1161, 1169 (1984). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC 273, 280-81 (1991). Indeed, the Commission itself has indicated that conformance with regulatory guides is likely to result in compliance with specific regulatory requirements, though nonconformance with such guides does not mean noncompliance with the regulations. Petition for Emergency & Remedial Action, CLI-78-6, 7 NRC 400, 406-07 (1978). See also Wrangler Laboratories et al., LBP-89-39, 30 NRC 746, 756-57, 759 (1989), rev'd and remanded on other grounds, ALAB-951, 33 NRC 505 (1991).

When determining issues of public health and safety, the Commission has discretion to use the best technical guidance available, including any pertinent NUREGs and regulatory guides, as long as they are germane to the issues then pending before the Commission. However, the Commission's decision to look to such documents for technical guidance in no way contradicts the Commission's ruling that NUREGs and regulatory guides are advisory by nature and do not themselves impose legal requirements on either the Commission or its licensees. Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 397 (1995).

The fact that the emergency planning regulations had not yet gone into effect when the applicant filed its applications did not preclude the Commission from seeking technical guidance from a NUREG that provided the scientific foundation for those regulations. Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 397-98 (1995).

Licensees can be required to show they have taken steps to provide equivalent or better measures than called for in regulatory guides if they do not, in fact, comply with the specific requirements set forth in the guides. Consolidated Edison Co. (Indian Point Nuclear Generating Unit 2) and Power Authority of the State of N.Y. (Indian Point Nuclear Generating Unit 3), LBP-82-105, 16 NRC 1629, 1631 (1982).

The criteria described in NUREG-0654 regarding emergency plans, referenced in NRC regulations, were intended to serve solely as regulatory guidance, not regulatory requirements. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983), citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1298-99 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 710 (1985); Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), LBP-86-11, 23 NRC 294, 367-68 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-836, 23 NRC 479, 487 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-845, 24 NRC 220, 238 (1986); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 544-45 (1986); Long Island

Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290-91 (1988).

In the absence of other evidence, adherence to NUREG-0654 may be sufficient to demonstrate compliance with the regulatory requirements of 10 C.F.R. § 50.47(b). However, such adherence is not required, because regulatory guides are not intended to serve as substitutes for regulations. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983), citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1298-99 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983).

Methods and solutions different from those set out in the guides will be acceptable if they provide a basis for the findings requisite to the issuance or continuance of a permit or license by the Commission. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983), citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1299 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1161 (1984).

6.21.4 Challenges to Regulations

In Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), 4 AEC 243, 244 (1969), the Commission recognized the general principle that regulations are not subject to amendment in individual adjudicatory proceedings. Under that ruling, now supplanted by 10 C.F.R. § 2.335 (formerly § 2.758), challenges to the regulations would be permitted only where application of the rule or regulation would not serve the purposes for which the rule or regulation was adopted. Cf. Hydro Res., Inc., LBP-06-1, 63 NRC 41, 59-60 (2006), aff'd, CLI-06-14, 63 NRC 510 (2006) (A Presiding Officer lacks authority to adopt a "policy" that invalidates a Commission regulation; intervenors may not use a licensing proceeding in essence to rewrite Commission regulations) (citing Balt. Gas & Elec., 4 AEC at 244)); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 233 (2008).

The Commission directed Licensing Boards to certify the question of the validity of any challenge to it prior to rendering any initial decision. Thus, the Commission adheres to the fundamental principle of administrative law that its rules are not subject to collateral attack in adjudicatory proceedings. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 & 2), LBP-82-119A, 16 NRC 2069, 2073 (1982).

No challenge of any kind is permitted, in an adjudicatory proceeding, as to a regulation that is the subject of ongoing rulemaking. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319 (1972); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-57, 4 AEC 946 (1972). In such a situation, the appropriate forum for deciding a challenge is the rulemaking proceeding itself. Union Electric Co. (Callaway Plant, Units 1 & 2), ALAB-352, 4 NRC 371 (1976).

The assertion of a claim in an adjudicatory proceeding that a regulation is invalid is barred as a matter of law as an attack upon a regulation of the Commission. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-410, 5 NRC 1398, 1402 (1977); Metropolitan Edison Co. (Three Mile Island Nuclear Station,

Unit 2), ALAB-456, 7 NRC 63, 65 (1978); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-86-25, 24 NRC 141, 144 (1986); American Nuclear Corp. (Revision of Orders to Modify Source Materials Licenses), CLI-86-23, 24 NRC 704, 709-710 (1986). Consequently, under current regulations, there can be no challenge of any kind by discovery, proof, argument, or other means except in accord with 10 C.F.R. § 2.335 (formerly § 2.758).

A contention based on a challenge to Table S-3 of 10 C.F.R. § 51.51 constituted an impermissible attack on a Commission regulation and the Board should not have admitted it. Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 & 4), CLI-09-3, 69 NRC 68, 75 (2009).

Under 10 C.F.R. 2.335 (formerly 2.758), the regulation must be challenged by way of a petition requesting a waiver or exception to the regulation on the sole ground of "special circumstances" (i.e., because of special circumstances with respect to the subject matter of the particular proceeding, application of the regulation would not serve the purposes for which the regulation was adopted). 10 C.F.R. § 2.335 (formerly § 2.758(b)); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-86-25, 24 NRC 141, 145 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-895, 28 NRC 7, 16 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-88-10, 28 NRC 573, 595 (1988), reconsid. denied, CLI-89-3, 29 NRC 234 (1989); Curators of the University of Missouri, LBP-90-23, 32 NRC 7, 9 (1990). Special circumstances are present only if the petition properly pleads one or more facts, not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the proceeding leading to the rule sought to be waived. Also, the special circumstances must be such as to undercut the rationale for the rule sought to be waived. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-88-10, 28 NRC 573, 596-97 (1988), reconsid. denied, CLI-89-3, 29 NRC 234 (1989). The petition must be accompanied by an affidavit. Other parties to the proceeding may respond to the petition. If the petition and responses, considered together, do not make a prima facie showing that application of the regulation would not serve the purpose intended, the Licensing Board may not go any further. If a prima facie showing is made, then the issue is to be directly certified to the Commission for determination. 10 C.F.R. § 2.335(d) (formerly § 2.758(d)). A waiver petition should not be certified unless the petition indicates that a waiver is necessary to address, on the merits, a significant safety problem related to the rule sought to be waived. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-88-10, 28 NRC 573, 597 (1988), reconsid. denied, CLI-89-3, 29 NRC 234 (1989). In the alternative, any party who asserts that a regulation is invalid may always petition for rulemaking under 10 C.F.R. Part 2, Subpart H (§§ 2.800-2.807).

The provisions of 10 C.F.R. § 2.335 (formerly § 2.758) do not entitle a petitioner for a waiver or exception to a regulation to file replies to the responses of other parties to the petition. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-87-12, 25 NRC 324, 326 (1987).

Petitioners also cannot challenge a mere increase in radiological dose that overall remains well within regulatory limits as this amounts to an impermissible collateral attack on the regulation. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

To make a prima facie showing under 10 C.F.R. § 2.335 (formerly § 2.758) for waiving a regulation, a stronger showing than lack of reasonable assurance has to be made. Evidence would have to be presented demonstrating that the facility under review is so different from other projects that the rule would not serve the purposes for which it was adopted. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-83-49, 18 NRC 239, 240 (1983).

To satisfy the "special circumstances" test under 10 C.F.R. § 2.335 (formerly § 2.1239), the situation must present "unusual facts" that were not contemplated when the regulation was promulgated. CFC Logistics, Inc., LBP-04-24, 60 NRC 475, 494 (2004).

Another Licensing Board has applied a "legally sufficient" standard for the prima facie showing. According to the Board, the question is whether the petition with its accompanying affidavits as weighed against the responses of the parties presents legally sufficient evidence to justify the waiver or exception from the regulation. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-87-12, 25 NRC 324, 328 (1987). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-895, 28 NRC 7, 22 (1988).

A request for an exception, based upon claims of costly delays resulting from compliance with a regulation, rather than claims that application of the regulation would not serve the purposes for which the regulation was adopted, is properly filed pursuant to 10 C.F.R. § 50.12 rather than 10 C.F.R. § 2.335 (formerly § 2.758). Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-85-33, 22 NRC 442, 444-45 (1985).

A request for an exception is properly filed pursuant to 10 C.F.R. § 50.12, and not 10 C.F.R. § 2.335 (formerly § 2.758), when the exception: (1) is not directly related to a contention being litigated in the proceeding; and (2) does not involve safety, environmental, or common defense and security issues serious enough for the Board to raise on its own initiative. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-85-33, 22 NRC 442, 445-46 (1985).

6.21.5 Agency's Interpretation of Its Own Regulations

In the absence of any specific definition in a rule, one looks first to the meaning of the language of the provision in question. Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), LBP-01-25, 54 NRC 177, 184 (2001). Where a regulatory term lacks a statutory or regulatory definition, it should be construed in accord with its "'ordinary or natural' meaning," which may be informed by regulatory and industry usage and practice. Hydro Res., Inc., LBP-06-1, 63 NRC 41, 66 n.24 (2006), aff'd, CLI-06-14, 63 NRC 510 (2006) (citing Smith v. United States, 508 U.S. 223, 228 (1993)).

The wording of a regulation generally takes precedence over any contradictory suggestion in its administrative history. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 469 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-89-38, 30 NRC 725, 745 (1989), aff'd, ALAB-949, 33 NRC 484, 489-90 (1991); Wrangler Laboratories, LBP-89-39, 30 NRC 746, 756 (1989), rev'd and remanded, ALAB-951, 33 NRC 505, 513-16 (1991).

Where the NRC interprets its own regulations and where those regulations have long been construed in a given way, the doctrine of stare decisis will govern absent compelling reasons for a different interpretation; the regulations may be modified, if appropriate, through rulemaking procedures. New England Power Co. (NEP Units 1 & 2), Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-390, 5 NRC 733, 741-42 (1977).

Agency practice, of course, is one indicator of how an agency interprets its regulations. See Power Reactor Development Co. v. International Union, 367 U.S. 396, 408 (1961); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-6, 43 NRC 123, 129 (1996); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999); Sequoyah Fuels Corp. (Gore, OK Site Decommissioning), CLI-01-2, 53 NRC 2, 14 (2001).

In interpreting a statute or regulation, the usual inference is that different language is intended to mean different things. This inference might be negated, however, by a showing that the purpose or history behind the language demonstrates that no difference was intended. Sequoyah Fuels Corp. and General Atomics (Gore, OK Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54 (1994), aff'd, CLI-94-12, 40 NRC 64 (1994).

If the plain language analysis does not resolve ambiguities, it may be appropriate to inquire into guidance documents, provided they do not conflict with the plain meaning of the words used in the regulation. Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), LBP-01-25, 54 NRC 177, 184 (2001).

Language in a Statement of Consideration for a regulation, having been endorsed by the Commission in its own Statement of Consideration, is entitled to "special weight" under relevant case law. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290-91 (1988), review declined, CLI-88-11, 28 NRC 603 (1988); Graystar Inc., LBP-01-7, 53 NRC 168, 187 (2001).

Interpretation of a regulation, like the interpretation of a statute, begins with the language and structure of the provision itself and the entirety of the provision must be given effect. Louisiana Energy Services (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 299 (1997); Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 361 (2001); AmerGen Energy Co., Inc. (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 674-75 (2008).

It is a canon of construction that, where possible, a regulation should be construed in a manner that avoids internal inconsistencies. Hydro Res., Inc., LBP-06-1, 63 NRC 41, 57 (2006), aff'd, CLI-06-14, 63 NRC 510 (2006) (citing, e.g., United States v. Raynor, 302 U.S. 540, 547 (1938); Water Quality Ass'n Employees' Benefit Corp. v. United States, 795 F.2d 1303, 1307 (7th Cir. 1986); Bhd. of Locomotive Firemen and Enginemen v. N. Pac. Ry. Co., 274 F.2d 641, 646-47 (8th Cir. 1960)).

Under the canon of construction known as the rule of the last antecedent, "qualifying words, phrases and clauses must be applied to the words or phrases immediately preceding them and are not to be construed as extending to and including others more remote." Hydro Res., Inc., LBP-06-1, 63 NRC 41, 56 n.11 (2006), aff'd, CLI-06-14,

63 NRC 510 (2006) (citing Demko v. United States, 216 F.3d 1049, 1053 (Fed. Cir. 2000) (quoting Wilshire Westwood Assocs. v. Atl. Richfield Corp., 881 F.2d 801, 804 (9th Cir. 1989))).

Where regulatory words at issue "are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." Hydro Res., Inc., LBP-06-1, 63 NRC 41, 58 (2006), aff'd, CLI-06-14, 63 NRC 510 (2006) (quoting Porto Rico Ry., Light & Power Co. v. Mor, 253 U.S. 345, 348 (1920)).

Boards have declined to interpret regulatory text in a way that would essentially negate the stated purpose of the regulation or impute to the Commission an intent to create a "schizophrenic" rule. Hydro Res., Inc., LBP-06-1, 63 NRC 41, 68-69 (2006), aff'd, CLI-06-14, 63 NRC 510 (2006) (citing Exxon Nuclear Co. (Nuclear Fuel Recovery and Recycling Center), ALAB-447, 6 NRC 873, 878 (1977); New York State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 419-20 (1973); Treadway v. Gateway Chevrolet Oldsmobile Inc., 362 F.3d 971, 976 (7th Cir. 2004)).

It is a well-established rule of construction that technical terms of art should be interpreted by reference to the trade or industry to which they apply. A layman's reading of a regulation, uninformed by context, is not decisive. Pa'ina Hawaii, LLC., CLI-06-13, 63 NRC 508, 518-19 (2006).

6.21.6 General Design Criteria

The GDC are not applicable to nuclear power plants with construction permits issued prior to May 21, 1971. Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 75 (2008). The GDC set out in 10 C.F.R. Part 50, Appendix A, are "cast in broad, general terms and constitute the minimum requirements for the principal design criteria of water-cooled nuclear power plants. There are a variety of methods for demonstrating compliance with GDC." Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 360-61 (2001), citing Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406 (1978).

GDC include little implementing detail. The GDC are "only a regulatory beginning and not the end product." Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 360 (2001), quoting Nader v. NRC, 513 F.2d 1045, 1052 (D.C. Cir. 1975).

There are no regulatory requirements that would require a summary of a licensee's conformance to the draft GDC in the updated final safety analysis report. Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), DD-05-2, 62 NRC 389, 395 (2005).

The NRC does not require licensees to compile a complete list of a plant's current conformance to the draft GDC. The design and licensing bases for any plant reside in many documents. These documents are either submitted to the NRC as part of the formal docket or are available at the plant for review by NRC inspectors. A compilation of a plant's compliance with the GDC or draft GDC is therefore not necessary for the

Staff to perform license reviews or license inspections. Vermont Yankee, DD-05-2, 62 NRC at 396-97.

GDC 62 instructs NRC licensees in general terms to prevent criticality "by physical systems or processes." GDC 62 contains no restrictive provisions against reliance on "administrative" measures (i.e., human intervention). In the context of regulations pertaining to nuclear power facilities, a "physical process" is a method of doing something, producing something, or accomplishing a specific result using the forces and operations of physics. Similarly, a "physical system" is an organized or established procedure or method based on the forces and operations of physics. Neither term excludes human intervention to set physical forces in motion or to monitor them. GDC 62 is not incompatible with "administrative" implementation of physical properties. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 361 (2001).

GDC 62's use of the term "physical" simply reinforces an obvious point: effective criticality prevention requires protective physical measures. The regulatory term excludes, at the most, marginal (and implausible) criticality prevention schemes lacking any physical component, such as, perhaps, mere observation without accompanying physical mechanisms. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 364 (2001).

GDC do not purport to prescribe "precise tests or methodologies." See Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406 (1978). Intervenors nonetheless would have the Staff construe GDC 62 to distinguish between "one-time" and "ongoing" administrative controls and to allow only "one-time" controls. Nothing in the text of GDC 62 suggests that, when promulgating the rule, the Commission envisioned anything like intervenors' complex approach, and the Staff declines to adopt it today. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 364 (2001).

10 C.F.R. 50.68 expressly provides for the use of enrichment, burnup, and soluble boron as criticality control measures. Both the regulation and its history demonstrate that the Commission endorses the use of physical controls with significant procedural aspects for criticality control. The Commission was mindful of GDC 62 when it approved the use of administrative controls in 10 C.F.R. 50.68. The Statement of Consideration refers specifically to GDC 62 as reinforcing the prevention of criticality in fuel storage and handling "through physical systems, processes, and safe geometrical configuration." See Criticality Accident Requirements, 62 Fed. Reg. 63,825, 63,826 (Dec. 3, 1997). Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 366 (2001).

As the latest expression of the rulemakers' intent, the more recent regulation prevails if there is a perceived conflict with an earlier regulation. See 2B Sutherland, Statutory Construction § 51.02 (1992). The specific provisions of 10 C.F.R. § 50.62 provide strong evidence for the NRC's current reading of the more general strictures of GDC 62. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 367 (2001).

In 1982, the Nuclear Waste Policy Act (NWPA) was enacted by Congress, recognizing that accumulation of spent nuclear fuel is a national problem and that federal efforts to

devise a permanent solution to problems of civilian radioactive waste disposal have not been adequate. See 42 U.S.C. § 10131(a)(2)-(3). The NWPA established federal responsibility and a definite federal policy for the disposal of spent fuel. See 42 U.S.C. § 10131(b)(2). Further, the act declared as one of its purposes the addition of new spent nuclear fuel storage capacity at civilian reactor sites. See 42 U.S.C. § 10151(b)(1). The NWPA directed nuclear power plant operators to exercise their "primary responsibility" for interim storage of spent fuel "by maximizing, to the extent practical, the effective use of existing storage facilities at the site of each civilian nuclear power reactor, and by adding new onsite storage capacity in a timely matter where practical." See 42 U.S.C. § 10151(a)(1). Under the NWPA, the Commission was to promulgate rules for an expedited hearing process on applications "to expand the spent nuclear fuel storage capacity at the site of civilian nuclear power reactor[s] through the use of high-density fuel storage racks." See 42 U.S.C. § 10154. The Licensing Board's understanding of GDC 62 is compatible with the NWPA, while intervenors' viewpoint cannot be reconciled with congressional policy on nuclear waste storage. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 367-68 (2001).

The phrase "physical systems or processes" in GDC 62 comprehends the administrative and procedural measures necessary to implement or maintain such physical systems or processes. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 369 (2001).

6.21.7 Reporting Requirements

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. Michel A. Phillipon (Denial of Senior Reactor Operator's License), LBP-99-44, 50 NRC 347, 368 (1999) interpreting 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 NRC for them. Michel A. Phillippon (Denial of Senior Reactor Operator's License), LBP-99-44, 50 NRC 347, 369 (1999).

6.22 Rulemaking

Rulemaking procedures are covered, in general, in 10 C.F.R. § 2.800-2.807, which govern the issuance, amendment and repeal of regulations and public participation therein. It is well established that an agency's decision to use rulemaking or adjudication in dealing with a problem is a matter of discretion. Fire Protection for Operating Nuclear Power Plants, CLI-81-11, 13 NRC 778, 800 (1981), citing NAACP v. FPC, 425 U.S. 662, 668 (1976); Oncology Services Corp., LBP-94-2, 39 NRC 11 (1994).

The Administrative Procedure Act provides agencies with considerable flexibility to choose between rulemaking and adjudicatory procedures when making law. All Power Reactor Licensees and Research Reactor Licensees who Transport Spent Nuclear Fuel, CLI-05-06, 61 NRC 37, 40 (2005). The Commission has authority to determine whether a particular issue shall be decided through rulemaking, through adjudicatory consideration,

or by both means. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-82-118, 16 NRC 2034, 2038 (1982), citing F.P.C. v. Texaco, Inc., 377 U.S. 33, 42-44 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192, 202 (1955). In the exercise of that authority, the Commission may preclude or limit the adjudicatory consideration of an issue during the pendency of a rulemaking. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-82-118, 16 NRC 2034, 2038 (1982).

When a matter is involved in rulemaking, the Commission may elect to require an issue which is part of that rulemaking to be heard as part of that rulemaking. Where it does not impose such a requirement, an issue is not barred from being considered in adjudication being conducted at that time. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-82-63, 16 NRC 571, 584-585 (1982); LBP-82-118, 16 NRC 2034, 2037 (1982).

A contention that seeks to litigate a matter that is the subject of an agency rulemaking is not admissible. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-01, 51 NRC 1, 5 (2000); See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179, 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).

It is, of course, a well-recognized proposition that the choice to use rulemaking rather than adjudication is a matter within the agency's discretion. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-01, 51 NRC 1, 5 (2000).

6.22.1 Rulemaking Distinguished from General Policy Statements

While notice and comment procedures are required for rulemaking, such procedures are not required for issuance of a policy statement by the Commission since policy statements are not rules. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-76-14, 4 NRC 163 (1976). However, if a policy statement changes the agency's interpretation of a rule, it may constitute an interpretive rule and would therefore require notice and comment. MetWest Inc. v. Sec'y of Labor, 560 F.3d 506, 509-12 (D.C. Cir. 2009).

6.22.2 Generic Issues and Rulemaking

The Commission has indicated that, as a rule, generic safety questions should be resolved in rulemaking rather than adjudicatory proceedings. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 814-15, clarified, CLI-74-43, 8 AEC 826 (1974). In this vein, it has been held that the Commission's use of rulemaking to set ECCS standards is not a violation of due process. Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1081-82 (D.C. Cir. 1974).

It is within the agency's authority to settle factual issues of a generic nature by means of rulemaking. Minnesota v. NRC, 602 F.2d 412, 416-17 (D.C. Cir. 1979) and Ecology Action v. AEC, 492 F.2d 998, 1002 (2d Cir. 1974), cited in Fire Protection for Operating Nuclear Power Plants, CLI-81-11, 13 NRC 778, 802 (1981). An agency's previous use of a case-by-case problem resolution method does not act as a bar to a later effort to resolve generic issues by rulemaking. Pacific Coast European Conference v. United

States, 350 F.2d 197, 205-06 (9th Cir.), cert. denied, 382 U.S. 958 (1965). The fact that standards addressing generic concerns adopted pursuant to such a rulemaking proceeding affect only a few, or one, licensee(s) does not make the use of rulemaking improper. Hercules, Inc. v. EPA, 598 F.2d 91, 118 (D.C. Cir. 1978), cited in Fire Protection, CLI-81-11, 13 NRC 778 (1981). Waiver of a Commission rule is not appropriate for a generic issue. The proper approach when a problem affects nuclear reactors generally is to petition the Commission to promulgate an amendment to its rules under 10 C.F.R. § 2.802. See, e.g., Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Station & Vermont Yankee Nuclear Power Stations), CLI-07-3, 65 NRC 13, 20-21 (2007) (stating that the proper approach for pursuing a claim of new and significant information regarding a generic issue previously addressed by rulemaking is a petition for rulemaking); Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 126 (2008). If the issue is sufficiently urgent, the petitioner may request suspension of the licensing proceeding while the rulemaking is pending. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-81-57, 14 NRC 1037, 1038-39 (1981). Questions of onsite low-level waste storage are highly site and design specific and hence not appropriate for a generic low-level waste confidence rulemaking. Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 & 4), CLI-09-3, 69 NRC 68, 76-78 (2009).

6.23 Research Reactors

10 C.F.R. § 50.22 constitutes the Commission's determination that if more than 50% of the use of a reactor is for commercial purposes, that reactor must be licensed under Section 103 of the AEA rather than Section 104. Section 104 licenses are granted for research and education, while Section 103 licenses are issued for industrial or commercial purposes. The Regents of the University of California (UCLA Research Reactor), LBP-83-24, 17 NRC 666, 670 (1983).

In amending the AEA, Congress intended to "grandfather" research and development nuclear plant licenses and to exempt such licenses from seeking new licenses under the Act's section governing commercial licenses. American Public Power Ass'n v. NRC, 990 F.2d 1309, 1313 (D.C. Cir. 1993).

The AEA does not require antitrust review for applications for renewal of research and development nuclear plant licenses. American Public Power Ass'n v. NRC, 990 F.2d 1309, 1314 (D.C. Cir. 1993).

6.24 Disclosure of Information to the Public

10 C.F.R. § 2.390 (formerly § 2.790) deals generally with NRC practice and procedure in making NRC records available to the public. The requirements governing the availability of some official records, governed by 10 C.F.R. § 2.390 (formerly § 2.790), were amended. 68 Fed. Reg. 18,836 (April 17, 2003). 10 C.F.R. Part 9 specifically establishes procedures for implementation of the FOIA (10 C.F.R. § 9.3 to 9.16) and Privacy Act (10 C.F.R. § 9.50, 9.51).

Under 10 C.F.R. § 2.390 (formerly § 2.790), hearing boards are delegated the authority and obligation to determine whether proposals of confidentiality filed pursuant to Section 2.390(b)(1) (formerly Section 2.790(b)(1)) should be granted pursuant to the

standards set forth in Subsections (b)(2) through (c) of that section. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-81-62, 14 NRC 1747, 1755-56 (1981). Pursuant to 10 C.F.R. § 2.319 (formerly § 2.718), boards may issue a wide variety of procedural orders that are neither expressly authorized nor prohibited by the rules. They may permit intervenors to contend that allegedly proprietary submissions should be released to the public. They may also authorize discovery or an evidentiary hearing that is not relevant to the contentions but is relevant to an important pending procedural issue, such as the trustworthiness of a party to receive allegedly proprietary material. However, discovery and hearings not related to contentions are of limited availability. They may be granted, on motion, if it can be shown that the procedure sought would serve a sufficiently important purpose to justify the associated delay and cost. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-2, 15 NRC 48 (1982).

Section 10(b) of the Federal Advisory Committee Act, 5 U.S.C. App. 10(b), generally requires an agency to make available for public inspection and copying all materials which were made available to or prepared for or by an advisory committee. The materials must be made available to the public before or on the date of the advisory committee meeting for which they were prepared. An FOIA request for disclosure of the materials is required only for those materials which an agency reasonably withholds pursuant to an FOIA exemption, 5 U.S.C. § 552(b). Food Chemical News v. HHS, 980 F.2d 1468, 1471-72 (D.C. Cir. 1992).

Under Chrysler Corp. v. Brown, 441 U.S. 281 (1979), neither the Privacy Act nor the FOIA gives a private individual the right to prevent disclosure of names of individuals where the Licensing Board elects to disclose. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-81-50, 14 NRC 888, 891 (1981).

In Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-33, 15 NRC 887, 891-892 (1982), the Board ruled that the names and addresses of temporary employees who have worked on a tube-sleeving project are relevant to intervenor's request for information about quality assurance in a tube-sleeving demonstration project. Since applicants have not given any specific reason to fear that intervenors will harass these individuals, their names should be disclosed so that intervenors may seek their voluntary cooperation in providing information to them.

In the Seabrook offsite emergency planning proceeding, the Licensing Board extended a protective order to withhold from public disclosure the identity of individuals and organizations who had agreed to supply services and facilities which would be needed to implement the applicant's offsite emergency plan. The Board noted the emotionally charged atmosphere surrounding the Seabrook facility, and, in particular, the possibility that opponents of the licensing of Seabrook would invade the applicant's commercial interests and the suppliers' right to privacy through harassment and intimidation of witnesses in an attempt to improperly influence the licensing process. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-88-8, 27 NRC 293, 295 (1988).

6.24.1 Freedom of Information Act Disclosure

Under FOIA, a Commission decision to withhold a document from the public must be by majority vote. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), CLI-80-35, 12 NRC 409, 412 (1980).

While FOIA does not establish new government privileges against discovery, the Commission has elected to incorporate the exemptions of the FOIA into its own discovery rules. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 121 (1980).

Section 2.390 (formerly Section 2.790) of the Rules of Practice is the NRC's promulgation in obedience to the FOIA. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 121 (1980).

Section 2.709 of the Rules of Practice provides that a presiding officer may order production of any record exempt under Section 2.390 (formerly Section 2.790) if its "disclosure is necessary to a proper decision and the document is not reasonably obtainable from another source." This balancing test weighs the need for a proper decision against the interest in privacy. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-81-50, 14 NRC 888, 892 (1981).

The presiding officer in an informal hearing lacks the authority to review the Staff's procedures or determinations involving FOIA requests for NRC documents. However, the presiding officer may compel the production of certain of the requested documents if they are determined to be necessary for the development of an adequate record in the proceeding. Alfred J. Morabito (Senior Operator's License), LBP-87-28, 26 NRC 297, 299 (1987).

Although 10 C.F.R. § 2.744 by its terms refers only to the production of NRC documents, it also sets the framework for providing protection for NRC Staff testimony where disclosure would have the potential to threaten the public health and safety. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), LBP-83-40, 18 NRC 93, 99 (1983). Nondisclosure of commercial or financial information pursuant to FOIA Exemption 4, 5 U.S.C. § 552(b)(4), may be appropriate if an agency can demonstrate that public disclosure of the information would harm an identifiable agency interest in efficient program operations or in the effective execution of its statutory responsibilities. The mere assertion that disclosure of confidential information provided to the NRC by a private organization will create friction in the relationship between the NRC and the private organization does not satisfy this standard. Critical Mass Energy Project v. NRC, 931 F.2d 939, 943-945 (D.C. Cir. 1991), vacated and reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991). Also, commercial or financial information may be withheld if disclosure of the information likely would impair the agency's ability to obtain necessary information in the future. To meet this standard, an agency may show that nondisclosure is required to maintain the qualitative value of the information. Critical Mass, 931 F.2d 945-947, citing National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974), vacated and reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991). On rehearing, the Court of Appeals reaffirmed the National Parks test for determining the confidentiality of commercial or financial information under FOIA Exemption 4. Such information is confidential if disclosure of the information is likely to (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. National Parks, 498 F.2d 770. However, the court restricted the National Parks test to information which a person is compelled to provide the government. Information which is voluntarily provided to the government is confidential under Exemption 4 if it is of a kind that customarily would

not be released to the public by the provider. Critical Mass Energy Project v. NRC, 975 F.2d 871, 876-877, 879-880 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993).

The Commission, in adopting the standards of Exemption 5, and the "necessary to a proper decision" as its document privilege standard has adopted traditional work product/executive privilege exemptions from disclosure. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 123 (1980).

The Government is no less entitled to normal privilege than is any other party in civil litigation. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 127 (1980).

Any documents in final form memorializing the Director's decision not to issue a notice of violation imposing civil penalties does not fall within Exemption 5. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 129 (1980).

A person who has submitted an FOIA request to an agency must exhaust all administrative remedies before filing a lawsuit seeking production of the documents. An agency has ten (10) working days to respond to the request. 5 U.S.C. § 552(a)(6)(A). If the agency has not responded within this 10-day period, then the requester has constructively exhausted the administrative remedies and may file a lawsuit. 5 U.S.C. § 552(a)(6)(C). However, if the agency responds after the 10-day period, but before the requester has filed suit, then the requester must exhaust all the administrative remedies. Oglesby v. United States Dep't of the Army, 920 F.2d 57, 63-65 (D.C. Cir. 1990).

An agency must conduct a good faith search for the requested records, using methods which reasonably can be expected to produce the information requested. Oglesby v. United States Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990).

6.24.2 Privacy Act Disclosure

(RESERVED)

6.24.3 Disclosure of Proprietary Information

10 C.F.R. § 2.390 (formerly § 2.790), which deals generally with public inspection of NRC official records, provides exemptions from public inspection in appropriate circumstances. Specifically, § 2.390(a) (formerly § 2.790(a)) establishes that the NRC need not disclose information, including correspondence to and from the NRC regarding issuance, denial, and amendment of a license or permit, where such information involves trade secrets and commercial or financial information obtained from a person as privileged or confidential.

Under 10 C.F.R. § 2.390(b) (formerly § 2.790(b)), any person may seek to have a document withheld, in whole or in part, from public disclosure on the grounds that it contains trade secrets or is otherwise proprietary. To do so, he must file an application for withholding accompanied by an affidavit identifying the parts to be withheld and containing a statement of the reasons for withholding. As a basis for withholding, the

affidavit must specifically address the factors listed in § 2.390(b)(4) (formerly § 2.790(b)(4)). If the NRC determines that the information is proprietary based on the application, it must then determine whether the right of the public to be fully appraised of the information outweighs the demonstrated concern for protection of the information.

A party is not required to submit an application and affidavit, pursuant to 10 C.F.R. § 2.390(b)(1) (formerly § 2.790(b)(1)), for withholding a security plan from public disclosure, since 10 C.F.R. § 2.390(d) (formerly § 2.790(d)) deems security plans to be commercial or financial information exempt from public disclosure. Louisiana Energy Services (Claiborne Enrichment Center), LBP-92-15A, 36 NRC 5, 1112 (1992).

For an affidavit to be exempt from the Board's general authority to rule on proposals concerning the withholding of information from the public, that affidavit must meet the regulatory requirement that it have "appropriate markings." When the plain language of the regulation requires "appropriate markings," an alleged tradition by which Staff has accepted the proprietary nature of affidavits when only a portion of the affidavits is proprietary is not relevant to the correct interpretation of the regulation. In addition, legal argument may not appropriately be withheld from the public merely because it is inserted in an affidavit, a portion of which may contain some proprietary information. Affidavits supporting the proprietary nature of other documents can be withheld from the public only if they have "appropriate markings." An entire affidavit may not be withheld because a portion is proprietary. The Board may review an initial Staff determination concerning the proprietary nature of a document to determine whether the review has addressed the regulatory criteria for withholding. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-81-62, 14 NRC 1747, 1754-5 (1981); reconsid. denied in part, Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-5A, 15 NRC 216 (1982).

A party may not withhold legal arguments from the public by inserting those arguments into an affidavit that contains some proprietary information. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-5A, 15 NRC 216 (1982).

If the Commission believes that an order contains proprietary information which may be harmful to the party/parties if released to the public, the Commission may withhold the order from public release. After the party/parties have an opportunity to review the order and advise the Commission of any confidential information, the Commission will release the order with the appropriate redactions. Power Authority of the State of New York (James A. FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-01-16, 54 NRC 1, 1-2 (2001).

After reviewing a dispute over redaction of allegedly privileged commercial information, the Commission ordered an applicant to provide the Board with redacted versions consistent with the rulings in the Commission's order, finding the Board to be better positioned to make an initial review of the proposed redactions given the factual nature of the redaction issues, the Board's greater familiarity with the record, and the Board's authorship of the initial redaction orders. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 183 (2005).

The Commission's requirements regarding the availability of official documents, governed by 10 C.F.R. § 2.390 (formerly § 2.790), were modified by an amendment, in part providing that those who submit documents supposedly containing proprietary or other confidential information mark the portions of the document containing such information. 68 Fed. Reg. 18,836 (April 17, 2003).

6.24.3.1 Protecting Information Where Disclosure Is Sought in an Adjudicatory Proceeding

To justify the withholding of information in an adjudicatory proceeding where full disclosure of such information is sought, the person seeking to withhold the information must demonstrate that:

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

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

The Government enjoys a privilege to withhold from disclosure the identity of persons furnishing information about violations of law to officers charged with enforcing the law. Rovario v. United States, 353 U.S. 53, 59 (1957), cited in Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), ALAB-639, 13 NRC 469, 473 (1981). This applies not only in criminal but also civil cases, In re United States, 565 F.2d 19, 21 (1977), cert. denied sub nom. Bell v. Socialist Workers Party, 436 U.S. 962 (1978), and in Commission proceedings as well, Northern States Power Co. (Monticello Plant, Unit 1), ALAB-16, 4 AEC 435, aff'd by the Commission, 4 AEC 440 (1970); § 2.390(a)(7) (formerly § 2.790(a)(7)); and is embodied in FOIA, 5 U.S.C. § 552(b)(7)(D). The privilege is not absolute; where an informer's identity is (1) relevant and helpful to the defense of an accused, or (2) essential to a fair determination of a cause (Rovario, supra), it must yield. However, the Appeal Board reversed a Licensing Board's order to the Staff to reveal the names of confidential informants (subject to a protective order) to intervenors as an abuse of discretion, where the Appeal Board found that the burden to obtain the names of such informants is not met by intervenor's speculation that identification might be of some assistance to them. To require disclosure in such a case would contravene NRC policy in that it might jeopardize the likelihood of receiving similar future reports. Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), ALAB-639, 13 NRC 469 (1981).

For a detailed listing of the factors to be considered by a Licensing Board in determining whether certain documents should be classed as proprietary and withheld from disclosure in an adjudicatory proceeding, see Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-137, 6 AEC 491, Appendix at 518 (1973) and Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-42, 15 NRC 1307 (1982). If a Licensing Board or an intervenor with a pertinent contention wishes to review data claimed by an applicant to be proprietary, it has a right to do so, albeit under a protective order if necessary. 10

C.F.R. § 2.390(b)(6) (formerly § 2.790(b)(6)); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-435, 6 NRC 541, 544 n.12 (1977); Power Authority of the State of New York (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 292 (2000).

Because 10 C.F.R. § 2.390 (formerly § 2.790) embodies the standards of Exemption 4 of the FOIA, the agency looks for guidance to the plentiful federal case law on that exemption, although that case law does not bind the Commission. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 163, 172 (2005). Under Exemption 4, the current generally accepted legal definition of "confidential" is information whose disclosure is likely to (1) impair the government's future ability to obtain necessary information; (2) impair other government interests such as compliance, program efficiency and effectiveness, and the fulfillment of an agency's statutory mandate; or (3) cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 163-64 (citing McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin., 180 F.3d 303, 305 (D.C. Cir. 1999), reh'g en banc denied, No. 98-5251 (D.C. Cir. Oct. 6, 1999); Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993), approving on this ground but rev'g and vacating on other grounds, 830 F.2d 278, 286 (D.C. Cir. 1987); 9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys., 721 F.2d 1, 7-10 (1st Cir. 1983). The federal courts (and now the Commission) have interpreted the third prong to require a showing of (a) the existence of competition and (b) the likelihood of substantial competitive injury. PFS, CLI-05-1, 61 NRC at 164, 171 (citing CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988); Nat'l Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 679 (D.C. Cir. 1976)). While federal court decisions are divided on the question as to what constitutes "competitive injury," the Commission has adopted the broader of two interpretations, finding that interpretation to be closer to the heart of Exemption 4 and § 2.390 (formerly § 2.790); this position concludes that such injury can flow from either competitors or noncompetitors (such as customers and suppliers). PFS, CLI-05-1, 61 NRC at 164 (citing McDonnell Douglas Corp., 180 F.3d at 306; Nat'l Parks & Conservation Ass'n, 547 F.2d at 687; Cont'l Oil Co. v. Fed. Power Comm'n, 519 F.2d 31, 35 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976)).

Applicants seeking redaction of supposedly confidential or privileged commercial or financial information must address the criteria of 10 C.F.R. § 2.390(b)(4) (formerly § 2.790(b)(4) with specificity, and if the Commission determines that any of the information is in fact "confidential commercial or financial information," then it must determine "'whether the right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs the demonstrated concern for protection of a competitive position.'" Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 163 (2005) (citing former 10 C.F.R. § 2.790(b)).

NRC decisions have consistently expressed support for settlements, and disclosure of proprietary information from a settlement [not of the immediate matter before the agency, but of a third-party settlement relevant to an applicant's costs] would discourage parties from settling their financial disputes in the future; this would in turn hinder the fulfillment of the agency's statutory mandate to protect the public

health and safety. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 168 (2005) (citing Sequoyah Fuels Corp and Gen. Atomic (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 205 (1997); 9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys., 721 F.2d 1, 10 (1st Cir. 1983); Pub. Citizen Health Research Group v. Nat'l Insts. of Health, 209 F.Supp. 2d 37, 53 (D.D.C. 2002); Nadler v. Fed. Deposit Ins. Corp., 899 F.Supp. 158, 162, 163 (S.D.N.Y. 1995), aff'd, 92 F.3d 93 (2d Cir. 1996)). The importance of honoring settling parties' expectations of confidentiality is particularly strong where both parties to the settlement oppose disclosure of its terms on grounds of potential financial harm. PFS, CLI-05-1, 61 NRC at 168.

Even where certain submitted information might otherwise have qualified for confidential treatment in connection with a licensing proceeding, an applicant's own actions and practice (publishing that or similar information on its Web site or in newsletters) may render redaction inappropriate under the five-factor test of 10 C.F.R. § 2.390 (b)(4) (formerly § 2.790(b)(4)). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 176-77 (2005) (certain ISFSI-related cost estimates).

In making determinations about document redaction, the NRC, like the federal courts, need not "engage in a sophisticated economic analysis of the substantial competitive harm…that might result from disclosure" of allegedly confidential or privileged commercial information. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 177 n.101 (2005) (quoting GC Micro Corp. v. Def. Logistics Agency, 33 F.3d 1109, 1115 (9th Cir. 1994)).

Portions of a hearing may have to be closed to the public when issues involving proprietary information are being addressed. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 292 (2000).

Where a party to a hearing objects to the disclosure of information on the basis that it is proprietary in nature and makes out a prima facie case to that effect, it is proper for an adjudicatory board to issue a protective order and conduct further proceedings in camera. If, upon consideration, the Board determined that the material was not proprietary, it would order the material released for the public record. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1214-15 (1985). See also Commonwealth Edison Co. (Zion Nuclear Station, Units 1 & 2), ALAB-196, 7 AEC 457, 469 (1974).

Following issuance of a protective order enabling an intervenor to obtain useful information, a Board can defer ruling on objections concerning the public's right to know until after the merits of the case are considered. If an intervenor has difficulties due to failure to participate in in camera sessions, these cannot affect the Board's ruling on the merits. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-81-55, 14 NRC 1017 (1981).

When relevant parties, by reason of a protective order, have access to information claimed to be proprietary and considerable effort would be involved in parsing the various parties' pleadings to identify and then resolve the question of what information has protected status, the resolution of disputes over the nature of the

protected information is best left until after the conclusion of a merits resolution relative to the issues of the litigation. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-6, 51 NRC 101, 135 (2000).

Where a demonstration has been made that the rights of association of a member of an intervenor group in the area have been threatened through threats of compulsory legal process to defend contentions, the employment situation in the area is dependent on the nuclear industry, and there is no detriment to applicant's interests by not having the identity of individual members of petitioner organization publicly disclosed, the Licensing Board will issue a protective order to prevent the public disclosure of the names of members of the organizational petitioner. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-16, 17 NRC 479, 485-486 (1983).

6.24.3.2 Security Plan Information Under 10 C.F.R. § 2.390(d) (formerly § 2.790(d))

Plant security plans are "deemed to be commercial or financial information" pursuant to 10 C.F.R. § 2.390(d) (formerly § 2.790(d)). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-80, 16 NRC 1121, 1124 (1982). Since 10 C.F.R. § 2.390(d) (formerly § 2.790(d)) deems security plans to be commercial or financial information exempt from public disclosure, a party is not required to submit an application and affidavit, pursuant to 10 C.F.R. § 2.390(b)(1) (formerly § 2.790(b)(1)), for withholding a security plan from public disclosure. Louisiana Energy Services (Claiborne Enrichment Center), LBP-92-15A, 36 NRC 5, 11-12 (1992).

A security plan, whether in the possession of the NRC Staff or a private party, is to be protected from public disclosure. Louisiana Energy Services (Claiborne Enrichment Center), LBP-92-15A, 36 NRC 5, 11 (1992).

In making physical security plan information available to intervenors, Licensing Boards are to follow certain guidelines. Security plans are sensitive and are subject to discovery in Commission adjudicatory proceedings only under certain conditions: (1) the party seeking discovery must demonstrate that the plan or a portion of it is relevant to its contentions; (2) the release of the plan must (in most circumstances) be subject to a protective order; and (3) no witness may review the plan (or any portion of it) without it first being demonstrated that he possesses the technical competence to evaluate it. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-24, 11 NRC 775, 777 (1980).

Intervenors in Commission proceedings may raise contentions relating to the adequacy of the applicant's proposed physical security arrangements. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-80, 16 NRC 1121, 1124 (1982).

Commission regulations, 10 C.F.R. § 2.390 (formerly § 2.790), contemplate that sensitive information may be turned over to intervenors in NRC proceedings under appropriate protective orders. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-80, 16 NRC 1121, 1124 (1982); Louisiana Energy Services (Claiborne Enrichment Center), LBP-92-15A, 36 NRC 5, 11 (1992), citing Pacific

Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-410, 5 NRC 1398, 1403, 1404 (1977).

Release of a security plan to qualified intervenors must be under a protective order and the individuals who review the security plan itself should execute an affidavit of nondisclosure. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-24, 11 NRC 775, 778 (1980).

Protective orders may not constitutionally preclude public dissemination of information which is obtained outside the hearing process. A person subject to a protective order, however, is prohibited from using protected information gained through the hearing process to corroborate the accuracy or inaccuracy of outside information. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-24, 11 NRC 775, 778 (1980). The Licensing Board is in the best position to determine the most appropriate circumstances in which safeguards information may be viewed. Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-05-2, 61 NRC 1, 7 (2005).

6.25 Enforcement Proceedings

6.25.1 NRC Enforcement Authority

Previous judicial interpretation makes it clear that the Commission's procedures for initiating formal enforcement powers under Section 161.b., 161.i(3), and 186.a. of the AEA are wide ranging, perhaps uniquely so. Oncology Services Corp., LBP-94-2, 39 NRC 11 (1994), citing Siegel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968).

As is evident from the Commission's enforcement policy statement, regulatory requirements – including license conditions – have varying degrees of public health and safety significance. Consequently, as part of the enforcement process, the relative importance of each purported violation is evaluated, which includes taking a measure of its technical and regulatory significance, as well as considering whether the violation is repetitive or willful. Although, in contrast to civil penalty actions, there generally is no specification of a "severity level" for the violations identified in an enforcement order imposing a license termination, suspension, or modification, this evaluative process nonetheless is utilized to determine the type and severity of the corrective action taken in the enforcement order. Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 33-34 (1994).

Under AEA provisions such as subsections (b) and (i) of Section 161, 42 U.S.C. § 2201(b), (i), the agency's authority to protect the public health and safety is uniquely wide-ranging. That, however, is not the same as saying that it is unlimited. In exercising that authority, including its prerogative to bring enforcement actions, the agency is subject to some restraints. See, e.g., Hurley Medical Center (Flint, MI), ALJ-87-2, 25 NRC 219, 236-37 & n.5 (1987) (NRC Staff cannot apply a comparative-performance standard in civil penalty proceedings absent fair notice to licensees about the parameters of that standard). One of those constraints is the requirement of constitutional due process. Indiana Regional Cancer Center, LBP 94 21, 40 NRC 22, 29-30 (1994).

The scope of the NRC regulatory authority does not extend to all questions of fire safety at licensed facilities; instead, the scope of agency regulatory authority with respect to fire protection is limited to the hazards associated with nuclear materials. Thus, while the agency's radiological protection responsibility requires it to consider questions of fire safety, this does not convert the agency into the direct enforcer of local codes, Occupational Safety and Health Administration regulations, or national standards on fire, occupational, and building safety that it has not incorporated into its regulatory scheme. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC 364, 388 (2000), citing Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 393 (1995); Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 159 (1995).

Only statutes, regulations, orders, and license conditions can impose requirements on applicants and licensees. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC 364, 390 (2000), citing Curators of the University of Missouri, CLI-95-1, 41 NRC at 41, 98.

The Commission is empowered to impose sanctions for violations of its license and regulations and to take remedial action to protect public health and safety. Within the limits of the agency's statutory authority, the choice of sanction is quintessentially a matter of the Commission's sound discretion. Advanced Medical Systems, Inc., CLI-94-6, 39 NRC 285, 312-313 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

A violation of a regulation does not of itself require that a license be suspended. Both the AEA and NRC regulations support the conclusion that the choice of remedy for regulatory violations is within the sound judgment of the Commission and not foreordained. See 42 U.S.C. §§ 2236, 2280, 2282; 10 C.F.R. § 50.100. Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 405 (1978).

Where the Staff in an enforcement settlement does not insist on strict compliance with a particular Commission regulation, it is neither waiving the regulation at issue nor amending it, but is instead merely exercising discretion to allow an alternative means of meeting the regulation's goals. Sequoyah Fuels Corp. and General Atomics (Gore, OK, Site), CLI-97-13, 46 NRC 195, 221 (1997).

6.25.2 Enforcement Procedures

On Aug. 15, 1991, the Commission completed final rulemaking which revised the Commission's procedures for initiating formal enforcement action.
56 Fed. Reg. 40,664 (Aug. 15, 1991). Pursuant to 10 C.F.R. § 2.204(a), the Commission will issue a demand for information to a licensee or other person subject to the jurisdiction of the Commission in order to determine whether to initiate an enforcement action. A licensee must respond to the demand for information; a person other than a licensee may respond to the demand or explain the reasons why the demand should not have been issued. 10 C.F.R. § 2.204(b). Since the demand for information only requires the submission of information, and does not by its own terms modify, suspend, or revoke a license, or take other enforcement action, there is no right to a hearing. If the Commission decides to initiate enforcement action, it will serve on the licensee or other person subject to the jurisdiction of the Commission, an order specifying the alleged violations and informing the licensee or other person of the right

to demand a hearing on the order. 10 C.F.R. § 2.202(a). The Commission has deleted the term "order to show cause" from Section 2.202.

While a show cause order with immediate suspension of a license or permit may be issued without prior written notice where the public health, interest or safety is involved, the Commission cannot permanently revoke a license without prior notice and an opportunity for a hearing guaranteed by 10 C.F.R. § 2.202. Consumers Power Co. (Midland Plant, Units 1 & 2), CLI-74-3, 7 AEC 7 (1974).

The designated Staff officials, subject to requirements that they give licensees written notice of specific violations in deciding whether penalties are warranted, may prefer charges, may demand the payment of penalties, and may agree to compromise penalty cases without formal litigation. Additionally, such officials may consult with their Staff privately about the course to be taken. Radiation Technology, Inc., ALAB-567, 10 NRC 533, 537 (1979).

Once a notice of opportunity for hearing has been published and a request for a hearing has been submitted, the decision as to whether a hearing is to be held no longer rests with the Staff but instead is transferred to the Commission or an adjudicatory tribunal designated to preside in the proceeding. Dairyland Power Coop. (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 371 (1980).

In Geo-Tech Associates (Geo-Tech Laboratories), CLI-92-14, 36 NRC 221 (1992), the Commission directed the presiding officer to consider the hearing request under the criteria for late filing in 10 C.F.R. 2.309(c) (formerly 2.714(a)(1)) in the absence of regulations governing late-filed and deficient hearing requests on enforcement orders.

An agency may dispense with an evidentiary hearing in an enforcement proceeding in resolving a controversy if no dispute remains as to a material issue of fact. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 299-300 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

Where a Board attaches license conditions in an enforcement proceeding, such action does not convert the enforcement proceeding into a license amendment proceeding. Once the Commission establishes a formal adjudicatory hearing in an enforcement case, it need not grant separate hearings on any license conditions that are imposed as a direct consequence of that enforcement hearing. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1148 (1985).

The procedures for modifying, suspending or revoking a license are set forth in Subpart B to 10 C.F.R. Part 2. See All Chemical Isotope Enrichment, Inc., LBP-90-26, 32 NRC 30, 36-38 (1990), citing AEA 186(a), 42 U.S.C. § 2236(a).

There is no statutory requirement under Section 189.a. of the AEA for the Commission to offer a hearing on an order lifting a license suspension. 42 U.S.C. § 2239(a). It is within the discretionary powers of the Commission to offer a formal hearing prior to lifting a license suspension. The Commission's decision depends upon the specific circumstances of the case, and a decision to grant a hearing in a particular instance (such as the restart of Three Mile Island, Unit 1) does not establish a general agency requirement for hearings on the lifting of license suspensions. The Commission has

generally denied such requests for hearings. Southern California Edison Co. (San Onofre Nuclear Generating Station, Unit 1), CLI-85-10, 21 NRC 1569, 1575 n.7 (1985). See, e.g., Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-84-5, 19 NRC 953 (1984), aff'd, San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1314 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986); Massachusetts v. NRC, 878 F.2d 1516, 1522 (1st Cir. 1989).

6.25.2.1 Due Process

The Commission's decision that cause existed to start a proceeding by issuing an immediately effective show cause order does not disqualify the Commission from later considering the merits of the matter. No prejudgment is involved, and no due process issue is created. Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4-5 (1980).

A party responding to an agency enforcement complaint has been accorded due process so long as the charges against it are understandable and it is afforded a full and fair opportunity to meet those charges. See Citizens State Bank v. FDIC, 751 F.2d 209, 213 (8th Cir. 1984). Put somewhat differently, "'[p]leadings in administrative proceedings are not judged by standards applied to an indictment at common law,' but are treated more like civil pleadings where the concern is with notice…." Id. (quoting Aloha Airlines, Inc. v. CAB, 598 F.2d 250, 262 (D.C. Cir. 1979)). Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 30 (1994).

The ability of the responsible Staff official to proceed against a licensee by issuing an order imposing civil penalties is not a denial of due process because the licensee was not able to cross-examine the official to determine that he had not been improperly influenced by his staff. The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective. Radiation Technology, Inc., ALAB-567, 10 NRC 533, 536-538 (1979).

6.25.2.2 Intervention

One cannot seek to intervene in an enforcement proceeding to have the NRC impose a stricter penalty than the NRC seeks. Issues in enforcement proceedings are only those set out in the order. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442 (1980). State of Alaska Dep't of Transp. and Pub. Facilities, CLI-04-26, 60 NRC 399, 404 (2004), reconsid. denied, CLI-04-38, 60 NRC 652 (2004). Injury alleged as a result of failure to grant more extensive relief is not cognizable in a proceeding on a confirmatory order and thus does not constitute grounds for appeal. FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 158 (2004). One who seeks the imposition of stricter requirements should file a petition pursuant to 10 C.F.R. § 2.206. Sequoyah Fuels Corp. (UF6 Production Facility), CLI-86-19, 24 NRC 508, 513-514 (1986), citing Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1982). State of Alaska Dep't of Transp. and Pub. Facilities, CLI-04-26, 60 NRC 399, 407 n.35 (2004), reconsid. denied, CLI-04-38, 60 NRC 652 (2004).

For an enforcement order, the threshold question – related to both standing and admissibility of contentions – is whether the hearing request is within the scope of the proceeding as outlined in the order. State of Alaska Dep't of Transp. and Pub. Facilities, CLI-04-26, 60 NRC 399, 405 (2004), reconsid. denied, CLI-04-38, 60 NRC 652 (2004).

For an enforcement order, the Commission has the authority to define the scope of the hearing, and this authority includes limiting the hearing to the question whether the order should be sustained. State of Alaska Dep't of Transp. and Pub. Facilities, CLI-04-26, 60 NRC 399, 405 (2004), reconsid. denied, CLI-04-38, 60 NRC 652 (2004).

One may only intervene in an enforcement action upon a showing of injury from the contemplated action set out in the show cause order. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54 (1994); aff'd, CLI-94-12, 40 NRC 64 (1994). One who seeks a stricter penalty than the NRC proposes has no standing to intervene because it is not injured by the lesser penalty. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442 (1980). State of Alaska Dep't of Transp. and Pub. Facilities, CLI-04-26, 60 NRC 399, 404 (2004), reconsid. denied, CLI-04-38, 60 NRC 652 (2004).

The requirements for standing in an enforcement proceeding are no stricter than those in the usual licensing proceeding. Dairyland Power Coop. (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 374 (1980); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54 (1994).

The agency has broad discretion in establishing and applying rules for public participation in enforcement proceedings. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 440-41 (1980). Intervention by interested persons who support an enforcement action does not diminish the agency's discretion in initiating enforcement proceedings because the Commission need not hold a hearing on whether another path should have been taken. The Commission may lawfully limit a hearing to consideration of the remedy or sanction proposed in the order. Sequoyah Fuels Corp. and General Atomics (Gore, OK, Site Decontamination and Decommissioning Funding), CLI-94-12, 40 NRC 64, 70 (1994).

The Commission has authority to define the scope of public participation in its proceedings beyond that which is required by statute. Consistent with this authority the Commission permits participation by those who can show that they have a cognizable interest that may be adversely affected if the proceeding has one outcome rather than another, including those who favor an enforcement action. Sequoyah Fuels Corp. and General Atomics (Gore, OK, Site), CLI-94-12, 40 NRC 64, 69 (1994).

For an enforcement order, the threshold question, intertwined with both standing and contention admissibility issues, is whether the hearing request is within the scope of the proceeding outlined in the enforcement order itself, i.e., whether the

confirmatory order should be sustained. The Commission has the authority to define the scope of the hearing, including narrowly limiting the proceeding. FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157-58 (2004).

The Commission has broad discretion to allow intervention where it is not a matter of right. Such intervention will not be granted where conditions have already been imposed on a licensee, and no useful purpose will be served by that intervention. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442-43 (1980).

Contentions in enforcement proceeding can be properly rejected under the doctrine of Belotti v. NRC [725 F.2d 1380 (D.C. Cir. 1983), aff'g Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982)], when they in reality seek additional measures as a substitute for those imposed by the Staff. State of Alaska Dep't of Transp. and Pub. Facilities, CLI-04-26, 60 NRC 399, 405 (2004), reconsid. denied, CLI-04-38, 60 NRC 652 (2004). The rationale underlying Belotti is that, when a licensee agrees to make positive changes or does not contest an order requiring remedial changes, it should not be at risk of being subjected to a wide-ranging hearing and further investigation. Id.

To decide whether an enforcement order should be upheld, the pertinent time contrast is between the petitioner's position with and without the order in question – not between the disputed order and a hypothetical substitute order, regardless of whether that substitute order would be, in the petitioner's estimation, an improvement. See State of Alaska Dep't of Transp. and Pub. Facilities, CLI-04-26, 60 NRC 399, 406 (2004), reconsid. denied, CLI-04-38, 60 NRC 652 (2004).

The critical inquiry in a proceeding on a confirmatory order is whether the order improves the licensee's health and safety conditions. If it does, no hearing is appropriate. See State of Alaska Dep't of Transp. and Pub. Facilities, CLI-04-26, 60 NRC 399, 408 (2004), reconsid. denied, CLI-04-38, 60 NRC 652 (2004). A petitioner is not adversely affected by a confirmatory order that improves the safety situation over what it was in the absence of the order. Id. at 406. However, the notice of opportunity for hearing provides the public a "safety valve" because an order conceivably may remove a restriction upon a licensee or otherwise have the effect of worsening the safety situation. Such an order remains open to challenge. Id. at 406 n.28.

For a proceeding on a confirmatory order (where the licensee has already agreed to an enforcement order by the time the notice of hearing is published, as distinct from an enforcement proceeding still contestable by the licensees at the time of publication of the notice of hearing), a challenge to the facts themselves by a nonlicensee is not cognizable. See State of Alaska Dep't of Transp. and Pub. Facilities, CLI-04-26, 60 NRC 399, 408 (2004), reconsid. denied, CLI-04-38, 60 NRC 652 (2004). (However, in the aforementioned situation where the licensees could still contest the Staff's factual findings or sanctions, a petitioner who supports the order could have standing. Id. at 408 n.38.)

In terms of enforcement, the NRC's role, as outlined in [10 C.F.R.] Section 30.7, is to procure corrective action for the licensee's program, and by example, other

licensees' programs, not to provide redress for the whistleblower. See State of Alaska Dep't of Transp. and Pub. Facilities, CLI-04-26, 60 NRC 399, 406-07 (2004), reconsid. denied, CLI-04-38, 60 NRC 652 (2004) [referencing 10 C.F.R. § 30.7(c)]. Even where a petitioner appears to have been a victim of retaliatory misbehavior, and understandably focuses on his personal grievances, the NRC charter does not include providing a personal remedy. Id. at 407.

In evaluating whether to pursue enforcement relief, and in considering various enforcement remedies, the NRC Staff acts like a prosecutor. The NRC's adjudicatory process is not an appropriate forum for petitioners to second-guess enforcement decisions on resource allocation, policy priorities, or the likelihood of success at hearings. See State of Alaska Dep't of Transp. and Pub. Facilities, CLI-04-26, 60 NRC 399, 407 (2004), reconsid. denied, CLI-04-38, 60 NRC 652 (2004).

The NRC Staff has considerable latitude in choosing enforcement weapons, and a petitioner's (or the Board's) disapproval of the remedy the Staff selected does not justify reopening an enforcement proceeding. See State of Alaska Dep't of Transp. and Pub. Facilities, CLI-04-26, 60 NRC 399, 409 (2004), reconsid. denied, CLI-04-38, 60 NRC 652 (2004). The precise enforcement sanction to impose is within the Staff's sound discretion, and whether the Staff carries out its responsibility in crafting the terms of enforcement directives to the degree a petitioner believes is warranted is not a matter within the ambit of a Licensing Board. Id. at 411.

6.25.3 Petitions for Enforcement Action Under 10 C.F.R. § 2.206

Although 10 C.F.R. § 2.206 may be technically available for a petitioner that wishes to assert operational problems, it is not the exclusive forum. Where operational issues are relevant to a recapture proceeding, they may also be raised in that proceeding. Moreover, the hearing rights available through a Section 2.206 petition are scarcely equivalent to, and not an adequate substitute for, hearing rights available in a licensing proceeding. See Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1175-77 (1983). The decision of the Staff to take or not take enforcement action pursuant to Section 2.206 is purely discretionary – it is not subject to review by the Commission (except on its own motion) or by courts, even for abuse of discretion. 10 C.F.R. § 2.206(c)(1) and (2); Heckler v. Cheney, 470 U.S. 821 (1985). The Commission has agreed that petitions utilizing 10 C.F.R. 2.206 to address matters under 10 C.F.R. Part 52 are reviewable – unlike actions taken under Section 2.206 in other contexts. Such reviewability in that context was one of the primary ingredients in the judicial approval of Part 52. Nuclear Information Resource Service v. NRC, 969 F.2d 1169 (D.C. Cir. 1992). The Court there noted that "the use to which a § 2.206 petition is put – not its form – governs its reviewability." 969 F.2d 1178. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Plant, Units 1 & 2), LBP-93-1, 37 NRC 5, 18 (1993).

Under 10 C.F.R. § 2.206, members of the public may request the NRC Staff to issue an enforcement order. Consolidated Edison Co. (Indian Point Nuclear Generating Unit 2) and Power Authority of the State of New York (Indian Point Nuclear Generating Unit 3), CLI-83-16, 17 NRC 1006, 1009 (1983); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 (1994). Under 10 C.F.R. § 2.206, any person at any time may request the Director of Nuclear Reactor Regulation,

Director of Nuclear Material Safety and Safeguards, or Director, Office of Inspection and Enforcement, as appropriate, to issue an order under 10 C.F.R. § 2.202 et seq. for suspension, revocation or modification of an operating license or a construction permit.

However, the Commission's longstanding policy discourages the use of Section 2.206 procedures as an avenue for deciding matters that are already under consideration in a pending adjudication. Georgia Power Co., et al. (Hatch Nuclear Plant, Units 1 & 2; Vogtle Electric Generating Plant, Units 1 & 2), CLI-95-5, 41 NRC 321, 322 (1995). The Staff's final determination of common issues should take into account the Licensing Board's findings.

Although petitions for enforcement action are filed with the NRC Staff, the Commission retains the power to rule directly on enforcement petitions. 10 C.F.R. § 2.206(c). The Commission will elect to exercise this power only when the issues raised in the petition are of sufficient public importance. Yankee Atomic Electric Co. (Yankee Rowe Nuclear Power Station), CLI-91-11, 34 NRC 3, 6 (1991); Earthline Technologies, LBP-03-6, 57 NRC 251, 245 (2003).

The Director of Nuclear Reactor Regulation, upon receipt of a request to initiate an enforcement proceeding, is required to make an inquiry appropriate to the facts asserted. Provided he does not abuse his discretion, he is free to rely on a variety of sources of information, including Staff analyses of generic issues, documents issued by other agencies, and the comments of the licensee on the factual allegations. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 432, 433 (1978).

In reaching a determination on a petition for enforcement action, the Director need not accord presumptive validity to every assertion of fact, irrespective of the degree of substantiation. Nor is the Director required to convene an adjudicatory proceeding to determine whether an adjudicatory proceeding is warranted. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 432 (1978).

The Administrative Procedure Act, 5 U.S.C.§§ 551 et seq., particularly Section 554, and the Commission's regulations deal specifically with on-the-record adjudication; thus, the Staff's participation in a construction permit proceeding does not render it incapable of impartial regulatory action in a subsequent show cause or suspension proceeding where no adjudication has begun. Moreover, in terms of policy, any view which questions the Staff's capabilities in such a situation is contradicted by the structure of nuclear regulation established by the AEA and the experience implementing that statute. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 431, 432 (1978).

New matters which cannot be raised before a Board because of a lack of jurisdiction may be raised in a petition under 10 C.F.R. § 2.206. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-579, 11 NRC 223, 226 (1980); Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1217 n.39 (1983); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-782, 20 NRC 838, 840 (1984). Where petitioner's case has no discernible relationship to any other pending proceeding involving the same facility, the procedure set out in 10 C.F.R. § 2.206 must be regarded as the exclusive remedy. Northern

Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558, 570 (1980).

After the Commission has awarded an operating license, the appropriate means by which to challenge the issuance of the license or to seek the suspension of the license is to file a petition, 10 C.F.R. § 2.206, requesting that the Commission initiate enforcement action pursuant to 10 C.F.R. § 2.202. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 67, 77-78 (1992).

In every case, a petitioner that for some reason cannot gain admittance to a construction permit or operating license hearing, but wishes to raise health, safety, or environmental concerns before the NRC, may file a request with the Staff under 10 C.F.R. § 2.206 asking the Staff to institute a proceeding to address those concerns. The Staff must analyze the technical, legal, and factual basis for the relief requested and respond either by undertaking some regulatory activity, or if it believes no proceeding or other action is necessary, by advising the requestor in writing of reasons explaining that determination. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767, 1768 (1982). See Washington Public Power Supply System (WPPSS Nuclear Project Nos. 1 & 2), CLI-82-29, 16 NRC 1221, 1228-1229 (1982). See also Porter County Chapter of the Izaak Walton League of America, Inc. v. NRC, 606 F.2d 1363, 1369-1370 (D.C. Cir. 1979); Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 552-53 (1983).

Under 10 C.F.R. § 2.206, one may petition the NRC for stricter enforcement actions than the agency contemplates. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442-43 (1980).

The mechanism for requesting an enforcement order is a petition filed pursuant to 10 C.F.R. § 2.206. See, e.g., Consolidated Edison Co. (Indian Point Nuclear Generating Unit 2) and Power Authority of the State of New York (Indian Point Nuclear Generating Unit 3), CLI-83-16, 17 NRC 1006, 1009 (1983). Note that such a petition may not be used to seek relitigation of an issue that has already been decided or to avoid an existing forum in which the issue is being or is about to be litigated. Consolidated Edison Co. (Indian Point Nuclear Generating Units 1, 2 & 3), CLI-75-8, 2 NRC 173, 177 (1975); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-81-6, 13 NRC 443, 446 (1981); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Units 1 & 2; Oyster Creek Nuclear Generating Station), CLI-85-4, 21 NRC 561, 563 (1985); Georgia Power Co., et al. (Hatch Nuclear Plant, Units 1 & 2; Vogtle Electric Generating Plant, Units 1 & 2), CLI-93-15, 38 NRC 1, 2-3 (1993), clarified CLI-95-5, 41 NRC 321 (1995). This general rule is not intended to bar petitioners from seeking immediate enforcement action from the NRC Staff in circumstances in which the presiding officer in a proceeding is not empowered to grant such relief. Georgia Power Co., et al. (Hatch Nuclear Plant, Units 1 & 2; Vogtle Electric Generating Plant, Units 1 & 2), CLI-93-15, 38 NRC 1, 2 (1993).

Non-parties to a proceeding are also prohibited from using 10 C.F.R. § 2.206 as a means to reopen issues which were previously adjudicated. General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Units 1 & 2; Oyster Creek Nuclear Generating Station), CLI-85-4, 21 NRC 561, 564 (1985). See, e.g., Northern Indiana

Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429 (1979), aff'd, Porter County Chapter of the Izaak Walton League, Inc. v. NRC, 606 F.2d 1363 (D.C. Cir. 1979).

The Director of Nuclear Reactor Regulation properly has discretion to differentiate between those petitions which indicate that substantial issues have been raised warranting institution of a proceeding and those which serve merely to demonstrate that in hindsight, even the most thorough and reasonable of forecasts will prove to fall short of absolute prescience. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978), aff'd, Porter County Chapter of the Izaak Walton League, Inc. v. NRC, 606 F.2d 1363 (D.C. Cir. 1979).

Under 10 C.F.R. § 2.202, the NRC Staff is empowered to issue an order when it believes that modification or suspension of a license, or other such enforcement action, is warranted. Under 10 C.F.R. § 2.206, members of the public may request the NRC Staff to issue such an order. Consolidated Edison Co. (Indian Point Nuclear Generating Unit 2) and Power Authority of the State of New York (Indian Point Nuclear Generating Unit 3), CLI-83-18, 17 NRC 1006, 1009 (1983).

A Director does not abuse his or her discretion by refusing to take enforcement action based on mere speculation that financial pressures might in some unspecified way undermine the safety of a facility's operation. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-83-21, 18 NRC 157, 160 (1983).

The Director may, in his discretion, consolidate the essentially indistinguishable requests of petitioners if those petitioners are unable to demonstrate prejudice as a result of the consolidation. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978), aff'd, Porter County Chapter of the Izaak Walton League, Inc. v. NRC, 606 F.2d 1363 (D.C. Cir. 1979).

If the intervenors disagree with conclusions reached at a meeting between Staff and licensee regarding whether the licensee had complied with the Commission's licensing conditions, the intervenors may seek further agency action by filing a petition with the Commission pursuant to 10 C.F.R. § 2.206. The Staff response to such a petition would be subject to the ultimate oversight of the Commission. Curators of the University of Missouri, CLI-95-17, 42 NRC 229 (1995).

In a materials licensing proceeding, the Commission rejected an intervenor's argument that because the licensee might not adhere to the methodology in its license, the intervenor should therefore have rights to an adjudicatory hearing on future determinations made in connection with particular license conditions. This argument would transmogrify license proceedings into open-ended enforcement actions; Licensing Boards would be required to keep license proceedings open for the entire life of the license so intervenors would have a continuing, unrestricted opportunity to raise charges of noncompliance. If the intervenors subsequently have cause to believe that the licensee is not following the relevant procedures, they can petition the Staff for enforcement action. Hydro Res., Inc. (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-1, 63 NRC 1, 5-6 (2006).

Requests for emergency injunctions are akin to petitions for enforcement actions. Earthline Technologies, LBP-03-6, 57 NRC 251, 245 (2003).

6.25.3.1 Commission Review of Director's Decisions Under 10 C.F.R. § 2.206

The Commission retains plenary authority to review Director's decisions. 10 C.F.R. § 2.206(c)(1). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-6, 43 NRC 123, 126 (1996).

10 C.F.R. § 2.206 provides that the Commission may, on its own motion, review the decision of the Director not to issue a show cause order to determine if the Director has abused his discretion. 10 C.F.R. § 2.206(c)(1). No other petition or request for Commission review will be entertained. 10 C.F.R. § 2.206(c)(2). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-6, 43 NRC 123, 127 (1996).

While there is no specific provision for Commission review of a decision to issue a show cause order, the regulation does acknowledge that the review power set forth in Section 2.206 does not limit the Commission's supervisory power over delegated Staff actions. 10 C.F.R. § 2.206(c)(1). Thus, it is clear that the Commission may conduct any review of a decision with regard to requests for show cause orders that it deems necessary. Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-94-40, 40 NRC 323 (1994).

The Commission has indicated that its review of Director's decisions under Section 2.206 would be directed toward whether the Director abused his authority and, in particular, would include a consideration of the following:

(1) does the statement of reasons for issuing the order permit a rational understanding of the basis for the decision;
(2) did the Director correctly comprehend the applicable law, regulations and policy;
(3) were all necessary factors included and irrelevant factors excluded;
(4) were appropriate inquiries made as to the facts asserted;
(5) is the decision basically untenable on the basis of the facts known to the Director.

Consolidated Edison Co. (Indian Point Nuclear Generating Units 1, 2 & 3), CLI-75-8, 2 NRC 173 (1975). See also Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 676 n.1 (1979).

Under the Indian Point standards, the Director's decision will not be disturbed unless it is clearly unwarranted or an abuse of discretion. Licensees Authorized to Possess or Transport Strategic Quantities of Special Nuclear Material, CLI-77-3, 5 NRC 16 (1977). Although the Indian Point review is essentially a deferral to the Staff's judgment on facts relating to a potential enforcement action, it is not an abdication of the Commission's responsibilities since the Commission will decide any policy matters involved. CLI-77-3, 5 NRC at 20 n.6.

If the Commission takes no action to reverse or modify a Director's decision within twenty-five (25) days of issuance of the decision, it becomes final agency action 10 C.F.R. § 2.206(c)(1). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-6, 43 NRC 123, 128 (1996).

The question of whether the federal courts have jurisdiction to review the Director's denial of a § 2.206 petition has not been directly addressed by the Supreme Court. See Lorion v. NRC, 470 U.S. 729 (1985). However, some federal appeals courts have determined that the Director's denial is unreviewable. Safe Energy Coalition v. NRC, 866 F.2d 1473, 1476, 1477-78 (D.C. Cir. 1989); Arnow v. NRC, 868 F.2d 223, 230, 231 (7th Cir. 1989), cert. denied, 110 S.Ct. 61 (1989); Massachusetts Public Interest Research Group v. NRC, 852 F.2d 9, 14-18 (1st Cir. 1988). The courts relied upon: (1) the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), which precludes judicial review when agency action is committed to agency discretion by law, and (2) the Supreme Court's interpretation of § 701(a)(2) in Heckler v. Chaney, 470 U.S. 821 (1985), decided the same day as Lorion v. NRC, 470 U.S. 729 (1985), wherein the Court held that an agency's refusal to undertake enforcement action upon request is presumptively unreviewable by the courts. That presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. Upon review of the AEA, NRC regulations, and NRC case law, the courts did not find any provisions which would rebut the presumption of unreviewability. Also note Ohio v. NRC, 868 F.2d 810, 818-19 (6th Cir. 1989), in which the court avoided the jurisdictional issue and instead dismissed the petition for review on its merits.

Licensing Boards lack jurisdiction to entertain motions seeking review only of actions of the Director of Nuclear Reactor Regulation; the Commission itself is the forum for such review. See 10 C.F.R. § 2.206(c). Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-466, 7 NRC 457 (1978).

Safety questions not properly raised in an adjudication may nonetheless be suitable for NRC consideration under its public petitioning process, 10 C.F.R. § 2.206. See Power Authority of the State of New York (James A. FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 311 (2000); International Uranium (USA) Corp. (Receipt of Material from Tonawanda, New York), CLI-98-23, 48 NRC 259, 265-266 (1998). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 n.4 (2001).

6.25.4 Grounds for Enforcement Orders

An intentional act that a person knows causes a violation of a licensee procedure is considered "deliberate misconduct" actionable under Section 30.10(a)(1). As a consequence, an assertion that a person who created a document containing false information did not intend to mislead the agency (or did not actually mislead the agency) appears irrelevant. Instead, the focus is on whether the person's action was a knowing violation of a licensee procedure that could have resulted in a regulatory violation by the submission to the agency of materially incomplete or inaccurate information. See 56 Fed. Reg. 40,664, 40,670 (1991) (stating that "[f]or situations that do not actually result in a violation by a licensee, anyone with the requisite knowledge who engages in deliberate misconduct as defined in the rule has the requisite intent to act in a manner that falls within the NRC's area of regulatory concern. The fact that the action may have been intercepted or corrected prior to the occurrence of an actual violation has no bearing on whether, from a health and safety standpoint, that person should be involved in nuclear activities."). Eastern Testing and Inspection, Inc., LBP-96-9, 43 NRC 211, 224 (1996).

The institution of a proceeding to modify, suspend, or revoke a license need not be predicated upon alleged license violations, but rather may be based upon any "facts deemed to be sufficient grounds for the proposed action." 10 C.F.R. § 2.202. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558, 570-71 (1980).

The Commission need not withhold enforcement action until it is ready to proceed with like action against all others committing similar violations. The Commission may act against one firm practicing an industry-wide violation. A rigid uniformity of sanctions is not required, and a sanction is not rendered invalid simply because it is more severe than that issued in other cases. Enforcement actions inherently involve the exercise of informed judgment on a case-by-case basis, and the ordering of enforcement priorities is left to the agency's sound discretion. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

The Staff is not precluded, as a matter of law, from relying on allegations as the basis for an enforcement order if there is a "sufficient nexus" between the allegations and the regulated activities that formed the focus of the Staff's order. Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-94-40, 40 NRC 323, 331 (1994), citing Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 31 (1994).

In assessing whether the bases assigned support an order in terms of both the type and duration of the enforcement action, a relevant factor may be the public health and safety significance, including the medical appropriateness, of the specified bases. Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-94-40, 40 NRC 323, 329 (1994).

A person may not be convicted of a conspiracy to conceal facts from the NRC unless he had a duty to reveal those facts or that he entered into an agreement to conceal facts from the NRC. Kenneth G. Pierce, LBP-95-4, 41 NRC 203, 218, n.50 (1995).

The standard to be applied in determining whether to issue an order is whether substantial health or safety issues have been raised. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978); Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-94-40, 40 NRC 323, 334 (1994). See also Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-95-7, 41 NRC 323 (1995).

Allegations about financial difficulties at an operating facility are not by themselves a sufficient basis for action to restrict operations. On the other hand, allegations that defects in safety practices have in fact occurred or are imminent would form a possible basis for enforcement action, whether or not the root cause of the fault was financial. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-83-21, 18 NRC 157, 159-60 (1983).

When there is no claim of a lack of understanding regarding the nature of the charges in an NRC Staff enforcement order, the fact that the validity of the Staff's assertions have not been litigated is no reason to preclude the Staff from utilizing those charges as a basis for the order. The adjudicatory proceeding instituted pursuant to 10 C.F.R. § 2.202 affords those who are adversely affected by the order with an

opportunity to contest each of the charges that make up the Staff's enforcement determination, an opportunity intended to protect their due process rights. The "unlitigated" nature of the Staff's allegations in an enforcement order thus is not a constitutional due process deficiency that bars Staff reliance on those allegations as a component of the enforcement order. Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 30 (1994).

The involvement of a licensee's management in a violation has no bearing on whether the violation may have occurred; if a licensee's employee was acting on the licensee's behalf and committed acts that violated the terms of the license or the Commission's regulations, the licensee is accountable for the violations, and appropriate enforcement action may be taken. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table); see also Atlantic Research Corp., CLI-80-7, 11 NRC 413 (1980).

A license or construction permit may be modified, suspended or revoked for

(1) any material false statement in an application or other statement of fact required of the applicant;
(2) conditions revealed by the application, statement of fact, inspection or other means which would warrant the Commission to refuse to grant a license in the first instance;
(3) failure to construct or operate a facility in accordance with the terms of the construction permit or operating license; or
(4) violation of, or failure to observe, any terms and provisions of the Atomic Energy Act, the regulations, a permit, a license, or an order of the Commission.

See, e.g., 10 C.F.R. § 50.100.

Where information is presented which demonstrates an undue risk to public health and safety, the NRC will take prompt remedial action including shutdown of operating facilities. Such actions may be taken with immediate effect notwithstanding the Administrative Procedure Act requirements of notice and opportunity to achieve compliance. Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 404, 405 (1978).

Refusal by a licensee and contractor to permit a lawful Staff investigation deemed necessary to assure public health and safety is serious enough to warrant the drastic remedy of permit suspension pending submission to investigation, since the refusal interferes with the Commission's duty to assure public health and safety. Union Electric Co. (Callaway Plant, Units 1 & 2), LBP-78-31, 8 NRC 366, 378 (1978), aff'd ALAB-527, 9 NRC 126 (1979).

If a safety problem is revealed at any time during low-power operation of a facility or as a result of the merits review of a party's appeal of the decision to authorize low-power operation, the low-power license can be suspended. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-789, 20 NRC 1443, 1447 (1984). See also Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 1), CLI-81-30, 14 NRC 950 (1981).

The Commission is authorized to consider a licensee's character and integrity in deciding whether to continue or revoke a license. Piping Specialists, Inc., et al. (Kansas City, MO), LBP-92-25, 36 NRC 156, 153 (1992), citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1207 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

The enforcement policy provides that suspensions ordinarily are not ordered where the failure to comply with requirements was "not willful and adequate corrective action has been taken." Piping Specialists, Inc., et al. (Kansas City, MO), LBP-92-25, 36 NRC 156 (1992).

6.25.5 Immediately Effective Orders

The validity of an immediately effective order is judged on the basis of information available to the Director at the time it was issued at the start of the proceeding. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). See Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-90-17, 31 NRC 540, 542-43 n.5, 556-57 (1990), aff'd, CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

Issuance of an order requiring interim action is not the determination of the merits of a controversy. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 6 (1980).

Although a licensee usually should be afforded a prior opportunity to be heard before the Commission suspends a license or takes other enforcement action, extraordinary circumstances may warrant summary action prior to hearing. The Commission's regulations regarding summary enforcement action are consistent with Section 9(b) of the Administrative Procedure Act, 5 U.S.C. § 558(c) and due process principles. Due process does not require that emergency action be taken only where there is no possibility of error; due process requires only that an opportunity for hearing be granted at a meaningful time and in a manner appropriate for the case. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 299-300 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table). The Commission is empowered to make a shutdown order immediately effective where such action is required by the public health, safety, or public interest. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1123-24 n.2 (1985). See 10 C.F.R. § 2.202(a)(5), implementing Administrative Procedure Act § 9(b), 5 U.S.C. 558(c).

The Commission is obligated under the law to lift the effectiveness of an immediately effective shutdown order once the concerns which brought about the order have been adequately resolved. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1124 (1985). See, e.g., Pan American Airways v. C.A.B., 684 F.2d 31 (D.C. Cir. 1982); Northwest Airlines v. C.A.B., 539 F.2d 846 (D.C. Cir. 1976); Air Line Pilots Ass'n v. C.A.B., 458 F.2d 846 (D.C. Cir. 1972), cert. denied, 420 U.S. 972 (1975). This holds true even where Licensing and Appeal Boards' deliberations and decisions as to resumption of operations are pending, provided the issues before the Board do not implicate the public health and safety.

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1149 (1985).

The Director may issue an immediately effective order without prior written notice if (1) the public health, safety or interest so requires, or (2) the licensee's violations are willful. In civil proceedings, action taken by a licensee in the belief that it was legal does not preclude a finding of willfulness. Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 677-78 (1979).

Latent conditions which may cause harm in the future are a sufficient basis for issuing an immediately effective show cause order where the consequences might not be subject to correction in the future. Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 677 (1979), citing Consumers Power Co. (Midland Plant, Units 1 & 2), CLI-74-3, 7 AEC 7, 10-12 (1974).

Purported violations of agency regulations support an immediately effective order even where no adverse public health consequences are threatened. Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 677-78 (1979).

An immediately effective suspension order was found justified where the alleged violations involved significant license conditions and procedures that were intended to ensure safe handling and maintenance of devices containing a radioactive source that could deliver a substantial or even lethal radiation dose. The Staff could reasonably conclude that license suspension was required to remove the possible threat of adverse safety consequences to patients and workers from maintenance and service on teletherapy units by untrained licensee employees. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 314 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

In deciding whether an immediately effective order is necessary to protect public health and safety, the Staff is required to make a prudent, prospective judgment at the time that the order is issued about the potential consequences of the apparent regulatory violations. A reasonable threat of harm requiring prompt remedial action, not the occurrence of the threatened harm itself, is all that is required to justify immediate action. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

Where the contested issues focused on the adequacy of the evidence in the Staff's knowledge when it initiated the license suspension, the Licensing Board did not err in limiting its consideration to the evidence amassed by the Staff before the order was issued. Nor is the Staff barred from relying on additional evidence gathered after an immediately effective order is issued to defend the continued effectiveness of that order; however, the Staff may not issue the order based merely on the hope that it will thereafter find the necessary quantum of evidence to sustain the order's immediate effectiveness. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

6.25.5.1 Review of Immediate Effectiveness of Enforcement Order

On May 12, 1992, the Commission issued a final rule concerning challenges to the immediate effectiveness of orders. 57 Fed. Reg. 20,194 (May 12, 1992). (See Digest § 6.25.10). Pursuant to 10 C.F.R. § 2.202(c)(2)(i), the subject of an immediately effective order may, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the order. The NRC Staff must respond within five (5) days after receiving the motion. The Commission declined to specify a time limit for the presiding officer's review of the motion and, instead, strongly emphasized that a presiding officer should decide the motion as expeditiously as possible. 57 Fed. Reg. at 20,197. The presiding officer will apply an adequate evidence test to evaluate the set aside motion. Adequate evidence exists "when facts and circumstances within the NRC Staff's knowledge, of which it has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that the charges specified in the order are true and that the order is necessary to protect the public health, safety, or interest." 57 Fed. Reg. at 20,196. The adequate evidence test does not apply to the determination of the merits of the immediately effective order. The presiding officer should rule on the merits of the immediately effective order as expeditiously as possible, although the presiding officer may delay the hearing for good cause. 10 C.F.R. § 2.202(c)(2)(ii). When an immediate effectiveness determination is challenged, the Staff must satisfy a two-part test: it must demonstrate that adequate evidence – i.e., reliable, probative and substantial (but not preponderant) evidence – supports a conclusion that (1) the licensee violated a Commission requirement (10 C.F.R. § 2.202(a)(1)), and (2) the violation was "willful," or the violation poses a risk to "the public health, safety, or interest" that requires immediate action (id. § 2.202(a)(5)). Safety Light Corp., LBP-05-2, 61 NRC 53, 61 (2005).

When the character and veracity of the source for a Staff allegation are in doubt, a presiding officer will be unable to credit the source's information as sufficiently reliable to provide "adequate evidence" for that allegation absent sufficient independent corroborating information. Eastern Testing and Inspection, Inc., LBP-96-9, 43 NRC 211, 219-21 (1996).

Pursuant to 10 C.F.R. § 2.202(c)(2)(i), a person to whom the Commission has issued an immediately effective enforcement order may move to set aside the immediate effectiveness of the order on the ground that "the order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error." St. Joseph Radiology Associates, Inc. and Joseph L. Fisher, M.D., LBP-92-34, 36 NRC 317 (1992); see also United Evaluation Services, Inc. (Beachwood, New Jersey), LBP-02-13, 55 NRC 351, 354 (2002).

The movant challenging a Staff determination to make an enforcement order immediately effective bears the burden of going forward to demonstrate that the order, and the Staff's determination that it is necessary to make the order immediately effective, are not supported by "adequate evidence" within the meaning 10 C.F.R. § 2.202(c)(2)(i), but the Staff has the ultimate burden of persuasion on whether this standard has been met. See 55 Fed. Reg. 27,645, 27646 (1990). See also St Joseph Radiology Associates, Inc., LBP-92-34, 36 NRC 317, 321-22 (1992).

Eastern Testing and Inspection, Inc., LBP-96-9, 43 NRC 211, 215-16 (1996); Aharon Ben-Haim, Ph.D., LBP-97-15, 46 NRC 60, 61 (1997).

Under 10 C.F.R. § 2.202(c)(2)(i), to support an immediate effectiveness determination for an enforcement order, besides showing that the bases for the order are supported by "adequate evidence," the Staff must show there is a need for immediate effectiveness that is supported by "adequate evidence." That need can be established by showing either that the alleged violations or the conduct supporting the violations is willful or that the public health, safety, or interest requires immediate effectiveness. Eastern Testing and Inspection, Inc., LBP-96-9, 43 NRC 211, 227 (1996).

Pursuant to 10 C.F.R. § 2.202(c)(2)(i), a set-aside motion must state with particularity the reasons why the enforcement order is not based upon adequate evidence and the motion must be accompanied by affidavits or other evidence relied upon by the movant. St. Joseph Radiology Associates, Inc., LBP-92-34, 36 NRC 317, 321-22 (1992); United Evaluation Services, Inc. (Beachwood, New Jersey), LBP-02-13, 55 NRC 351, 354 (2002).

In order to set aside the immediate effectiveness of an enforcement order, a party served with an enforcement order must file a timely written answer, under oath, that admits or denies each Staff allegation or charge in the enforcement order and sets forth the facts and legal arguments on which the party relies in claiming that the order should not have been issued. Failure to comply with the requirements of 10 C.F.R. 2.202(b) may result in dismissal of the proceeding. St. Joseph Radiology Associates, Inc. and Joseph L. Fisher, M.D., LBP-93-14, 38 NRC 18 (1993).

A Licensing Board will uphold the immediate effectiveness of the order if it finds that there is adequate evidence to support immediate effectiveness. The adequate evidence test is met when the "facts and circumstances within the NRC Staff's knowledge, of which it has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that the charges specified in the order are true and that the order is necessary to protect the public health, safety, or interest." 57 Fed. Reg. 20,194, 20,196 (May 12, 1992). St. Joseph Radiology Associates, Inc. and Joseph L. Fisher, M.D., LBP-93-14, 38 NRC 18 (1993). United Evaluation Services, Inc. (Beachwood, New Jersey), LBP-02-13, 55 NRC 351, 354 (2002). The Commission likened the adequate evidence standard to probable cause, which is described as "less than must be shown in trial, but…more than uncorroborated suspicion or accusation." United Evaluation Services, Inc. (Beachwood, New Jersey), LBP-02-13, 55 NRC 351, 354 (2002), citing, Horne Brothers, Inc. v. Laird, 463 F.2d 1268, 1271 (D.C. Cir. 1972).

In determining whether the Director abused his discretion in issuing an immediately effective order, a Licensing Board will evaluate the reasonableness of the Director's decision in light of the facts available to the Director at the time he issued his decision. Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-90-17, 31 NRC 540, 556-57 (1990), aff'd, CLI-94-6, 39 NRC 285 (1994), aff'd, 61 F.3d 903 (6th Cir. 1995) (Table).

The standard by which the immediate effectiveness of an order is judged may differ from the standard ultimately applied after a full adjudication on the merits of an

enforcement order. The review of an order's immediate effectiveness permits such orders to be based on preliminary investigation or other emerging information that is reasonably reliable and that indicates the need for immediate action under the criteria in 10 C.F.R. § 2.202. In accordance with the Commission's rulemaking on the procedures for review of the immediate effectiveness of enforcement orders, the basic test is "adequate evidence," a test similar to the one used for probable cause for an arrest, warrant, or preliminary hearing. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table); Aharon Ben-Haim, Ph.D., LBP-97-15, 46 NRC 60, 63 (1997).

The "adequate evidence" test is intended to strike a balance between the interest of the Commission in protecting the public health, safety, or interest and an affected party's interest in protection against arbitrary enforcement action. The test is intended only as a preliminary procedural safeguard against the ordering of immediately effective action based on clear error, unreliable evidence, or unfounded allegations. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

In considering whether there is probable cause for an arrest, courts have held that information supplied by an identified ordinary citizen witness may be presumed reliable. See, e.g., McKinney v. George, 556 F.Supp. 645, 648 (N.D. Ill. 1983) (citing cases), aff'd, 726 F.2d 1183 (7th Cir. 1984). In determining whether there is "adequate evidence" within the meaning of 10 C.F.R. §2.202(c)(2)(i) to support the immediate effectiveness of an enforcement order, applying this presumption to a witness who is corroborating a family member's allegations may be inappropriate because that relationship creates a possible bias that also brings the corroborating witness' reliability into substantial question. Eastern Testing and Inspection, Inc., LBP-96-9, 43 NRC 211, 221 (1996).

Absent a showing that provides some reasonable cause to believe that, because of bias or mistake, an agency inspector cannot be considered a credible observer, inspector's direct personal observations should be credited in considering whether allegations based on those observations are supported by "adequate evidence" within the meaning of 10 C.F.R. § 2.202(c)(2)(i). This is based on the accepted presumption that a government officer can be expected faithfully to execute his or her official duties. Eastern Testing and Inspection, Inc., LBP-96-9, 43 NRC 211, 225 (1996) (citing United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926)).

Claims of a movant under 10 C.F.R. § 2.202(c)(2)(i) may properly suggest the existence of factual disputes, but they may not be sufficient to demonstrate lack of probable cause for a Staff immediately effective order. Aharon Ben-Haim, Ph.D., LBP-97-15, 46 NRC 60, 64 (1997).

The Commission's supervisory role over licensing and enforcement proceedings permits it, on its own initiative, to lift the immediate effectiveness of a license suspension order issued by the Staff. Safety Light Corp., CLI-05-7, 61 NRC 69, 69-70 (2005).

6.25.6 Issues in Enforcement Proceedings

The agency alone has power to develop enforcement policy and allocate resources in a way that it believes is best calculated to reach statutory ends. The NRC can develop policy that has licensees consent to, rather than contest, enforcement proceedings. A Director may set forth and limit the questions to be considered in an enforcement proceeding. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 441 (1980).

In an enforcement proceeding, once the licensee has voluntarily complied with the Staff's enforcement order requiring cleanup and decontamination of the licensee's byproduct materials facility, the controverted issue upon which a proceeding may be based – whether the order was justified – has become moot. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), LBP-92-36, 36 NRC 366, 368 (1992), review denied, CLI-93-8, 37 NRC 181 (1993).

To justify further inquiry into a claim of discriminatory enforcement, the licensee must show both that other similarly situated licensees were treated differently and that no rational reason existed for the different treatment. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

The Commission may limit the issues in enforcement proceedings to whether the facts as stated in the order are true and whether the remedy selected is supported by those facts. Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 45 (1982), aff'd sub nom. Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir 1983); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 441-442 (1980); Sequoyah Fuels Corp. (UF6 Production Facility), CLI-86-19, 24 NRC 508, 512 n.2 (1986).

When violation of ambiguous plant procedures is alleged by NRC Staff in an enforcement proceeding, it is appropriate to receive evidence from plant operators to determine how those procedures were interpreted by them. It is also appropriate to interpret the procedures in light of company actions in cases of alleged violations of the same procedures, as reflected in official records. It is not appropriate to sustain an enforcement action in which the operator did not act willfully because he reasonably believed he had complied with plant procedures. Kenneth G. Pierce, LBP-95-4, 41 NRC 203, 212 (1995).

When a person is charged with improperly stating under oath that he had failed to remember facts about a meeting or conversation, it is important to examine precisely what that person was doing at the time and how strong others' memories are before concluding that he had lied. Kenneth G. Pierce, LBP-95-4, 41 NRC 203, 221-24 (1995).

Licensing Boards have no jurisdiction to enforce license conditions unless they are the subject of an enforcement action initiated pursuant to 10 C.F.R. § 2.202. Gulf States Utilities Co. (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31 (1994); aff'd, CLI-94-10, 40 NRC 43 (1994).

A decision under Section 2.206 on a request for a show cause order is no more than the decision of an NRC Staff Director and thus does not constitute an adjudicatory order under Section 189.b. of the AEA and cannot serve as the basis of a valid contention in an enforcement proceeding. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Plant, Units 1 & 2), LBP-93-9, 37 NRC 433 (1993).

No further consideration need be given to the potential willful nature of license violations where an order's immediate effectiveness was not sustained on the basis of willfulness and where the licensee suffers no other collateral effects of the order. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

In Geo-Tech Associates (Geo-Tech Laboratories), CLI-92-14, 36 NRC 221 (1992), the Commission provided guidance on any hearing held on the issue of an order revoking materials license for failure to pay the annual license fee required by 10 C.F.R. Part 171. A hearing request on enforcement sanctions for failure to pay license fees will be limited in scope to the issue of whether the licensee's fee was properly assessed (i.e., was licensee placed in the proper category; was licensee charged the proper fee for that category; was licensee granted a partial or total exemption from the fee by the NRC Staff) and challenges to the fee schedule or its underlying methodology are not properly challenged in this type of proceeding, since they were established by rulemaking which an adjudicatory proceeding cannot amend.

6.25.7 Burden of Proof

The AEA intends the party seeking to build or operate a nuclear reactor to bear the burden of proof in any Commission proceeding bearing on its application to do so, including a show cause proceeding on a construction permit. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 571 (1980).

The burden of proof in a show cause proceeding with respect to a construction permit is on the permit holder. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-283, 2 NRC 11 (1975). As to safety matters this is so until the award of a full-term operating license. Dairyland Power Coop. (La Crosse Boiling Water Reactor), LBP-81-7, 13 NRC 257, 264-65 (1981). However, the burden of going forward with evidence "sufficient to require reasonable minds to inquire further" is on the person who sought the show cause order. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-315, 3 NRC 101, 110-11 (1976).

The Commission has never adopted the "clear and convincing" evidence standard as the evidentiary yardstick in reaching the ultimate merits of an enforcement proceeding, nor is it required to so under the AEA or the Administrative Procedure Act. NRC administrative proceedings have generally relied upon the "preponderance of the evidence" standard in reaching the ultimate conclusions after a hearing to resolve the proceeding. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

6.25.8 Licensing Board Review of Proposed Sanctions

In making a determination about whether a license suspension or modification order should be sustained, a presiding officer must undertake an evaluative process that may involve assessing, among other things, whether the bases assigned in the order support it both in terms of the type and duration of the enforcement action. As the Commission noted, "the choice of sanction is quintessentially a matter of the agency's sound discretion." Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 312 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995)(Table) (footnote omitted). In this regard, a presiding officer's review of an NRC Staff enforcement action would be limited to whether the Staff's choice of sanction constituted an abuse of discretion. And, just as with the NRC Staff's initial determination about imposition of the enforcement order, a relevant factor may be the public health and safety significance of the bases specified in the order. Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 34 n.5 (1994).

A Licensing Board may terminate an enforcement proceeding when the licensee withdraws its challenge to the revocation of its license. The Board should not vacate for mootness any prior decisions in the proceeding when no appeals of those prior decisions are extant. Wrangler Laboratories, LBP-91-37, 34 NRC 196, 197 (1991).

One or more of the bases put forth by the NRC Staff as support for an enforcement order may be subject to dismissal if it is established they lack a sufficient nexus to the regulated activities that are the focus of the Staff's enforcement action. Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 31 (1994).

A Staff action to relax or rescind the conditions in an enforcement order that is the subject of an ongoing adjudication would be subject to review by the presiding officer with input from all parties to the proceeding. Sequoyah Fuels Corp. and General Atomics (Gore, OK, Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54 (1994); aff'd, CLI-94-12, 40 NRC 64 (1994).

Review of a show cause order is limited to whether the Director of Nuclear Reactor Regulation abused his discretion. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978).

It is not likely that, after a lengthy evidentiary hearing, a Board would agree with the Director of the Office of Nuclear Material Safety and Safeguards and in every detail. Nor is that necessary in order to sustain the Director's decision. Atlantic Research Corp. (Alexandria, Virginia), ALAB-594, 11 NRC 841, 848-49 (1980) (the adjudicatory hearing in a civil penalty proceeding is essentially a trial de novo, subject only to the principle that the Board may not assess a greater penalty than the Staff). See Piping Specialists, Inc., (Kansas City, MO), LBP-92-25, 36 NRC 156, review declined, CLI-92-16, 39 NRC 351 (1992).

6.25.9 Stay of Enforcement Proceedings

Claiming a constitutional deprivation arising from a delayed adjudication generally requires some showing of prejudice. Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-94-40, 40 NRC 323, 330 (1994), citing Oncology Services Corp., CLI-93-17, 38 NRC 44, 50-51 (1993).

Commission regulations require that hearings regarding immediately effective enforcement orders be held expeditiously. David Geisen, CLI-06-19, 64 NRC 9, 12 (2006) (citing 10 C.F.R. § 2.202(c)(1)).

The pendency of a related criminal investigation can provide an appropriate basis for postponing litigation on a Staff enforcement order. Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-94-40, 40 NRC 323, 330-31 (1994).

The NRC's mere assertion that it wishes to protect a pending criminal prosecution does not, without more, justify holding the NRC's parallel administrative enforcement proceeding in abeyance. The Staff, as the party supporting abeyance, must make at least some showing of potential detrimental effect on the criminal case. Andrew Siemaszko, CLI-06-12, 63 NRC 495 (2006). The Commission concluded that the Staff and the Department of Justice (DOJ) met their burden of making at least some showing of potential harm where the NRC enforcement proceeding was likely to conclude less than a month prior to the start of the criminal trial and hearing and prehearing activities would interfere with DOJ's efforts to prepare witnesses for trial because a great number of the same witnesses would be called to testify in both proceedings. A showing of the potential inability of the DOJ to adequately prepare witnesses for the criminal trial because of the NRC proceeding is sufficient justification for a stay. David Geisen, CLI-07-6, 65 NRC 112, 116-118 (2007).

The Commission, as a matter of policy memorialized in a formal Memorandum of Understanding with DOJ, defers to DOJ when it seeks a delay in NRC enforcement proceedings pending the conclusion of DOJ's own criminal investigations or proceedings. The Commission does not lightly second-guess DOJ's views on whether, or how, premature discussions might affect its criminal prosecution. Andrew Siemaszko, CLI-06-12, 63 NRC at 504.

The presiding officer may delay an enforcement proceeding for good cause. 10 C.F.R. § 2.202(c)(2)(ii). In determining whether good cause exists, the presiding officer must consider both the public interest as well as the interests of the person subject to the immediately effective order. The factors to be considered in balancing the competing interests include (1) length of delay, (2) reason for the delay, (3) risk of erroneous deprivation, (4) assertion of one's right to prompt resolution of the controversy, (5) prejudice to the licensee, including harm to the licensee's interests and harm to the licensee's ability to mount an adequate defense. Oncology Service Corp., CLI-93-17, 38 NRC 44, 50-51 (1993); followed by Licensing Board in third request for stay by NRC Staff in Oncology proceeding, LBP-93-20, 38 NRC 130 (1993); Andrew Siemaszko, CLI-06-12, 63 NRC 495, 500 (2006).

The determination of whether the length of delay in an enforcement proceeding is excessive depends on the facts of the particular case and the nature of the proceeding.

The risk of erroneous deprivation is reduced if the licensee is given an opportunity to request that the presiding officer set aside the immediate effectiveness of the suspension order by challenging whether the suspension order, including the need for immediate effectiveness, is based on adequate evidence. Oncology Service Corp., CLI-93-17, 38 NRC 44, 57 (1993); followed by Licensing Board in third request for stay by NRC Staff in Oncology proceeding, LBP-93-20, 38 NRC 130 (1993); cf. David Geisen, CLI-07-6, 65 NRC 119 (2007).

Staff's showing of possible interference with an investigation being conducted by the NRC Office of Investigations and a strong interest in protecting the integrity of the investigation in conjunction with a demonstration that the risk of erroneous deprivation has been reduced weighs heavily in the Staff's favor. However, a licensee's vigorous opposition to a stay and its insistence on a prompt adjudicatory hearing are entitled to strong weight, irrespective of whether the licensee failed to challenge the basis for the immediate effectiveness of the Staff's suspension order. Oncology Service Corp., CLI-93-17, 38 NRC 44, 58 (1993). Nevertheless, without a particularized showing of harm to the licensee's interests, licensee's vigorous opposition to a stay does not tip the scale in favor of the licensee when balancing the competing interests. CLI-93-17 at 59-60. The Commission's decision was followed by the Licensing Board in ruling on a third NRC Staff request for a stay in the Oncology proceeding, LBP-93-20, 38 NRC 130 (1993).

Although it is not unusual for an adjudicatory proceeding and an investigation on the same general subject matter to proceed simultaneously, the Commission has been willing to stay parallel proceeding if a party shows substantial prejudice, e.g., where discovery in an adjudicatory proceeding would compromise an investigation. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 & 2), CLI-95-9, 41 NRC 404, 405 (1995).

The target of an enforcement action has a strong argument regarding harm from delay in enforcement proceedings where there is direct causal nexus between the enforcement order and the target's firing. David Geisen, CLI-06-19, 64 NRC 9, 12 (2006).

The Commission has found insufficient basis for holding an enforcement proceeding in abeyance where the DOJ affidavit in support of such an abeyance (i.e., justifying why continuation of the enforcement proceeding could jeopardize a parallel criminal proceeding) includes only generalities rather than specific supporting facts, which are essential in justifying such a request. David Geisen, CLI-06-19, 64 NRC 9, 12-14 (2006) (citing Andrew Siemaszko, CLI-06-12, 63 NRC 495, 503 (2006)). The strength of this argument, however, is undermined when the target of the enforcement action is also under a grand jury indictment, and thus re-employment with an NRC-licensee can likely occur only if both the enforcement action and the criminal actions are concluded in the target's favor. David Geisen, CLI-07-6, 65 NRC 112, 120 (2007).

While the Commission is generally inclined to accommodate DOJ's requests for abeyance of NRC enforcement proceedings pursuant to the Memorandum of Understanding (MOU) between the agencies, the MOU does not entail an ironclad guarantee of such accommodation. The MOU reflects a clear understanding that DOJ must provide factual justification for delays in NRC adjudication (and related

impositions on the enforcement target), via appropriate affidavits or testimony. David Geisen, CLI-06-19, 64 NRC 9, 13 (2006).

6.25.10 Civil Penalty Proceedings

Section 234 of the AEA directs the Commission to afford an opportunity for a hearing to a licensee to whom a notice has been given of an alleged violation. Pittsburgh-Des Moines Steel Co., ALJ-78-3, 8 NRC 649, 653 (1978).

The Commission established detailed procedures and considerations to be undertaken in the assessment of civil penalties by: (1) notice of proposed rulemaking (36 Fed. Reg. 19,122, Aug. 26, 1971), and (2) amendment of the Rules of Practice to include the factors which will determine the assessment of civil penalties. (35 Fed. Reg. 16,894, Dec. 17, 1970). These two actions fulfill the legal requirements for standards utilized in civil penalty proceedings. Radiation Technology, Inc., ALJ-78-4, 8 NRC 655, 663 (1978), aff'd, ALAB-567, 10 NRC 533 (1979). See also Pittsburgh-Des Moines Steel Company, ALJ-78-3, 8 NRC 649, 653 (1978).

Under Section 234 of the AEA, 42 U.S.C. § 2282(b), and 10 C.F.R. § 2.205 of the Commission's regulations, a person subject to imposition of a civil penalty must first be given written notice of: (1) the specific statutory, regulatory or license violations; (2) the date, facts, and nature of the act or omission with which the person is charged; and (3) the proposed penalty. The person subject to the fine must then be given an opportunity to show in writing why the penalty should not be imposed. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-82-31, 16 NRC 1236, 1238 (1982).

Although recognizing the Staff's broad discretion in determining the amount of a civil penalty, results reached in other cases may nonetheless be relevant in determining whether the Staff may have abused its discretion in this case. A nexus to the current proceeding would have to be shown, and differing circumstances might well explain seemingly disparate penalties in various cases. Radiation Oncology Center at Marlton (Marlton, NJ), LBP-95-25, 42 NRC 237, 239 (1995).

When a hearing is requested to challenge the imposition of civil penalties, the officer presiding at the hearing, not the Staff, decides on the basis of the record whether the charges are sustained and whether civil penalties are warranted. Radiation Technology, Inc., ALAB-567, 10 NRC 533, 536 (1979).

Civil penalties are not invalidated by the absence of a formally promulgated schedule of fees when the penalties imposed are within statutory limits and in accord with general criteria published by the Commission. Radiation Technology, ALAB-567, 10 NRC 533, 541 (1979).

One factor which a Licensing Board may consider in determining the amount of a civil penalty is the promptness and extent to which a licensee takes corrective action. Certified Testing Laboratories, Inc., LBP-92-2, 35 NRC 20, 44 (1992).

The five-year statute of limitations on civil penalty actions imposed by 28 U.S.C. § 2462 commences when the claim first accrues. This requirement is satisfied by the issuance of a Notice of Violation and Proposed Imposition of Civil Penalty within five years of the

date of the underlying violation. 3M Company v. Browner, 17 F.3d 1453, 1457-63 (D.C. Cir.1994); See also Johnson v. SEC, 87 F.3d 484 (D.C. Cir. 1996). With respect to continuing violations, absent fraud or concealment of the violation, the claim first accrues when the course of conduct constituting the violation ceases. See Newell Recycling Co. v. U.S. EPA, 231 F.3d 204, 206 (5th Cir. 2000). In some circumstances, equitable considerations permit tolling the five-year period. For example, if the fraudulent conduct of the defendant caused the injured party to remain ignorant of the violation, without any fault or lack of due diligence, the limitations period does not begin to run until the fraud is discovered. Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1874); Hobson v. Wilson, 737 F.2d 1, 34 (D.C. Cir. 1984). Furthermore, when a licensee is required to report a violation, the limitation does not run until the licensee reports the violation. See Public Interest Research Group v. Powell Duffryn Terminals, 913 F.2d 64, 75 (3rd Cir. 1990); United States v. ALCOA, 824 F.Supp. 640, 645 (D.W.Tex. 1993).

A civil penalty may be imposed on a licensee even though there is no evidence of (1) malfeasance, misfeasance, or nonfeasance by the licensee, or (2) a failure by the licensee to take prompt corrective action. In such circumstances, a civil penalty may be considered proper if it might have the effect of deterring future violations of regulatory requirements or license conditions by the licensee, other licensees, or their employees. It does not matter that the imposition of the civil penalty may be viewed as punitive. Atlantic Research Corp., CLI-80-7, 11 NRC 413 (1980), vacating ALAB-542, 9 NRC 611 (1979).

An adjudicatory hearing in a civil penalty proceeding is essentially a trial de novo. The penalty assessed by the Staff constitutes the upper bound of the penalty which may be imposed after the hearing, but the Board may substitute its own judgment for that of the Director. Atlantic Research Corporation, ALAB-594, 11 NRC 841, 849 (1980).

The grounds for the Staff's finding of a whistleblower violation form the upper jurisdictional boundary for the grounds available to a Licensing Board in determining whether a violation has occurred. These bounds are established in the enforcement order. Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2, & 3), CLI-04-24, 60 NRC 160, 202-203 (2004).

Civil penalty adjudications are de novo proceedings. The Licensing Board may substitute its own judgment for that of the Director and is entirely free to mitigate or remit the assessed penalty. The Commission's Enforcement Policy does not give exclusive discretion to the Staff in determining the amount of a civil penalty. TVA, CLI-04-24, 60 NRC at 217-218.

Where the Staff is detailed and complete in explaining its method of calculating the amount of civil penalty and the licensee has not controverted the Staff's reasoning, the amount of the civil penalty will stand. Cameo Diagnostic Centre, Inc., LBP-94-34, 40 NRC 169, 175-76 (1994).

A licensee is responsible for all violations committed by its employees, whether it knew or could have known of them. There is no need to show scienter. One is not exempted from regulation by operating through an employee. Atlantic Research Corp.,

CLI-80-7, 11 NRC 413 (1980); Pittsburgh-Des Moines Steel Co., ALJ-78-3, 8 NRC 649, 651-52 (1978).

For treatment of the administrative record of an NRC civil penalty action in a collection action in federal district court, see NRC v. Radiation Technology, 519 F.Supp. 1266 (D.N.J. 1981).

6.25.11 Settlement of Enforcement Proceedings

In enforcement proceedings, settlements between the Staff and the licensee, once a matter has been noticed for hearing, are subject to review by the presiding officer. 10 C.F.R. § 2.203. Thus, once an enforcement order has been set for hearing at a licensee's request, the NRC Staff no longer has untrammeled discretion to offer or accept a compromise or settlement. Sequoyah Fuels Corp. and General Atomics (Gore, OK, Site), CLI-94-12, 40 NRC 64, 71 (1994).

Where the Staff in an enforcement settlement does not insist on strict compliance with a particular Commission regulation, it is neither waiving the regulation at issue nor amending it, but is instead merely exercising discretion to allow an alternative means of meeting the regulation's goals. Sequoyah Fuels Corp. and General Atomics (Gore, OK, Site), CLI-97-13, 46 NRC 195, 221 (1997).

6.25.12 Inspections and Investigations

The Commission has both the duty and the authority to make such investigations and inspections as it deems necessary to protect the public health and safety. Union Electric Co. (Callaway Plant, Units 1 & 2), LBP-78-31, 8 NRC 366, 374 (1978), aff'd, ALAB-527, 9 NRC 126 (1979).

Because the atomic energy industry is a pervasively regulated industry, lawful inspections of licensee's activities are within the warrantless search exception for a "closely regulated industry" delineated by the Supreme Court in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). A licensee's submission to all applicable NRC regulations constitutes advance consent to lawful inspections; a search warrant is not required for such inspections. Union Electric Co. (Callaway Plant, Units 1 & 2), LBP-78-31, 8 NRC 366, 377 (1978), aff'd, ALAB-527, 9 NRC 126 (1979); Radiation Technology, Inc., ALAB-567, 10 NRC 533, 540 (1979); U.S. v. Radiation Technology, Inc., 519 F.Supp. 1266, 1288 (D.N.J. 1981).

Proposed investigation of the discharge by a licensee's contractor of a worker who reported alleged construction problems to the NRC was within the NRC's statutory and regulatory authority to assure public health and safety. The Commission should not defer such an inquiry into the discharge of a worker under a proper exercise of its authority to investigate safety related matters merely because such investigation may touch on matters that are the subject of a grievance proceeding between the licensee and the worker. Union Electric Co. (Callaway Plant, Units 1 & 2), LBP-78-31, 8 NRC 366, 376-78 (1978), aff'd, ALAB-527, 9 NRC 126 (1979).

An agency investigation must be conducted for a legitimate purpose. However, Section 161.c. of the AEA, 42 U.S.C. § 2201(c), does not require that the precise nature and extent of the investigation be articulated in a specific provision of the AEA

or the Energy Reorganization Act. Rather, AEA § 161.c. makes clear that an NRC investigation is proper if it "assist[s] [the NRC] in exercising any authority provided in this,…or any regulations or orders issued thereunder." U.S. v. Construction Products Research, Inc., 73 F.3d 464, 471 (2nd Cir. 1996).

Inspections of licensed activities during company-scheduled working hours are reasonable per se. Commission inspections may not be limited to "office hours." In re Radiation Technology, Inc., ALAB-567, 10 NRC 533, 540 (1979); U.S. v. Radiation Technology, Inc., 519 F.Supp. 1266, 1288 (D.N.J. 1981).

The NRC Staff is authorized by the Commission to issue subpoenas pursuant to Section 161.c. of the AEA where necessary or appropriate for the conduct of inspections or investigations. Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), CLI-87-8, 26 NRC 6, 9 (1987). The NRC Staff may issue a subpoena to a person who is not an NRC licensee under Section 161.c. of the AEA, where the recipient of the subpoena has information that would help determine whether a properly issued NRC regulation was violated by the former employee of a licensee. Rene Chun, CLI-04-34, 60 NRC 607 (2004).

The DOJ guidelines for issuing subpoenas to members of the media do not vest any rights in members of the media. Thus, the fact that a subpoena does not satisfy the DOJ guidelines does not mean that a federal court would refuse to enforce the subpoena. Further, while members of the media enjoy some protection from subpoena under the First Amendment "reporter's privilege," the First Amendment interest protected by this "qualified privilege" is narrowed and easier to overcome when confidential sources are not involved. Specifically, where non-confidential sources are involved and information is sought from a non-party press entity, the privilege can be overcome if the party issuing the subpoena can show that the materials at issue are of likely relevance to a significant issue in the case and are not reasonably obtainable from other available sources. (citing Gonzales v. NBC, 194 F.3d 29, 36 (2d Cir. 1999). Id.

6.25.13 False Statements

The Commission depends on licensees and applicants for accurate information to assist the Commission in carrying out its regulatory responsibilities and expects nothing less than full candor from licensees and applicants. Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 427 (1993); Hamlin Testing Laboratories, Inc., 2 AEC 423, 428 (1964), aff'd, 357 F.2d 632 (6th Cir.1966). A seminal case on false statements in the context of NRC regulation is Virginia Electric and Power Co. (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480 (1976), aff'd, 571 F.2d 1289 (4th Cir.1978).

The penalties that flow from making a false statement to a presiding officer and the NRC Staff, including the possibility of criminal violations under 18 U.S.C. § 1001 and agency enforcement actions, can be sufficient to ensure compliance without the additional step of incorporating into a decision a list of commitments that an applicant has clearly acknowledged it accepts and will fulfill. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC 364, 410 (2000), citing Florida Power and Light Co. (Turkey Point Nuclear Generating Plants,

Units 3 & 4), ALAB-898, 28 NRC 36, 41 n.20 (1988) (holding that there was no need to incorporate applicant commitment in order given potential Staff enforcement).

6.25.14 Independence of Inspector General

Congress enacted the Inspector General Act of 1978 in order "to more effectively combat fraud, abuse, waste and mismanagement in the programs and operations of…departments and agencies." NRC v. Federal Labor Relations Authority, 25 F.3d 229, 233 (4th Cir. 1994), citing S. Rep. No. 1071, 95th Cong., 2d Sess. 1 (1978), reprinted in 1978 USSCAN 2676. One of the most important goals of the Inspector General Act was to make Inspectors General independent enough that their investigations and audits would be wholly unbiased. The bulk of the Inspector General Act's provisions are accordingly devoted to establishing the independence of the Inspectors General from the agencies that they oversee. Thus, shielded with independence from agency interference, the Inspector General in each agency is entrusted with the responsibility of auditing and investigating the agency, a function which may be exercised in the judgment of the Inspector General as each deems it "necessary or desirable." 5 U.S.C. App. 3 § 6(a)(2). NRC v. Federal Labor Relations Authority, 25 F.3d at 234.

To allow the agency and the union, which represents the agency's employees, to bargain over restrictions that would apply in the course of the Inspector General's investigatory interviews in the agency would impinge on the statutory independence of the Inspector General, particularly when it is recognized that investigations within the agency are conducted solely by the Office of the Inspector General. NRC v. Federal Labor Relations Authority, 25 F.3d 229, 234 (4th Cir. 1994).

6.25.15 Whistleblower Protection

Licensing Board findings of fact are reviewed by the Commission under the "clearly erroneous" standard, and such deference is particularly great where a Board bases its findings of fact in significant part on the credibility of witnesses. Whistleblowing discrimination cases are, by their nature, peculiarly fact-intensive and dependent on witness credibility. Fact-based appeals in a whistleblower case face an uphill climb before the Commission. Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2, & 3), CLI-04-24, 60 NRC 160, 189 (2004).

The touchstone for evidentiary standards in nuclear whistleblowing cases is the special evidentiary framework under Section 211 of the Equal Rights Act, not McDonnell Douglass Corp v. Green, or Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). TVA, CLI-04-24, 60 NRC at 190-91. Section 211 of the Equal Rights Act establishes a two-part evidentiary approach for nuclear whistleblower cases: (1) employees must show that the whistleblowing activity was a "contributing factor" in an unfavorable personnel action, and (2) if that showing is made, the employer must demonstrate by "clear and convincing" evidence that it would have taken the same personnel activity anyway, regardless of the whistleblowing activity. Id. at 191.

The evidentiary framework of Section 211 of the Equal Rights Act does not provide for a special exception for nuclear whistleblower cases litigated on a "pretext" theory. TVA, CLI-04-24, 60 NRC at 191.

The evidentiary standard set forth in Section 211 of the Equal Rights Act favors employees by imposing a "clear and convincing evidence" standard on employers to prove that its chosen personnel activity would have been taken notwithstanding the alleged whistleblowing activity. TVA, CLI-04-24, 60 NRC at 192-93.

Employees must demonstrate under Section 211 of the Equal Rights Act that the whistleblowing activity was a "contributing factor" in an unfavorable personnel action. This requires that the evidence presented must allow a reasonable person to infer that protected activities influenced the unfavorable personnel action to some degree. It does not require an employee to demonstrate that the whistleblowing activity was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action. TVA, CLI-04-24, 60 NRC at 197.

The mere involvement, without more, in the resolution of a safety or regulatory compliance issue raised by another person does not constitute a "protected activity" defined in 10 C.F.R. § 50.7(a). However, an employee's involvement in the resolution of such an issue does not deprive an employee of the protections that Section 50.7 offers for otherwise protected activities. TVA, CLI-04-24, 60 NRC at 209.

6.26 Stay of Agency Licensing Action – Informal Hearings

The pendency of a hearing request, or an ongoing proceeding, does not preclude the Staff (acting under its general authority delegated by the Commission) from granting a requested licensing action effective immediately. Babcock & Wilcox (Apollo, PA, Fuel Fabrication Facility), LBP-92-31, 36 NRC 225, 261 (1992). Section 2.1213 (formerly 10 C.F.R. 2.1263) provides that if a requested licensing action is approved and is made effective immediately by the Staff, then any participant in an ongoing informal adjudication concerning that action can request that the presiding officer stay the effectiveness of the licensing action. Babcock & Wilcox (Apollo, PA, Fuel Fabrication Facility), LBP-92-31, 36 NRC 225, 261 (1992).

Applications for stay of Staff's licensing action are governed by the stay criteria in § 2.342 (formerly § 2.788). The participants should use affidavits to support any factual presentations that may be subject to dispute. See 10 C.F.R. § 2.342(a)(3) (formerly § 2.788(a)(3)). Babcock & Wilcox (Apollo, PA, Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 262-63 (1992).

Because no one of the four stay criteria, of itself, is dispositive, the strength or weakness of a movant's showing on a particular factor will determine how strong its showing must be on the other factors. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-820, 22 NRC 743, 746 n.8 (1985). However, the second stay factor – irreparable injury – is so central that failing to demonstrate irreparable injury requires that the movant make a particularly strong showing relative to the other factors. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-90-3, 31 NRC 219, 260 (1990). Babcock & Wilcox (Apollo, PA, Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 263 (1992). Nuclear Fuel Services, Inc. (Erwin, TN), LBP-04-2, 59 NRC 77, 80 (2004).

The irreparable injury factor will weigh in the movant's favor only if the movant establishes that the claimed injury would be "both certain and great." Mere speculation that a nuclear

accident could potentially occur does not meet this standard. Nuclear Fuel Services, Inc. (Erwin, TN), LBP-04-2, 59 NRC at 81.

A movant's reliance upon a listing of areas of concern in its hearing petition, along with the otherwise unexplained assertion that it expects to prevail on those issues, is inadequate to meet its burden under the first stay criteria to establish a likelihood of success on the merits. See Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 270 (1990). Babcock & Wilcox (Apollo, PA, Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 264 (1992).

Failure to show irreparable injury means that the movant's stay application will fail unless the movant can show to a "virtual certainty" that it will ultimately prevail on the merits. NFS, LBP-04-2, 59 NRC at 80.

Further, a movant's failure to make an adequate showing relative to the first two stay criteria makes an extensive analysis of the third and fourth factors unnecessary. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985). Babcock & Wilcox (Apollo, PA, Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 266 (1992). NFS, LBP-04-2, 59 NRC at 83.

An applicant's showing regarding extensive additional financial expenditures it must make if a stay is granted is a relevant consideration under the third stay criterion – harm to other parties. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-808, 21 NRC 1595, 1602-03 (1985). Babcock & Wilcox (Apollo, PA, Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 267 (1992).

Stays of any final decisions or actions of the Commission, a presiding officer, or the NRC Staff in issuing a license are permissible, but the regulations do not provide for "injunctions" to stay actions that are not yet final. Earthline Technologies, LBP-03-6, 57 NRC 251, 245 (2003).

6.27 (RESERVED)

6.28 Technical Specifications

10 C.F.R. § 50.36 specifies, inter alia, that each operating license will include technical specifications to be derived from the analysis and evaluation included in the safety analysis report, and amendments thereto, and may also include such additional technical specifications as the Commission finds appropriate. The regulation sets forth with particularity the types of items to be included in technical specifications. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 351 (2001). Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 272 (1979). The policy of the Commission "is to reserve technical specifications for the most significant safety requirements", as outlined in 10 C.F.R. § 50.36. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-02-1, 55 NRC 1, 3 (2002).

There is neither a statutory nor a regulatory requirement that every operational detail set forth in an application's safety analysis report (or equivalent) be subject to a technical specification to be included in the license as an absolute condition of operation which is legally binding upon the licensee unless and until changed with specific Commission

approval. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 360 (2001). Technical specifications are reserved for those matters where the imposition of rigid conditions or limitations upon reactor operation is deemed necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 273 (1979); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-831, 23 NRC 62, 65-66 & n.8 (1986) (fire protection program need not be included in technical specification).

Originally, 10 C.F.R. § 50.36 contained no well-defined criteria specifically describing the required contents of the technical specifications. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 351 (2001). After 10 C.F.R. § 50.36 was issued, the amount of items listed in the technical specifications greatly increased. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 352 (2001). The NRC revised Section 50.36 so that it identifies criteria to be used in deciding what should be included in the technical specifications. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 352 (2001). If a requirement meets one of the criteria, it must be retained in the technical specifications. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 352 (2001). If it does not meet any of the criteria, it may be transferred to licensee-controlled documents. The agency policy is to limit technical specifications to focus licensee and plant operator attention on the most significant technical concerns. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 352 (2001). NRC "generic letters" issued to licensees identify particular items deemed amenable to removal from the technical specifications. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 352 (2001).

Relative to technical specification conditions for power reactor licenses, the Appeal Board has observed: "technical specifications are to be reserved for those matters as to which the imposition of rigid conditions or limitations upon reactor operation is deemed necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC 364, 409 (2000), citing Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 273 (1979). While this suggests that the threshold for imposing a technical license condition is not insignificant, in other contexts, in particular financial matters, Commission rulings indicate that the threshold may be somewhat lower. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 32 (2000) (adopting as ISFSI license conditions Private Fuel Storage financial qualification commitments made during the licensing process); Louisiana Energy Services (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 308-09 (1997) (adopting as enrichment facility license conditions financial qualification commitments made in licensing proceedings).

Technical specifications for a nuclear facility are part of the operating license for the facility and are legally binding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1257 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985) (citing Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 272-73 (1979)).

6.29 Termination of Facility Licenses

Termination of facility licenses is covered generally in 10 C.F.R. § 50.82.

In a proceeding concerning the adequacy of a License Termination Plan (LTP), the scope of admissible contentions in the proceeding is coextensive with the scope of the LTP itself, which is governed by the requirements of 10 C.F.R. § 50.82. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-99-14, 49 NRC 238, 239 (1999).

The Commission considers the LTP significant enough to require the LTP to be treated as a license amendment, complete with a hearing opportunity. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185 (1988).

A site characterization in an LTP must contain a description of the essential character or quality of the plant site. Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), LBP-01-21, 54 NRC 33, 59 (2001). The Commission declines to develop a "bright line" test for when a site characterization or site remediation plan is final or complete enough to support approval of an LTP. A site characterization is not incomplete solely because additional site characterization may be obtained at a later time, but site characterization involves more than methodologies or plans for characterization. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 377 (2005).

It appears that the adequacy of site characterization and site remediation plans depends to a large extent on site-specific conditions. At a minimum, the site characterization and remediation plans must provide sufficient information to allow the NRC to determine the extent and range of expected radioactive contamination, to determine whether estimates for remaining decommissioning costs are reasonable, to determine the likely schedule for remaining activities, and to support the final survey site to verify compliance with Part 20 release limits—the ultimate goal of the decommissioning process. Yankee, CLI-05-15, 61 NRC at 377 (discussing the content requirements of 10 C.F.R. § 50.82(a)(9)(ii)(A),(C) for LTPs). The purpose of site characterization is to define relevant features of the soil, water, and buildings in order to assess risks and develop adequate plans to complete decommissioning. The LTP must deal with issues already identified and those reasonably anticipated. The key question at the LTP stage is whether the site characterization is sufficiently detailed to allow the evaluation of the adequacy of each element prescribed by 10 C.F.R. § 50.82(a)(9) and for making the findings required for approval of the LTP (see 10 C.F.R. § 50.82(a)(10)). Id. at 381.

A showing of a violation of 10 C.F.R. § 50.82(a)(9) – which contains the words, "[t]he [license termination plan] must include" – could constitute a significant indication of a possible violation of 10 C.F.R. § 50.82(a)(10); if a site characterization as required under Section 50.82(a)(9)(ii)(A) is shown to be inadequate, then areas not covered by the site characterization might be omitted or given inadequate attention in cleanup efforts and in the final status survey, which could in turn be an indication that the LTP has not "demonstrate[d] that the remainder of the decommissioning activities [1] will be performed in accordance with the regulations in this chapter, [2] will not be inimical to the common defense and security or to the health and safety of the public and [3] will not have a significant effect on the quality of the environment," under Section 50.82(a)(10). Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), LBP-01-21, 54 NRC 33, 66-67 (2001).

Spent fuel management is outside the scope of a license termination proceeding, which is confined to a review of the matters specified in 10 C.F.R. § 50.82(a)(9) and (10). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185 (1988).

6.30 Procedures in Other Types of Hearings

6.30.1 Military or Foreign Affairs Functions

Under the Administrative Procedure Act, 5 U.S.C. § 554(a) (4), and the Commission's Rules of Practice, 10 C.F.R. § 2.301 (formerly § 2.700a), procedures other than those for formal evidentiary hearings may be fashioned when an adjudication involves the conduct of military or foreign affairs functions. Nuclear Fuel Services, Inc. (Erwin, Tennessee), CLI-80-27, 11 NRC 799, 802 (1980).

The fact that an applicant lists a foreign-owned entity among its contractors does not indicate foreign ownership, domination, or control over the applicant. PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC __ (Aug. 10, 2009) (slip op. at 50).

6.30.2 Import/Export Licensing

Individual fuel exports are not major federal actions. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-15, 11 NRC 672 (1980). (Also see Section 3.4.6.)

Commission regulations provide in 10 C.F.R. § 110.82(c)(2) that hearing requests on applications to export nuclear fuel are to be filed within fifteen (15) days after the application is placed in the Commission's Public Document Room. Westinghouse Electric Corp. (Nuclear Fuel Export License for Czech Republic – Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 327 (1994).

United States non-proliferation policy, as set forth in the Nuclear Non-Proliferation Act of 1978 (NNPA) requires the NRC to act in a timely manner on export license applications to countries that meet U.S. non-proliferation requirements. Because Congress viewed timely action on export license applications as fundamental to achieving the non-proliferation goals underlying the NNPA, the Commission is reluctant to grant late hearing requests on export license applications. Because timely action on export licenses supports U.S. nuclear non-proliferation goals under the NNPA, it is particularly important that petitioners in this context demonstrate that the pertinent factors weigh in favor of granting an untimely petition. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic – Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 328 (1994).

Under the NNPA, the Commission is required to hold a hearing only if it concludes that public participation will be in the public interest and assist it in making the statutory determinations required by the AEA. Nothing in the statutory language suggests that the Commission must hold a hearing if a member of the public requesting a hearing has standing – or as AEA § 189 puts it, "an interest which may be affected." U.S. Dep't of Energy (Plutonium Export License), CLI-04-17, 59 NRC 357, 366-67 (2004). In its export licensing orders, the Commission has typically addressed the standing of requesters but has not explicitly found that if a person has standing the Commission must hold a hearing. See id. at 367.

In a case where petitioners requested a hearing challenging an export license to export weapons-grade plutonium oxide to France, the Commission stated that (under the NNPA and 10 C.F.R. § 110.84(a)), the petitioners' requested export license hearing for the purpose of delving into the specifics of the physical security measures of a recipient foreign country to determine the adequacy of those measures and of the existing standards clearly would not be appropriate, both because of legal restrictions on dissemination of such information and because further dissemination of such information could endanger security. See U.S. Dep't of Energy (Plutonium Export License), CLI-04-17, 59 NRC 357, 368-69 (2004).

In a case where petitioners requested a hearing challenging an export license to export weapons-grade plutonium oxide to France, and petitioners argued standing in part because of proximity to cross-country shipments of the plutonium, the Commission stated (via dicta in a footnote) that the NRC's jurisdiction to license DOE exports of SNM under AEA § 54.d. does not extend to any aspects of DOE's domestic transportation of such material. Therefore, it was unclear that denial of DOE's proposed export license would redress or avoid the harm that petitioners asserted for standing purposes – i.e., DOE's transportation of the plutonium oxide near petitioners' residences. See U.S. Dep't of Energy (Plutonium Export License), CLI-04-17, 59 NRC 357, 366 n.13 (2004).

The transfer of nuclear material to an intermediate consignee performing only shipping services does not in any respect constitute an "export" to a foreign sovereign under the Commission's regulations (see 10 C.F.R. § 110.2) or under international law. U.S. Dep't of Energy (Plutonium Export License), CLI-04-17, 59 NRC 357, 370 (2004).

Under 10 C.F.R. § 110.84(c), untimely hearing requests may be denied unless good cause for failure to file on time is established. In reviewing untimely requests, the Commission will also consider: (1) the availability of other means by which the petitioner's interest, if any, will be protected or represented by other participants in a hearing; and (2) the extent to which the issues will be broadened or action on the application delayed. The potential for delay of action on an export license application is an important factor in the Commission's analysis of a late-filed petition on such applications, in light of the NNPA's directive for timely decisions on export license applications. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic – Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 328 (1994).

The first and principal test for late intervention is whether a petitioner has demonstrated "good cause" for filing late. In addressing the good-cause factor, a petitioner must explain not only why it failed to file within the time required, but also why it did not file as soon thereafter as possible. Lacking a demonstration of "good cause" for lateness, a petitioner is bound to make a compelling showing that the remaining factors nevertheless weigh in favor of granting the late intervention and hearing request. The fact that no one will represent a petitioner's perspective if its hearing request is denied is in itself sufficient for the Commission to excuse the untimeliness of the request. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic – Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 329 (1994). Also, in the absence of evidence that a hearing would generate significant new information or analyses, a public hearing would be inconsistent with the NNPA. CLI-94-7 at 334.

6.30.2.1 Jurisdiction of Commission re Export Licensing

The Commission is neither required nor precluded by the AEA or NEPA from considering impacts of exports on the global commons. Provided that NRC review does not include visiting sites within the recipient nation to gather information or otherwise intrude upon the sovereignty of a foreign nation, consideration of impacts upon the global commons is legally permissible. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 637-644 (1980). The Commission's legislative mandate neither compels nor precludes examination of health, safety and environmental effects occurring abroad that could affect U.S. interests. The decision whether to examine these effects is a question of policy to be decided as a matter of agency discretion. CLI-80-14, 11 NRC at 654.

As a matter of policy, the Commission has determined not to conduct such reviews in export licensing decisions primarily because no matter how thorough the NRC review, the Commission still would not be in a position to determine that the reactor could be operated safely. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 648 (1980).

The Commission lacks legal authority under AEA, NEPA, and NNPA to consider health, safety and environmental impacts upon citizens of recipient nations because of the traditional rule of domestic U.S. law that federal statutes apply only to conduct within, or having effect within, the territory of the U.S. unless the contrary is clearly indicated in the statute. Id., 11 NRC at 637. See also General Electric Co. (Exports to Taiwan), CLI-81-2, 13 NRC 67, 71 (1981).

The alleged undemocratic character of the Government of the Philippines does not relate to health, safety, environmental and non-proliferation responsibilities of the Commission and are beyond the scope of the Commission's jurisdiction. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 656 (1980).

The NRC views actions as being inimical to the common defense and security where there is an unacceptable likelihood of grave or exceptionally grave damage to the United States. Thus, the NRC's principal concern once fissile nuclear materials have left the United States is the possibility of theft. U.S. Dep't of Energy, CLI-04-17, 59 NRC 357, 375 (2004).

6.30.2.2 Export License Criteria

The AEA, as amended by the NNPA, provides that the Commission may not issue a license authorizing the export of a reactor, unless it finds, based on a reasonable judgment of the assurances provided, that the criteria set forth in §§ 127 and 128 of the AEA are met. The Commission must also determine that the export would not be inimical to the common defense and security or health and safety of the public and would be pursuant to an Agreement for Cooperation. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 652 (1980).

In order to grant an export license to a nuclear-weapons state, the Commission must determine that the nonproliferation criteria set forth in Section 127 of the AEA have been met, and also, pursuant to Section 57.c(2) of the AEA, that a proposed

export will not be "inimical to the common defense and security" of the United States. See U.S. Dep't of Energy (Plutonium Export License), CLI-04-17, 59 NRC 357, 372, 373 (2004).

The Commission may not issue a license for export unless it determines that the three specific criteria in Section 109(b) of AEA are met and determines that the export will not be inimical to common defense. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 654 (1980).

The legislative history of the NNPA indicates that, in the absence of "unusual circumstances," the Commission "need not look beyond the non-proliferation safeguards [in Section 127 for nuclear-weapons states] in determining whether the common defense and security standard is met." U.S. Dep't of Energy (Plutonium Export License), CLI-04-17, 59 NRC 357, 374 (2004) (quoting Natural Res. Def. Council, Inc. v. NRC, 647 F.2d 1345, 1363 (D.C. Cir. 1981)).

The NRC may properly rely on the conclusions of the Executive Branch regarding the common defense and security requirements of Section 126 of the AEA (regarding export licensing procedures). Transnuclear, Inc. (Export of 93.3% Enriched Uranium), CLI-00-16, 52 NRC 68, 77 (2000). See also U.S. Dep't of Energy (Plutonium Export License), CLI-04-17, 59 NRC 357, 374 (2004) (quoting Natural Res. Def. Council, Inc. v. NRC, 647 F.2d 1345, 1363 (D.C. Cir. 1981). (The NRC can rely on the Executive Branch's noninimicality determinations because they involve "strategic judgments" and foreign policy and national security expertise.

6.30.2.3 HEU Export License – Atomic Energy Act

Diplomatic notes containing a foreign government's assurance that it will use low-enriched uranium (LEU) targets when such targets become available, provided that their use does not result in a large percentage increase in the total cost of operating the pertinent reactor, constitute assurance sufficient to satisfy AEA Section 134.a(2), 42 U.S.C. § 2160d. That provision requires that the proposed recipient of high-enriched uranium (HEU) provide assurance that, whenever an alternative nuclear reactor target can be used in that reactor, it will use that alternative in lieu of HEU. Transnuclear, Inc. (Export of 93.3% Enriched Uranium), CLI-99-20, 49 NRC 469, 473 (1999).

The requirement under AEA Section 134.a(3) of an active program for the development of an LEU target that can be used in the particular reactor to which the HEU exports are being made is satisfied where the Commission finds that the principals have executed a confidentiality agreement to enable the principals to forward technical information that would enable a feasibility study to be completed and have provided information pursuant to that agreement. Transnuclear, Inc. (Export of 93.3% Enriched Uranium), CLI-99-20, 49 NRC 469, 473 (1999).

6.30.2.4 Import Licensing

"[T]he Commission will issue an LLW import license if it finds that: (1) the proposed import will not be inimical to the common defense and security; (2) the proposed import will not constitute an unreasonable risk to the public health and safety; (3) the environmental requirements of Part 51 have been satisfied (to the extent

applicable); and (4) an appropriate facility has agreed to accept the waste for management or disposal." EnergySolutions, LLC (Radioactive Waste Import/Export Licenses), CLI-08-24, 68 NRC 491, 494 (2008). An integral aspect of the Commission's determination of a facility's appropriateness for disposal of imported waste is whether the facility can actually accept that waste for disposal. Id. at 495.

6.30.3 High-Level Waste Licensing

There is no legal requirement for a notice-and-comment rulemaking proceeding concerning the Commission's statutory concurrence in DOE's General Guidelines for Recommendation of Sites for Nuclear Waste Repositories, pursuant to Section 112(a) of the Nuclear Waste Policy Act of 1982. NRC Concurrence in High-Level Waste Repository Safety Guidelines Under Nuclear Waste Policy Act of 1982, CLI-83-26, 18 NRC 1139, 1140 (1983).

The procedures that govern the conduct of an adjudicatory proceeding on the application for authorization to construct a high-level radioactive waste repository at a geologic repository operations area (GROA) and an application for a license to receive and possess high-level radioactive waste at a GROA are specified in Subparts J, C and G. See 10 C.F.R. § 2.1000. The procedures in Subpart J take precedence over the rules of general applicability in 10 C.F.R. Part 2, Subpart C, except for those provisions listed in 10 C.F.R. § 2.1000.

Subpart J prohibits appeals except as prescribed in 10 C.F.R. § 2.1015(b), (c), and (d). See U.S. Dep't of Energy (High-Level Waste), CLI-10-10, 71 NRC __ (Mar. 11, 2010) (slip op. at 3-4) (noting that Subpart J does not provide for appeals of a Presiding Officer's ruling on a late-filed intervention petition). A request for interlocutory review that is not permitted under Subpart J may be granted as an exercise of the Commission's inherent supervisory authority over adjudications if the basic structure of the proceeding is affected in a pervasive and unusual manner. U.S. Dep't of Energy (High-Level Waste), CLI-10-13, 71 NRC __ (Apr. 23, 2010) (slip op. at 3 & n.6) (reviewing and reversing Board decision to suspend the proceeding pending court action on matters related to DOE's request to withdraw its license application).

Subpart J provides procedures for the development and operation of the Licensing Support Network (LSN), an electronic information management system that makes documentary material relevant to the proceeding electronically available to the participants. See Digest Section 2.12.7, Discovery in High-Level Waste Licensing Proceedings. Because many of the features of the system contemplated under the original 1988 rule no longer provide optimal approaches to electronic information management, the Commission adopted a revised approach to the LSN in a rulemaking published at 63 Fed. Reg. 71,729 (Dec. 30, 1998).

The duty to certify compliance with the LSN applies only to documents in existence at the time the certification occurs. There is no requirement that certification be delayed until all the materials that a party intends to rely on are complete and final. U.S. Dept. of Energy (High-Level Waste Repository), CLI-08-12, 67 NRC 386, 392 (2008); U.S. Dept. of Energy (High Level Waste Repository), LBP-08-1, 67 NRC 37 (2008). See also U.S. Dept. of Energy (High Level Waste Repository), LBP-08-5, 67 NRC 205 (2008) (rejecting Dept. of Energy's Motion to Strike the State of Nevada's certification). However, participants must make a diligent and good faith effort to include all after-

created and after-discovered documents in each monthly LSN supplementation. U.S. Dep't of Energy (High-Level Waste Repository), LBP-09-06, 69 NRC 367, 387 (2009), rev'd in part on other grounds, CLI-09-14, 69 NRC 580 (2009).

6.30.3.1 Intervention in the High-Level Waste Proceeding

A petitioner may not be granted party status in the high-level waste proceeding if it cannot demonstrate substantial and timely compliance with the requirements in 10 C.F.R. § 2.1003. U.S. Dep't of Energy (High-Level Waste Repository), LBP-09-06, 69 NRC 367, 381-83 (2009), rev'd in part on other grounds, CLI-09-14, 69 NRC 580 (2009). If a party is found not to be in substantial and timely compliance, it can later request party status upon a subsequent showing of compliance and its participation will be "conditioned on accepting the status of the proceeding at the time of admission." Id. at 383 (quoting 10 C.F.R. § 2.1012(b)(2)).

With regard to standing, the Commission has conferred standing as of right to certain parties including the State of Nevada, local governmental bodies in which the GROA is located, and any affected federally recognized Indian tribe as defined in 10 C.F.R. Part 63, if the party satisfies the 10 C.F.R. § 2.309(f) requirements with respect to at least one contention. U.S. Dep't of Energy, LBP-09-06, 69 NRC at 381 (2009), rev'd in part on other grounds, CLI-09-14, 69 NRC 580 (2009).

The Commission has imposed additional requirements in 10 C.F.R. § 51.109 on the admissibility of contentions that involve NEPA. U.S. Dep't of Energy, LBP-09-06, 69 NRC at 391-92, aff'd, CLI-09-14, 69 NRC at 402. The additional requirements are that (1) each contention must be supported by an affidavit that sets forth factual and/or technical bases, and (2) the affidavit must set forth "significant and substantial" grounds for the claim that it is not practicable to adopt the EIS. Id. at 392 (quoting 10 C.F.R. § 51.109). An affidavit is not, however, required for NEPA contentions that raise purely legal issues because the requirement to provide supporting factual and/or technical bases is not applicable to purely legal contentions. Id. at 422, aff'd, CLI-09-14, 69 NRC at 590.

6.30.3.2 Consideration of Character and Competence in the High-Level Waste Proceeding

The high-level waste (HLW) proceeding is unique with regard to consideration of character and competence because the government, not a private enterprise, is the applicant. U.S. Dep't of Energy (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 605 (2009). The NRC will not question whether DOE is an appropriate applicant. Id. The Commission extends comity to other governmental entities and presumes, absent strong and concrete evidence to the contrary, that government agencies and their employees will do their jobs honestly and properly. Id. at 606. The NRC does not have statutory authority to consider DOE's character because DOE is not a "person" as defined in Section 11 of the AEA. Id. at 607-08.

6.30.4 Low-Level Waste Disposal

Faced with a looming shortage of disposal sites for low-level radioactive waste in 31 states, Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985, which, among other things, imposes upon states, either alone or in

"regional compacts" with other states, the obligation to provide for the disposal of waste generated within their borders, and contains three provisions setting forth "incentives" to states to comply with that obligation. The three incentives are: (1) the monetary incentives; (2) the access incentives; and (3) the "take title" provision.

Because the Act's take title provision offers the states a "choice" between two unconstitutionally coercive alternatives – either accepting ownership of waste or regulating according to Congress' instructions – the provision lies outside Congress' enumerated powers and is inconsistent with the Tenth Amendment. On the one hand, either forcing the transfer of waste from generators to the states or requiring the states to become liable for the generators' damages would "commandeer" states into the service of federal regulatory purposes. On the other hand, requiring the states to regulate pursuant to Congress' direction would present a simple unconstitutional command to implement legislation enacted by Congress. Thus, the states' "choice" is no choice at all. New York v. U.S., 505 U.S. 144, 176-77 (1992).

The take title provision is severable from the rest of the Act, since severance will not prevent the operation of the rest of the Act or defeat its purpose of encouraging the states to attain local or regional self-sufficiency in low-level radioactive waste disposal. New York v. U.S., 505 U.S. 144, 186-87 (1992).

6.30.5 (RESERVED)

6.30.6 Certification of Gaseous Diffusion Plants

Individuals who wish to petition for review of an initial Director's decision must explain how their "interest may be affected." 10 C.F.R. § 76.62(c). For guidance, petitioners may look to the Commission's adjudicatory decisions on standing. U.S. Enrichment Corp. (Paducah, Kentucky), CLI-01-23, 54 NRC 267, 272 (2001); U.S. Enrichment Corp. (Paducah, Kentucky, and Piketon, Ohio), CLI-96-12, 44 NRC 231, 234, 236 (1996).

An analysis of potential accidents and consequences is required by 10 C.F.R. § 76.85 and should include plant operating history that is relevant to the potential impacts of accidents. U.S. Enrichment Corp. (Paducah, Kentucky, and Piketon, Ohio), CLI-96-12, 44 NRC 231, 245-46 (1996).

By rejecting a petition for review pursuant to 10 C.F.R. § 76.62(c), the Commission allows a Director's decision to become final. U.S. Enrichment Corp. (Paducah, KY), CLI-98-2, 47 NRC 57 (1998).

To be eligible to petition for review of a Director's decision on the certification of a gaseous diffusion plant, an interested party must have either submitted written comments in response to a prior Federal Register notice, or provided oral comments at an NRC meeting held on the application or compliance plan. 10 C.F.R. § 76.62(c). U.S. Enrichment Corp. (Paducah, Kentucky, and Piketon, Ohio), CLI-96-10, 44 NRC 114, 117 (1996); U.S. Enrichment Corp. (Paducah, Kentucky, and Piketon, Ohio), CLI-96-12, 44 NRC 231, 233-34 (1996).

10 C.F.R. Part 76 contemplates a Commission decision on petitions for review of certification decisions within a relatively short (60-day) time period. See

10 C.F.R. § 76.62(c). Extending the Part 76 petition deadline in the absence of a strong reason is not compatible with the contemplated review period. U.S. Enrichment Corp. (Paducah, Kentucky, and Piketon, Ohio), CLI-96-10, 44 NRC 114, 118 (1996).

Pursuant to 10 C.F.R. § 76.45(d), "any person whose interest may be affected," may file a petition requesting the Director of the Office of Nuclear Material Safety and Safeguards review NRC Staff determinations made on an application for amendment to a certification of a gaseous diffusion plant. U.S. Enrichment Corp. (Paducah, Kentucky), CLI-01-23, 54 NRC 267, 271-72 (2001). Pursuant to 10 C.F.R. § 76.54(e), "any person whose interest may be affected and who filed a petition for review or filed a response to a petition for review under § 76.54(d), may file a petition requesting the Commission's review of a Director's decision. U.S. Enrichment Corp. (Paducah, Kentucky), CLI-01-23, 54 NRC 267, 271-72 (2001).

6.30.7 Senior Operator License Proceedings

The NRC Staff's policy states that an applicant must score "at least" an 80% on the written exam to pass. The Commission declines to accept a Presiding Officer procedure of rounding up lower scores and declares the practice "impermissible." Ralph L. Tetrick (Denial of Application for Reactor Operator License), CLI-97-10, 46 NRC 26, 32 (1997).

"A presiding officer properly can look to NUREG-1021, 'Operator Licensing Examination Standards for Power Reactors' (Interim Rev. 8, Jan. 1997), 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." Michel A. Phillippon (Denial of Senior Reactor Operator License), LBP-99-44, 50 NRC 347, 358 (1999), quoting Frank J. Calabrese, Jr. (Denial of Senior Reactor Operator License), LBP-97-16, 46 NRC 66, 86 (1997).

6.30.8 Subpart K Proceedings

Under 10 C.F.R. § 2.341 (formerly § 2.786(b)(4)(1)), the Commission will grant a petition for review if the petition raises a "substantial question" whether a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding. The general reviewability standards set out in 10 C.F.R. § 2.341 (formerly § 2.786) apply to Subpart K by virtue of 10 C.F.R. § 2.1103 (formerly § 2.1117), which makes the general Subpart C rules applicable "except where inconsistent" with Subpart K. Subpart K has no reviewability rules of its own. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 27, n.6 (2001).

6.31 License Transfer Proceedings

The AEA and NRC's own rules unquestionably confer to the NRC the legal power to approve the indirect transfer of control over NRC operating licenses. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Units 1, 2, & 3), CLI-00-18, 52 NRC 129 (2000). See 42 U.S.C. § 2234; 10 C.F.R. § 50.80(a).

On its face, Section 184 not only broadly prohibits all manner of transfers, assignments, and disposals of NRC licenses, but also all manner of actions that have the effect of, in

any way, directly or indirectly, transferring actual or potential control over a license without the agency's knowledge and express written consent. Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 451 (1995).

If the statutory proscription against the transfer of control of NRC licenses could be avoided by the expedience of a corporate restructuring, complex or otherwise, then Section 184 would be a toothless tiger. Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 454 (1995).

As long as Section 184 and any other regulation or license condition is not violated, a material licensee may transfer its assets without notifying and obtaining the agency's permission. Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 456 (1995). When the transfer of control of NRC licenses is involved, Section 184 requires the agency's express written consent, not just that the agency be notified. Id.

The language of the AEA itself demonstrates that Congress placed no importance on the corporate form in enacting Section 184. Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 456 (1995).

The inclusion of a "corporation" in the definition of a "person" in Section 11.s. of the AEA and the use of the latter term in the inalienability of licenses provision in Section 184 indicates that Congress intended a corporation to be treated in the same manner as all other entities. Corporate law principles, which are applicable only to the corporate form of organization, are entitled to no consideration under Section 184 and do not thwart NRC regulatory jurisdiction over a corporation for violating that provision. It long has been established that the fiction of corporate separateness of state-chartered corporations will not be permitted to frustrate the policies of a federal statute. Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 457 (1995).

The statutory frustration principle permits the NRC to disregard the corporate form and impose liability on the parent corporation shareholder for the obligations of its subsidiary. And, this is true whether or not its intent was to avoid the statutory prohibition of Section 184 for "intention is not controlling when the fiction of corporate entity defeats a legislative purpose." Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 458 (1995), quoting Kavanaugh v. Ford Motor Co., 353 F.2d 710, 717 (7th Cir. 1965).

A hearing on the transfer of a license need not be a pre-effectiveness or prior hearing. AEA § 189.a(1); 42 U.S.C. § 2239. The NRC has strictly construed 189.a(1). Although this section mentions numerous actions for which hearings shall be granted if requested by an interested person, the discussion of pre-effectiveness hearings mentions only four of these actions for which a prior hearing is required. A transfer of control is not one of these four actions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 76-77 (1992).

Section 189.a.(1)(A) of the AEA requires the Commission to offer an opportunity for a hearing for certain kinds of proceedings, including those involving the "transfer of control" over licensed facilities. In order to trigger hearing rights under the "transfer of control"

provision of § 189.a.(1)(A), there must actually be a license transfer. Where a corporate merger did not propose to change either operating or possession authority, there was no direct license transfer. Similarly, where the same parent company would indirectly control the licensee – both before and after the proposed merger – there was no indirect license transfer. Therefore, the proceeding did not involve a "transfer of control," and no hearing rights attached. Amergen Energy Co., LLC (Three Mile Island Nuclear Station, Unit 1), CLI-05-25, 62 NRC 572, 573-74 (2005).

The Commission's rules for the 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 an oral hearing. Duquesne Light Co., FirstEnergy Nuclear Operating Co., and Pennsylvania Power Co. (Beaver Valley Power Station, Units 1 & 2), CLI-99-23, 50 NRC 21, 22 (1999).

When a license is transferred, the new licensee is subject to both the terms of the license and the applicable sections of Part 40. Moab Mill Reclamation Trust (Atlas Mill Site), CLI-00-7, 51 NRC 216, 224 (2000).

6.31.1 Subpart M Procedures

Subpart M to 10 C.F.R. Part 2 is intended to apply in all license transfer proceedings unless the Commission directed otherwise in a case-specific order. Moab Mill Reclamation Trust (Atlas Mill Site), CLI-00-7, 51 NRC 216, 221-22 (2000).

Motions for a Subpart G proceeding are expressly prohibited in Subpart M proceedings, pursuant to 10 C.F.R. § 2.1322(d). Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 290 (2000), citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 162 (2000). However, 10 C.F.R. § 2.335 provides for waiver of the rules under "special circumstances" that demonstrate that the "application of a rule or regulation would not serve the purposes for which it was adopted." Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 130 (2001).

The interpretation of Subpart M as dealing only with financial matters is overly restrictive and does not meet the requisite "special circumstances" for a waiver of the rules. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 290 (2000).

Subpart M calls for "specificity" in pleadings. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating, Unit 3), CLI-00-22, 52 NRC 266, 300 (2000), n.23, citing Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Units 1, 2, & 3), CLI-00-18, 52 NRC 129, 131-32 (2000). However, where critical information has been submitted to the NRC under a claim of confidentiality and was not available to the petitioners when framing their issues, the Commission has deemed it appropriate to defer ruling on the admissibility of an issue until the petitioner has had an opportunity to review this information and submit a properly documented issue. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3),

CLI-00-22, 52 NRC 266, 300 (2000). The issues in license transfer proceedings constitute contentions under 10 C.F.R. 2.309(f) and must therefore meet the standards for admissibility set forth in that regulation. Consumers Energy Co., Nuclear Management Co, LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc. (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399 (2007).

Specific pleadings are required in license transfer hearings. Neither "notice pleading," nor "the filing of a vague, unparticularized issue," nor the submission of "general assertions or conclusions," suffices to trigger a license transfer hearing. Northeast Nuclear Energy Co., et al. (Millstone Nuclear Power Station, Units 1, 2, & 3), CLI-00-18, 52 NRC 129, 132 (2000) (citing GPU Nuclear Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202-03 (2000); Northern States Power Co. (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000)).

These standards do not allow "mere notice pleading"; the Commission will not accept "the filing of a vague, unparticularized" issue, unsupported by alleged fact or expert opinion and documentary support. General assertions or conclusions will not suffice. However, the threshold admissibility requirements should not be turned into a fortress to deny intervention. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 295 (2000). An individual license transfer adjudication is not an appropriate forum for a legislative-like inquiry into issues affecting the entire nuclear industry. Id. at 296.

In the NRC's Subpart M rulemaking, which established the agency's current license transfer hearing process, the Commission expressed a willingness to review labor-type issues to a limited extent. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 315 (2000), citing Final Rule, "Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 66,721, 66.723 (Dec. 3, 1998). See also Fla. Power & Light Co., FPL Energy Seabrook, LLC, FPL Energy Duane Arnold, LLC, Constellation Energy Group, Inc. (Calvert Cliffs Nuclear Plant, Units 1 & 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Nine Mile Point Nuclear Station, Units 1 & 2; R.E. Ginna Nuclear Power Plant; Turkey Point Nuclear Generating Plants, Units 3 & 4; St. Lucie Nuclear Power Plant, Units 1 & 2; Seabrook Station; Duane Arnold Energy Center), CLI-06-21, 64 NRC 30, 34 (2006) (Although the Commission is disinclined to "step into the middle of a labor dispute," there may be cases where employment-related contentions which are "closely tied to specific health-and-safety concerns or to potential violations of NRC rules[] can be admitted for a hearing" (quoting FitzPatrick, CLI-00-22, 52 NRC at 314, 315)). However, general assertions, unsupported by specific facts or expert opinion, that personnel reductions may adversely affect health and safety do not meet the Commission's contention-pleading standards (whose "hallmark" is "specificity") and are inadmissible. Calvert Cliffs, CLI-06-21, 64 NRC at 34 (citing FitzPatrick, CLI-00-22, 52 NRC at 315, and quoting Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Units 1, 2, & 3), CLI-00-18, 52 NRC 129, 132 (2000)). Overall, the Commission generally does not involve itself in the personnel decisions of licensees. "[T]he Commission is interested in whether the plant poses a risk to the public health and safety, and so long as personnel decisions do not impose that risk, NRC regulations and policy do not

preclude a licensee from reducing or replacing portions of its staff." Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 315 (2000), quoting Oyster Creek, CLI-00-6, 51 NRC at 214, and citing Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 170 n.1600 (2000).

The Commission's license transfer hearings under Subpart M are designed solely to adjudicate genuine health-and-safety disputes arising out of license transfers. "The grant of hearings merely on the broad assertion that contentious labor controversies will lead to deleterious health and safety consequences would have no stopping point and would risk converting [the NRC] into a labor relations forum, contrary to [the Commission's] statutory mission and at a significant cost in resources and effort." Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 316 (2000).

Petitioners are obligated to put forward and support contentions when seeking intervention, based on the application and information available. See, e.g., Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 429 (2003). See generally 10 C.F.R. § 2.309(c) and (f)(2) (providing for admission of late-filed contentions if based on previously unavailable information). The Commission may decide the admissibility of such contentions or defer ruling on them, considering the need for access to redacted information and other relevant factors. See Power Authority of the State of New York and Entergy Nuclear Fitzpatrick, LLC, Entergy Nuclear Indian Point 3, LLC and Entergy Nuclear Operations, Inc. (James A. FitzPatrick Nuclear Power Plant and Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 296-319 (2000).

To demonstrate that contentions are admissible under Subpart M, a petitioner must:

> set forth the [contentions] (factual and/or legal) that petitioner seeks to raise,…demonstrate that those [contentions] fall within the scope of the proceeding,…demonstrate that those [contentions] are relevant and material to the findings necessary to a grant of the license transfer application,…show that a genuine dispute exists with the applicant regarding the [contentions], and – provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such [contentions], together with references to the sources and documents on which petitioner intends to rely.

Power Authority of the State of New York and Entergy Nuclear Fitzpatrick, LLC, Entergy Nuclear Indian Point 3, LLC and Entergy Nuclear Operations, Inc. (James A. FitzPatrick Nuclear Power Plant and Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 295 (2000); see also Niagara Mohawk Power Corporation, New York State Electric & Gas Corporation, and AmerGen Energy Company, LLC (Nine Mile Point, Units 1 & 2), CLI-99-30, 50 NRC 333, 342 (2000). 10 C.F.R. § 2.309(f). As the Commission observed in FitzPatrick, "[t]hese standards do not allow mere notice pleading; the Commission will not accept the filing of a vague, unparticularized [contention], unsupported by alleged fact or expert opinion and documentary support." In short, "[g]eneral assertions or conclusions will not suffice." FitzPatrick, CLI-00-22, 52 NRC at 295 (internal quotation marks omitted). Consumers Energy Co., Nuclear Management Co, LLC, Entergy Nuclear Palisades, LLC, and

Entergy Nuclear Operations, Inc. (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC399 (2007).

6.31.2 Standing in License Transfer Proceedings (Also see 2.10.4.1.4, "Standing to Intervene in License Transfer Proceedings")

The Staff ordinarily does not participate as a party in the adjudicatory portion of license transfer proceedings. (See 10 C.F.R. 2.1316(b), (c); see also Consumers Energy Co., Nuclear Management Co, LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc. (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399 (2007).

To demonstrate standing in a license transfer proceeding, the 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 (e.g., the grant of an application to approve a license transfer), 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).

Consumers Energy Co., Nuclear Management Co, LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc. (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399 (2007).

The petitioner must also specify the facts pertaining to that interest. See Port Authority of the State of New York (James A. FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 293 (2000); Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Units 1 & 2), CLI-99-30, 50 NRC 333, 340-41 & n.5 (1999) (and cited authority).

Organizations seeking to intervene in their own right must satisfy the same standing requirements as individuals seeking to intervene. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-952, 33 NRC 521, 528, aff'd in relevant part, CLI-91-13, 34 NRC 185, 187-88 (1991). This is because an organization, like an individual, is considered a "person" as defined in 10 C.F.R. § 2.4 and as used in 10 C.F.R. § 2.309 regarding standing. Consumers Energy Co., Nuclear Management Co, LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc. (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399 (2007).

In a license transfer case in which petitioners plausibly claim that deficiencies may result in a general safety risk affecting their persons or property, the petitioners have standing to seek a hearing on the merits of their arguments. Northern States Power Co. (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000).

The standing of petitioners in a license transfer case, involving simply a change in corporate structure, is not affected by the same petitioners having been granted standing to intervene in a separate case which involved an addition to the physical facility. Northeast Nuclear Energy Co., et al. (Millstone Nuclear Power Station, Units 1, 2 & 3), CLI-00-18, 52 NRC 129, 132 (2000) citing Texas Utilities Electric Co. (Comanche Park Steam Electronic Station, Unit 2), CLI-93-4, 37 NRC 156, 163 (1993).

Local government entities, such as school districts or townships, have standing to intervene in a license transfer case when the township is the locus of the power plant because it is in a position analogous to that of an individual living or working within a few miles of the plant. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 294-95 (2000). Assertions that a member lives within the service area of the utility that operates a licensed facility or within the same county as the facility are insufficiently specific to justify a finding of standing. To demonstrate an interest based on proximity, a petitioner must provide greater specificity than merely stating that some of its members live, work, or engage in recreation "adjacent" to or "near" an NRC-licensed facility. See, e.g., Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 n.10 (1994); Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 426-27, aff'd, CLI-97-8, 46 NRC 21 (1997). The Commission requires fact-specific standing allegations, not conclusory assertions. Consumers Energy Co., Nuclear Management Co, LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc. (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399 (2007).

The Commission has granted standing in license transfer proceedings to petitioners who raised similar assertions and who were authorized to represent members living or active quite close to the site. E.g., Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 293-94 (2000), citing Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163-64 (2000).

The Commission denied a state public utilities commission standing to represent the interests of electric consumers in a proceeding before the Commission when the state commission provided no facts or legal arguments suggesting that it represented citizens on nuclear safety issues. The Commission stated, "the 'zone of interests' test for standing in an NRC proceeding does not encompass economic harm that is not directly related to environmental or radiological harm." Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 336 (2002).

Employees who work inside a nuclear power plant should ordinarily be accorded standing as long as the alleged injury is fairly traceable to the license transfer. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 294 (2000). However, in an indirect license transfer proceeding, an employee's standing cannot be based on proximity alone but must demonstrate how the transfer could harm the employee's interest. Entergy Nuclear Operations, Inc. and Entergy Nuclear Fitzpatrick, LLC (James L. FitzPatrick Nuclear Power Plant) et al., CLI-08-19, 68 NRC 251, 260-61 (2008) (finding that a union did not have representational standing based on a union member and plant employee's authorization affidavit where the affidavit rested on

proximity alone and failed to state precisely how employee was aggrieved by the proposed transfer).

As part of a petitioner's required demonstration of standing for intervention in a license transfer proceeding, the petitioner must show it "has suffered [or will suffer] a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute [and that this] injury can fairly be traced to the challenged action" (the approval of the license transfer). FirstEnergy Nuclear Operating Co. (Beaver Valley Power Station, Units 1 & 2; Davis-Besse Power Station, Unit 1; Perry Nuclear Power Plant, Unit 1), CLI-06-2, 63 NRC 9, 13-14 (2006) (quoting Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996)).

A union failed to demonstrate standing in an indirect license transfer proceeding where it described no causal nexus between the asserted potential injury to its members' "employment and financial well-being" and the indirect transfer of licenses for six of the seven facilities at issue, whose employees it did not even claim to represent. Fla. Power & Light Co., FPL Energy Seabrook, LLC, FPL Energy Duane Arnold, LLC, Constellation Energy Group, Inc. (Calvert Cliffs Nuclear Plant, Units 1 & 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Nine Mile Point Nuclear Station, Units 1 & 2; R.E. Ginna Nuclear Power Plant; Turkey Point Nuclear Generating Plants, Units 3 & 4; St. Lucie Nuclear Power Plant, Units 1 & 2; Seabrook Station; Duane Arnold Energy Center), CLI-06-21, 64 NRC 30, 34-35 (2006).

A union failed to demonstrate standing in an indirect license transfer proceeding where it provided no factual support, only speculation, for its alleged link between the proposed merger and personnel decisions affecting its members, and where the personnel actions of which it complained commenced at least a year before the parent corporations filed their transfer applications. Fla. Power & Light Co., FPL Energy Seabrook, LLC, FPL Energy Duane Arnold, LLC, Constellation Energy Group, Inc. (Calvert Cliffs Nuclear Plant, Units 1 & 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Nine Mile Point Nuclear Station, Units 1 & 2; R.E. Ginna Nuclear Power Plant; Turkey Point Nuclear Generating Plants, Units 3 & 4; St. Lucie Nuclear Power Plant, Units 1 & 2; Seabrook Station; Duane Arnold Energy Center), CLI-06-21, 64 NRC at 30, 35 (2006); Entergy Nuclear Operations, Inc. and Entergy Nuclear Fitzpatrick, LLC (James L. FitzPatrick Nuclear Power Plant) et al., CLI-08-19, 68 NRC 251, 266-67 (2008).

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. North Atlantic Energy Service Corp. (Seabrook Station, Unit 1) and Northeast Nuclear Energy Co. (Millstone Station, Unit 3), CLI-99-28, 50 NRC 257, 263 (1999). Cf. North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 215 (1999).

"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 the 'real-world

consequences that conceivably could harm Petitioners and entitle them to a hearing.'" Niagara Mohawk Power Corp., et al. (Nine Mile Point, Units 1 & 2), CLI-99-30, 50 NRC 333, 341 (1999), quoting North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 215 quoting Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 205 (1998); North Atlantic Energy Service Corp. (Seabrook Station, Unit 1) and Northeast Nuclear Energy Co. (Millstone Station, Unit 3), CLI-99-27, 50 NRC 257, 262-63 (1999).

The standing of petitioners in a license transfer case, involving simply a change in corporate structure, is not affected by the same petitioners having standing to intervene in a separate case which involved an addition to the physical facility. Northeast Nuclear Energy Co., et al. (Millstone Nuclear Power Station, Units 1, 2, & 3), CLI-00-18, 52 NRC 129 (2000) (citing Texas Utilities Electric Co. (Comanche Peak Steam Electronic Station, Unit 2), CLI-93-4, 37 NRC 156, 163 (1993)).

In a license transfer proceeding, the Commission found a petitioner's "highly general comment" that it and its members "compete with [the entities involved in the transfer] for generation…services" to be too vague and general to show a real potential for injury sufficient for standing. Petitioners failed to explain how their distribution, generation, and transmission rights would be adversely affected in connection with certain antitrust license conditions that they claimed would allegedly be rendered unenforceable by the license transfer. FirstEnergy Nuclear Operating Co. (Beaver Valley Power Station, Units 1 & 2; Davis-Besse Power Station, Unit 1; Perry Nuclear Power Plant, Unit 1), CLI-06-2, 63 NRC 9, 16 (2006) (citing GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 203 (2000); Pac. Gas and Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 337 (2002)).

6.31.3 Scope of License Transfer Proceedings

The "NRC's role in evaluation of transferee's financial qualifications is to decide whether the plan as proposed, including the [power sale agreement], will meet our financial qualifications regulations." Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 340 (2002). "If an application lacks detail, a Petitioner may meet its pleading burden by providing 'plausible and adequately supported' claims that the data are either inaccurate or insufficient." Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC109, 134 (2001); citing GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 213-214 (2000).

Claims that a proposed license transfer is not in the public interest are too broad and vague to be considered in an NRC adjudication. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 149 (2001). The NRC's goal is to protect the public health and safety, not to make general judgments concerning public interest. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 149 (2001). Such determinations regarding public policy are best left to agencies charged with that mission, such as the Federal Energy Regulatory Commission and state public service commissions. Consolidated Edison Co., Entergy

Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 149 (2001).

A license transfer proceeding is not a forum for a full review of all aspects of current plant operation. GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 213-214 (2000), cited in Northeast Nuclear Energy Co., et al. (Millstone Nuclear Power Station, Units 1, 2, & 3), CLI-00-18, 52 NRC 129, 133 (2000). Substantive questions related to plant operation, such as the necessity for future remediation, are outside the scope of a license transfer proceeding. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 145 (2001).

The question in indirect transfer cases is whether the proposed shift in ultimate corporate control will affect a licensee's existing financial and technical qualifications. See 65 Fed. Reg. at 18,381 (2000). The transfer applicants need provide only information bearing on the inquiry at hand, and not more extensive information that may be required in other contexts. Northeast Nuclear Energy Co., et al. (Millstone Nuclear Power Station, Units 1, 2, & 3), CLI-00-18, 52 NRC 129, 133 (2000). "A license transfer proceeding is not a forum for a full review of all aspects of current plant operation." GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202-03 (2000), cited in Northeast Nuclear Energy Co., et al. (Millstone Nuclear Power Station, Units 1, 2, & 3), CLI-00-18, 52 NRC 129, 133 (2000).

A petitioner in an individual adjudication cannot challenge generic decisions made by the Commission in rulemakings. Thus, general attacks on the agency's competence and regulations are not admissible issues in license transfer proceedings. Molycorp, Inc. (Washington, Pennsylvania, Temporary Storage of Decommissioning Wastes), LBP-00-24, 52 NRC 139 (2000). See also North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 217 (1999).

The enforcement or revision of power purchase contracts entered into by private parties, subject to NRC regulatory authority, is not within the jurisdiction of the NRC, and is outside the scope of a license transfer proceeding. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 139 (2001).

A license transfer hearing is not the proper forum in which to conduct a full-scale health-and-safety review of a plant. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 311 (2000), quoting Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 169 (2000), and citing GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 213, 214 (2000). A petitioner may file a petition for Staff enforcement pursuant to10 C.F.R. § 2.206 if it is concerned about current safety issues, citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 169 n.14 (2000).

The NRC's responsibility in license transfer cases "is to protect the health and safety of the nuclear workforce and general population by ensuring the safe use of nuclear power." Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19,

54 NRC 109, 140 (2001). Issues that are not in conflict with Commission jurisdiction and are properly contested under an individual state's law, such as contractual matters, are issues for the state to handle and should not be a part of an NRC license transfer proceeding. Consolidated Edison, Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Units 1 & 2), CLI-01-19, 54 NRC 109, 140 (2001).

The Commission has regulations at 10 C.F.R. § 50.54(m) that require specific staffing levels and qualifications for key positions necessary to operate a plant safely. Other than those specific positions, the licensee has a responsibility to ensure that it has adequate staff to meet the Commission's regulatory requirements. If a licensee's staff reductions or other cost-cutting decisions result in its being out of compliance with NRC regulations, then the agency can and will take the necessary enforcement action to ensure the public health and safety. However, so long as personnel decisions do not impose a risk to the public health and safety, NRC regulations and policy do not preclude a licensee from reducing or replacing portions of its staff. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 313 (2000), citing GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 209, 214 (2000). An intervenor's speculation about the likelihood of staff reductions is insufficient to trigger a hearing on this issue. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 313 (2000).

In a license transfer adjudication, petitioners who have been granted access to an applicant's or licensee's proprietary information must show that any new or revised contentions could not have been submitted without the requested access to the redacted proprietary information in the license transfer application. If petitioners cannot make this showing, then they will have to meet not only the contention requirements set forth above, but also the late-filing requirements set forth in 10 C.F.R. § 2.309(c). Consumers Energy Co., Nuclear Management Co, LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc. (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399 (2007).

New licensees must meet all requirements of 10 C.F.R. § 50.47 and Appendix E to 10 C.F.R. Part 50 concerning emergency planning and preparedness. For the issue to be admissible at a license transfer hearing, the petitioner must allege with supporting facts that the new licensee is likely to violate the NRC's emergency planning rules. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 317 (2000).

A plant's proximity to various cities, towns, entertainment centers, and military facilities is not relevant to the question whether to approve the license transfer to that plant. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 317 (2000).

The Commission denied a petitioner's request to arrange for an independent analysis of plants' conditions based on "historical problems" in the NRC's Region I since such an inquiry would go considerably beyond the scope of the license transfer proceeding. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 318 (2000),

citing, Vermont Yankee, CLI-00-20, 52 NRC at 171 (2000); GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 210 (2000); see Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

A petitioner's contentions regarding the overall performance of NRC's Region I office in overseeing a plant for which a license transfer was being considered were deemed to be far outside the scope of a license transfer proceeding. Vermont Yankee Nuclear Power Corp., et al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 171 (2000).

In a license transfer proceeding, the Commission held that where both petitioners have independently met the requirements for participation, the Presiding Officer may provisionally permit petitioners to adopt each other's issues early in the proceeding. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 132 (2001). If the primary sponsor of a contention withdraws from the proceeding, the remaining petitioner must demonstrate that it can independently litigate the issue. If the petitioner cannot make such a showing, the issue is subject to dismissal prior to hearing. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 & 2), CLI-01-19, 54 NRC 109, 132 (2001). The Commission cautioned that it did not "give carte blanche approval of this practice of incorporation by reference, particularly in cases where it would have the effect of circumventing NRC-prescribed page limits or specificity requirements." Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 132-33 (2001). Incorporation should also be denied to parties who merely establish standing and then attempt to incorporate issues of other petitioners. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 133 (2001). Incorporation by reference would also be improper in cases where a petitioner has not independently established compliance with requirements for admission in its own pleadings by submitting at least one admissible contention. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 133 (2001).

6.31.3.1 Consideration of Financial Qualifications

Outside of the reactor context, it is sufficient for a license applicant to identify adequate mechanisms to demonstrate reasonable financial assurance, such as license conditions and other commitments. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 30 (2000) (citing Louisiana Energy Services (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997)). In a license transfer proceeding, the NRC's financial qualifications rule is satisfied if the applicant provides a cost and revenue projection for the first five years of operation that predicts sufficient revenue to cover operating costs. GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 206-08 (2000), cited in Vermont Yankee Nuclear Power Corp., et al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 176 (2000).

In a case of a license transfer where the new owner and the new operator of the nuclear power plant facility is not an electric utility, as defined in applicable regulations, the transferee must demonstrate its financial qualifications to own and/or operate the plant. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 129 (2001), citing 10 C.F.R. § 50.33.

Pursuant to 10 C.F.R. § 50.33(f)(2), applicants for a license transfer "shall submit estimates for total annual operating costs for each of the first five years of operation of the facility." The Commission has interpreted this rule as requiring "data for the first five 12-months periods after the proposed transfer…." Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 131 (2001). If the submissions are deemed sufficient, this alone is not grounds for rejecting the application. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 131 (2001); citing Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 95-96 (1995), reconsid. denied, CLI-95-8, 41 NRC 386, 395 (1995). If the missing data concerning financial qualifications can easily be submitted for consideration at the adjudicatory hearing, the Presiding Officer need not reject the application. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 131 (2001).

Where a petitioner raises a genuine issue about the accuracy or plausibility of an applicant's cost and revenue projections, the petitioner is entitled to a hearing. North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 220-21 (1999), cited in Vermont Yankee Nuclear Power Corp., et al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 176 (2000).

The adequacy of a corporate parent's supplemental commitment is not material to the NRC's license transfer decision, absent a demonstrated shortfall in the revenue predictions required by 10 C.F.R. § 50.33(f). GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 205 (2000), cited in Vermont Yankee Nuclear Power Corp., et al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 177 (2000).

Consideration of supplemental funding is not warranted where the applicant has not relied on supplemental funding as a basis for its financial qualifications. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 139 (2001).

In a license transfer proceeding, the NRC's financial qualifications rule is satisfied if the applicant provides a cost and revenue projection for the first five years of operation that predicts sufficient revenue to cover operating costs. GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 206-08, cited in Vermont Yankee Nuclear Power Corp., et al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151 (2000). In determining the applicable financial requirements to be met by applicants in license transfer proceedings, the NRC does not need to examine site-specific conditions in calculating the cost of

decommissioning. The NRC's decommissioning funding regulation, 10 C.F.R. § 50.75(c), generically establishes the amount of decommissioning funds that must be set aside. Vermont Yankee Nuclear Power Corp., et al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 165-166 (2000).

Under 10 C.F.R. § 50.33(f)(2), the sufficiency vel non of the transferee's supplemental funding does not constitute grounds for a hearing; and the parent company guarantee is supplemental information and not material to the financial qualifications determination. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 299-300 (2000), citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 175 (2000); GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 205 (2000).

Petitioner can challenge the transferee's cost and revenue projections if the challenge is based on sufficient facts, expert opinion, or documentary support. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 300 (2000), citing Oyster Creek, CLI-00-6, 5 NRC at 207-08.

The Commission does not require "absolute certainty" in financial forecasts. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 300 (2000), citing North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 20, 221-22 (1999). Challenges by intervenors to financial qualifications "ultimately will prevail only if [they] can demonstrate relevant certainties significantly greater than those that usually cloud business outlooks." Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 300 (2000), quoting North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 20, 222 (1999).

A petitioner's argument that the applicant must meet financial requirements in addition to those imposed by NRC regulations constitutes a demand for additional rules, but does not provide an adequate basis for a hearing. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 301 (2000), n.24, citing Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 178 (2000).

6.31.3.2 Antitrust Considerations

The AEA does not require, and arguably does not allow, the Commission to conduct antitrust evaluations of license transfer applications. As a result, failure by the NRC to conduct an antitrust evaluation of a license transfer application does not constitute a federal action warranting a NEPA review. Vermont Yankee Nuclear Power Corp., et al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 168 (2000). See also Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999); Final Rule, Antitrust Review Authority: Clarification, 65 Fed. Reg. 44,649 (July 19, 2000). The fact that a particular license transfer may have antitrust implications does not remove it from

the NEPA categorical exclusion. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266 (2000), quoting Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 167-68 (2000).

The Commission no longer conducts antitrust reviews in license transfer proceedings. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 318 (2000), citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 168, 174 (2000); GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 210 (2000); Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999); Final Rule, Antitrust Review Authority: Clarification, 56 Fed. Reg. 44,649 (July 19, 2000).

NRC antitrust review of post-operating license transfers is unnecessary from both a legal and policy perspective. GPU Nuclear, Inc., et al. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 210 (2000) (responding to petitioner's concern that corporations may be "stretched too thin in their ability to operate a multitude of nuclear reactors").

6.31.3.3 Need for EIS Preparation

License transfers fall within a categorical exclusion for which EISs are not required, and the fact that a particular license transfer may have antitrust implications does not remove it from the categorical exclusion. Vermont Yankee Nuclear Power Corp., et al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 167-168 (2000). See also 10 C.F.R. § 51.22(c)(21).

The Commission may reject a petitioner's request for an EIS on the ground that the scope of the proceeding does not include the new owner's operation of the plant – but includes only the transfer of their operating licenses. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 309 (2000).

6.31.3.4 Concurrent Proceedings

Simultaneous litigation in multiple proceedings does not impose a "tremendous burden" upon parties in reactor license transfer proceedings sufficient to suspend the NRC proceedings, as such parties are frequently participants in proceedings concurrently conducted by other state and federal agencies. Niagara Mohawk Power Corp., et al. (Nine Mile Point, Units 1 & 2), CLI-99-30, 50 NRC 333, 343 (1999). See also Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 269 (1982), aff'd, City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-171, 7 AEC 37, 39 (1974).

The occurrence of concurrent proceedings before a state regulatory agency is not a sufficient ground for suspension of a reactor license transfer proceeding, when the state agency is reviewing a license transfer under a different statutory authority than the NRC (and its conclusion would therefore not be dispositive of issues before the

NRC) and when an insufficient explanation of financial burden reduction on the parties has not been fully explained. Niagara Mohawk Power Corp., et al. (Nine Mile Point, Units 1 & 2), CLI-99-30, 50 NRC 333, 344 (1999).

6.31.3.5 Decommissioning

Pursuant to 10 C.F.R. § 50.33(k)(1), a license transfer application must contain information pertaining to the adequacy of its funding for decommissioning of the facility. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 142 (2001). A reactor licensee must provide assurances that it has adequate resources to fund decommissioning by one of the methods described in 10 C.F.R. § 50.75(e). Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 142 (2001). The Commission has held that showing compliance with 10 C.F.R. § 50.75 demonstrates sufficient assurance of decommissioning funding. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 142 (2001); see also North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 217 (1999).

The Commission's regulations regarding decommissioning funding are intended to minimize administrative effort and provide reasonable assurance that funds will be available to carry out decommissioning in a manner that protects public health and safety. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 143 (2001); citing Final Rule: General Design Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,030 (June 27, 1988). The generic formulas set out in 10 C.F.R. § 50.75(c) fulfill the dual purpose of the rule. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 144 (2001).

"Price-Anderson indemnification agreements continue in effect even after plants have ceased permanent operation and are engaged in decommissioning." Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 301 (2000), citing 10 C.F.R. § 140.92 and quoting Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 175 (2000).

The Commission has accepted the question of whether the applicants' financial assurance arrangement is lawful under 10 C.F.R. § 50.75 as a genuine dispute of law and fact that is admissible at a hearing. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 302 (2000). Other issues which have been recognized as appropriate in a hearing on a license transfer are whether NRC approval of the transfers will deprive the Commission of authority to require the applicant to conduct remediation under decommissioning, and whether, under those circumstances, the applicant would no longer have access to the decommissioning trust for the remediation it would need to complete. Power Authority of the State of

New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 307 (2000).

A petitioner's challenge to an applicant's use of the very decommissioning cost estimate methodology sanctioned by the Commission's rules amounts to an impermissible collateral attack on 10 C.F.R. § 50.75. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 303 (2000); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 165-66 (2000).

The Commission does not have statutory authority to determine the recipient of excess decommissioning funds. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 305 (2000).

In addition, once the funds are in the decommissioning trust, withdrawals are limited by 10 C.F.R. § 50.82, so that "non-decommissioning" funds (as defined by the NRC) could be spent after the NRC-defined "decommissioning" work had been finished or committed. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 308 n.52 (2000).

The use of site-specific estimates was expressly rejected by the Commission in its decommissioning rulemaking, although the Commission did recognize that site-specific cost estimates may be prepared for rate regulators. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 144 (2001); citing Final Rule: Financial Assurances Requirements for Decommissioning Nuclear Power Reactors, 63 Fed. Reg. 50,465, 50,469-69 (Sep. 22, 1998); Final Rule: General Design Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,030 (June 27, 1988).

NRC regulations do not require a license transfer application to provide an estimate of the actual decommissioning and site cleanup costs. Instead the Commission's decommissioning funding regulation under 10 C.F.R. § 50.75(c) generically establishes the amount of decommissioning funds that must be set aside. A petitioner cannot challenge the regulation in a license transfer adjudication. The NRC's decommissioning funding rule reflects a deliberate decision not to require site-specific estimates in setting decommissioning funding levels. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 308 (2000), citing Northern States Power Co. (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, reconsid. denied, CLI-00-14, 52 NRC 37, 59 (2000).

The argument that decommissioning technology is still in an experimental stage is considered a collateral attack on 10 C.F.R. § 50.75(c) establishing the amount that must be set aside, and is thus invalid. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating

Unit 3), CLI-00-22, 52 NRC 266, 309 (2000), quoting Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 167 n.9 (2000) and citing Northern States Power Co. (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, reconsid. denied, CLI-00-14, 52 NRC 37, 59 (2000).

NRC regulations regarding decommissioning funding do not require the inclusion of costs related to nonradioactive structures or materials beyond those necessary to terminate an NRC license. Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 1 & 2), CLI-01-19, 54 NRC 109, 145 (2001).

6.31.4 Motions for Stay/Suspension of Proceedings

When ruling on stay motion in a license transfer proceeding, the Commission applies the four-pronged test set forth in 10 C.F.R. § 2.1327(d):

(1) Whether the requestor will be irreparably injured unless a stay is granted.
(2) Whether the requestor has made a strong showing that it is unlikely to prevail on the merits.
(3) Whether the granting of a stay would harm other participants; and
(4) Where the public interest lies.

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79 (2000).

A temporary suspension of a license transfer proceeding where several parties have not yet exercised their right of first refusal to buy out a co-owner's share of a reactor does not contravene the Commission's stated policy of expedition in Subpart M proceedings, because it would not be sensible to require the expenditure of both public and co-owner funds in a proceeding, part or all of which may well be rendered moot in the immediate future. 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.") Niagara Mohawk Power Corp., et al. (Nine Mile Point, Units 1 & 2), CLI-99-30, 50 NRC 333, 343 (1999).

The pendency of parallel proceedings before other forums is not an adequate ground to stay a license transfer adjudication. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 289 (2000), citing Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Units 1 & 2), CLI-99-30, 50 NRC 333, 343-44 (1999). But the parties should inform the Commission promptly of any court or administrative decision that might in any way relate to, or render moot, all or part of the proceeding. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 289 (2000).

When a number of arguments apply to the plants for which a request for a joint license transfer hearing was made, and the Commission's resources would be better spent by

addressing these arguments only once, the Commission may grant the motion to consolidate the license transfer proceedings. Power Authority of the State of New York, et al. (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 288 (2000).

6.32 Television and Still Camera Coverage of NRC Proceedings

Under current agency practice, any individual or organization may videotape a Commission-conducted open meeting so long as their activities do not disrupt the proceeding. See U.S. Nuclear Regulatory Commission, "A Guide to Open Meetings," NUREG/BR-0128, Rev. 2 (4th ed.); see also Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-14, 44 NRC 3, 5 (1996).

Videotaping of a Board proceeding must be done in a manner that does not present an unacceptable distraction to the participants or otherwise disrupt the proceeding. The Board may terminate videotaping at any time it determines a videotape-related activity is disruptive (i.e., interferes with the good order of the proceeding). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-14, 44 NRC 3, 6 (1996).

Anyone videotaping a proceeding held in the Atomic Safety and Licensing Board Panel Hearing Room must abide by the following conditions:

1. Cameras must remain stationary in the designated camera area of the Licensing Board Panel Room.
2. No additional lighting is permitted.
3. No additional microphones will be permitted outside of the designated camera area. A connection is available in the designated camera area that provides a direct feed from the hearing room audio system.

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-14, 44 NRC 3, 6 (1996).

As provided in the 1978 Commission policy statement, 43 Fed. Reg. 4,294 (1978), when a Licensing Board is using other facilities, such as a state or federal courtroom, the Board generally will follow the camera policy governing that facility, even if it is stricter than the agency's camera policy. However, in order to prevent disruption of the proceeding and maintain an appropriate judicial atmosphere, the Board reserves the right to impose restrictions beyond those generally used at the facility. Yankee Atomic Electric Co., LBP-96-14, 44 NRC 3, 6 n.2 (1996).

6.33 National Historic Preservation Act Requirements

The National Historic Preservation Act (NHPA) contains no prohibition against a "phased review" of a property. Section 470(f) of that statute provides only that a federal agency shall, "prior to the issuance of any license…Take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." Nor does federal case law suggest any such prohibitions. The regulations implementing Section 470(f) are ambiguous on the matter. Hydro Resources, Inc., CLI-98-8, 47 NRC 314, 323 n.15 (1998); Hydro Resources, Inc., CLI-99-22, 50 NRC 3, 12 (1999).

Absent a clear congressional statement, adjudicatory tribunals should not infer that Congress intended to alter equity practices such as the standards for reviewing stay requests. The National Historic Preservation Act contains no such clear congressional statement. Hydro Resources, Inc., CLI-98-8, 47 NRC 314, 323 (1998).

Unlike NEPA, consideration of alternatives under the NHPA comes into play only if the project will have an adverse effect on historic properties and only after that determination is made. USEC, Inc. (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 448-49 (2006).

Section 106 of the NHPA provided the Oglala Sioux Tribe a procedural right to protect its interests in cultural resources. Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska), LBP-08-24, 68 NRC 691, 714-15 (2008). Failure to follow consultation requirements of Section 106 would have been a violation of this right, and would therefore be an injury within the zone of interest protected by the NHPA. Id. at 715. This injury was sufficient to establish standing for the tribe. Id.

Section 106 of the NHPA provides a federally recognized Indian tribe with a procedural right to protect its interest in cultural resources. The petitioner's interest, as a federally recognized Indian tribe, was that there were cultural resources that had not been properly identified and may have been harmed as a result of activities authorized per the grant of a license by the NRC. Without the consultation to which the petitioner was entitled pursuant to Section 106 of the NHPA, culturally significant resources might have gone unidentified and unprotected. Therefore, the petitioner's threatened injury was considered within the zone of interests protected by the NHPA and, as such, the petitioner was accorded standing. Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility) LBP-10-16, 71 NRC at __ (slip op. at 25) (Aug. 5, 2010).

Only Indian tribes that appear on the Department of the Interior's list of recognized tribes have consultation rights under Section 106 of the NHPA. As the petitioner was not on that list, any claims of injury as a result of the NRC Staff's failure to consult with the petitioner pursuant to Section 106 of the NHPA were not cognizable in the proceeding. Cogema Mining, Inc. (Irigaray and Christensen Ranch Facilities), LBP-09-13, 70 NRC 168, 188 (2009).

6.34 Trust Responsibility

"The trust responsibility requires federal agencies to take actions or refrain from taking actions 'in fulfillment of [Congress's] duty to protect the Indians.'" Cogema Mining, Inc. (Irigaray and Christensen Ranch Facilities), LBP-09-13, 70 NRC 168, 189 (2009). (quoting United States v. Navajo Nation, 537 U.S. 488, 515 (2003)). However, when the petitioner has presented no plausible chain of causation whereby it or its members would be harmed by the proposed operations that would be authorized by the grant of the license, the trust responsibility is not triggered. Id.

6.35 Native American Graves Protection and Repatriation Act Requirements

Under the Native American Graves Protection and Repatriation Act, 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,

funeral 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. Hydro Resources, Inc., CLI-99-22, 50 NRC 3, 14-15 (1999).

6.36 Hybrid Procedures under Subpart K (Also see Section 6.16.9)

The procedures in Subpart K apply to contested proceedings on applications filed after January 7, 1983, for a license or license amendment under Part 50 of this chapter, to expand the spent fuel storage capacity at the site of a civilian nuclear power plant, through the use of high density fuel storage racks, fuel rod compaction, the transshipment of spent nuclear fuel to another civilian nuclear power reactor within the same utility system, the construction of additional spent nuclear fuel pool capacity or dry storage capacity or by other means. See 10 C.F.R. § 2.1103.

The Subpart K process empowers a Licensing Board to resolve fact questions, when it can do so accurately, at the abbreviated hearing stage. Pacific Gas and Electric Company (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 514 (2008); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001).

Subpart K establishes a two-part test to determine whether a full evidentiary hearing is warranted: (1) there must be a genuine and substantial dispute of fact "which can only be resolved with sufficient accuracy" by a further adjudicatory hearing; and (2) the Commission's decision "is likely to depend in whole or in part on the resolution of that dispute." See 10 C.F.R. § 2.1115(b). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001).

Subpart K derives from the Nuclear Waste Policy Act (NWPA), where Congress called on the Commission to "encourage and expedite" onsite spent fuel storage. See 42 U.S.C. § 10151(a)(2). To help accomplish this goal, the NWPA required the Commission, "at the request of any party," to employ an abbreviated hearing process – i.e., discovery, written submissions, and oral argument. See 42 U.S.C. § 10154. The NWPA authorized the Commission to convene additional "adjudicatory" hearings "only" where critical fact questions could not otherwise be answered "with sufficient accuracy." See 42 U.S.C. § 10154(b)(1)(A). Pacific Gas and Electric Company (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 514 (2008); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 384 (2001).

In promulgating Section 2.1115(b) of Subpart K, the Commission used the same test described in the NWPA at 42 U.S.C. § 10154(b)(1). The statutory criteria are quite strict and are designed to ensure that the hearing is focused exclusively on real issues. They are similar to the standards under the Commission's existing rule for determining whether summary disposition is warranted. They go further, however, in requiring a finding that adjudication is necessary to resolution of the dispute and placing the burden of demonstrating the existence of a genuine and substantial dispute of material fact on the party requesting adjudication. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383-84 (2001), quoting, Final Rule, Hybrid Hearing Procedures for Expansion of Spent Nuclear Fuel Storage Capacity at Civilian Nuclear Power Reactors, 50 Fed. Reg. 41,662, 41,667 (Oct. 15, 1985).

Subpart K proceedings are intended to be decided "on the papers" with no live evidentiary hearing unless issues such as witness credibility require it. Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-03-11, 58 NRC 47, 57-58 (2003).

It seems unlikely that Congress intended the Commission to enact Subpart K simply to replicate the NRC's existing summary disposition practice. Congress "cannot be presumed to do a futile thing." Halverson v. Slater, 129 F.3d 180, 184 (D.C. Cir. 1997). Accord Independent Insurance Agents of America, Inc. v. Hawke, 211 F.3d 638, 643 (D.C. Cir. 2000). Hence, Subpart K extends beyond the NRC's pre-existing summary disposition practice. Unlike summary disposition, which requires an additional evidentiary hearing whenever a Licensing Board finds, based on the papers filed, that there remains a genuine issue of material fact, Subpart K's procedure authorizes the Board to resolve disputed facts based on the evidentiary record made in the abbreviated hearing, without convening a full evidentiary hearing, if the Board can do so with "sufficient accuracy." Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 384-85 (2001).

Subpart K directs the Board to "[dispose] of any issues of law or fact not designated for resolution in an adjudicatory hearing." See 10 C.F.R. § 2.1115(a)(2) (emphasis added). "Issues" are, by definition, points of debate or dispute. To "dispose" of issues, a Board must resolve them. To move from Subpart K's abbreviated hearing stage to an additional evidentiary hearing, a Licensing Board must make a specific determination that issues "can only be resolved with sufficient accuracy" at such a hearing. See 10 C.F.R. § 2.1115(b)(1) (emphasis added). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370 (2001).

The Statement of Considerations for Subpart K reinforces the rule's text:

> The appropriate evidentiary weight to be given an expert's technical judgment will depend, for the most part, on the expert's testimony and professional qualifications. In some circumstances, it may be possible to make such a determination without the need for an adjudicatory hearing. The presiding officer must decide, based on the sworn testimony and sworn written submissions, whether the differing technical judgment gives rise to a genuine and substantial dispute of fact that must be resolved in an adjudicatory hearing.

See 50 Fed. Reg. at 41,667 (1985). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 385 (2001).

The NWPA and the NRC rule implementing it (Subpart K) contemplate merits rulings by Licensing Boards based on the parties' written submissions and oral arguments, except where a Board expressly finds that "accuracy" demands a full-scale evidentiary hearing. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 385 (2001). Under 10 C.F.R. § 2.1115(b), a two-part test is used to determine whether a full evidentiary hearing is warranted on a contention in a 10 C.F.R. Part 2, Subpart K proceeding: (1) There must be a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing; and (2) the decision of the Commission is likely to depend in whole or in part on the resolution of that dispute. Northeast Nuclear Energy Co. (Millstone

Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 26 (2001). The criteria of 10 C.F.R. § 2.1115(b), for determining whether a full evidentiary hearing is warranted are strict and are designed to ensure that the hearing is focused exclusively on real issues. They are similar to the standards for determining whether summary disposition is warranted. They go further in requiring a finding that adjudication is necessary to resolution of the dispute and in placing the burden of demonstrating the existence of a genuine and substantial dispute of material fact on the party requesting adjudication. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 26 (2001) n.5.

Licensing Boards are fully capable of making fair and reasonable merits decisions on technical issues after receiving written submissions and hearing oral arguments. The Commission is a technically oriented administrative agency, an orientation that is reflected in the makeup of its Licensing Boards. Most Licensing Boards have two, and all have at least one, technically trained member. In Subpart K cases, Licensing Boards are expected to assess the appropriate evidentiary weight to be given competing experts' technical judgments, as reflected in their reports and affidavits. The inquiry is similar to that performed by presiding officers in materials licensing cases, where fact disputes normally are decided "on the papers," with no live evidentiary hearing. See, e.g., Hydro Resources, Inc., CLI-01-4, 53 NRC at 45; Curators of the University of Missouri, CLI-95-1, 41 NRC at 118-20. The NRC's administrative judges, in other words, and the Commission itself, are accustomed to resolving technical disputes without resort to in-person testimony. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 385-86 (2001).

There may be issues, such as those involving witness credibility, that cannot be resolved absent face-to-face observation and assessment of the witness. Or there may be issues involving expert or other testimony where key questions require follow-up and dialogue to be answered "with sufficient accuracy." In these kinds of cases, Subpart K contemplates further evidentiary hearings. Many issues, however, particularly those involving competing technical or expert presentations, frequently are amenable to resolution by a Licensing Board based on its evaluation of the thoroughness, sophistication, accuracy, and persuasiveness of the parties' submissions. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 386 (2001).

The Commission generally will defer to Licensing Boards' judgment on when they will benefit from hearing live testimony and from direct questioning of experts or other witnesses. If a decision can be made judiciously on the basis of written submissions and oral argument, the Boards are expected to follow the mandate of the NWPA and Subpart K to streamline spent fuel pool expansion proceedings by making the merits decision expeditiously, without additional evidentiary hearings. See 42 U.S.C. §§ 10151(a)(2), 10154. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 386 (2001).

The Commission is generally not inclined to upset the Board's fact-driven findings and conclusions, particularly where it has weighed the affidavits or submissions of technical experts. Where the Board analyzed the parties' technical submissions carefully and made intricate and well-supported findings in a 42-page opinion, the Commission, on appeal, saw no basis to redo the Board's work. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 388 (2001).

The Commission saw no basis for upsetting the Board's probability estimate or its decision against a further evidentiary hearing. Even if a further evidentiary hearing were convened, intervenor apparently intends merely to reiterate its critique of the probabilistic risk assessment of others (the NRC Staff and the licensee), but not to offer a fresh analysis of its own. Under these circumstances, scheduling a further hearing would serve only to delay the proceedings and increase the costs for all parties, in direct contravention of the NWPA. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 389 (2001).

In a 10 C.F.R. Part 2, Subpart K proceeding, general allegations are insufficient to trigger an evidentiary hearing. Factual allegations must be supported by experts or documents to demonstrate that an evidentiary hearing is warranted. The applicant cannot be required to prove that uncertain future events could never happen. Although the ultimate burden of persuasion is on the license applicant, the proponent of a contention has the initial burden of coming forward with factual issues, not merely conclusory statements and vague allegations. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 27 (2001).

Under 10 C.F.R. § 2.341(b)(4)(1) (formerly § 2.786(b)(4)(1)), the Commission will grant a petition for review if the petition raises a "substantial question" whether a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding.

Once an intervenor crosses the admissibility threshold relative to its environmental contention, the ultimate burden in a Subpart K proceeding then rests with the proponent of the NEPA document – the Staff (and the applicant to the degree it becomes a proponent of the Staff's EIS-related action) – to establish the validity of that determination on the question whether there is an EIS preparation trigger. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 249 (2001).

Subpart K presentations cannot be supplemented. Pacific Gas and Electric Company (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 524 (2008) citing 10 C.F.R. § 2.1113.

6.37 Agreement State Issues

In reviewing a petition under 10 C.F.R. § 2.206 to revoke, suspend or modify an agreement state license, the NRC will respond only to common defense and security issues, not public health and safety issues. For agreement state licenses, public health and safety issues are the domain of the agreement state, while the NRC retains authority only to regulate issues relating to the common defense and security. Radiac Research Corp. (License No. NYDOL 1944-1879), DD-04-4, 60 NRC 387, 389, 396 (2004).

6.38 Generic Security Issues

The NRC will not analyze the petitioner's concern that the fears of local residents would make the facilities attractive terrorist targets. While psychological fear exists, the NRC can only evaluate the technical merits of the common defense and security issues that may contribute to the concerned citizens' fears and openly and accurately communicate those findings. Radiac Research Corp., DD-04-4, 60 NRC 387, 392 (2004) (reviewing a

petition under 10 C.F.R. § 2.206 to revoke, suspend or modify an agreement state license).

6.39 Deferred Plant Status

The Commission has established a policy statement containing procedures that apply to nuclear power plants in a deferred or terminated plant status and when they are being reactivated. A deferred plant means a nuclear power plant that has ceased construction or reduced activity to maintenance level, while maintaining in effect a construction permit (CP). A terminated plant is a nuclear power plant that has announced that construction has permanently stopped, but still has a valid CP. Deferred plant licensee is required to protect and retain records, maintain and preserve equipment and materials, and implement a quality assurance program. Reactivation of construction is announced at least 120 days before construction is resumed via a letter from the CP licensee to the NRC. If a plant in terminated status implements the requirements of a deferred plant, a terminated plant may then be reactivated under the same provisions as a deferred plant. 52 Fed. Reg. 38,077, 38079 (Oct. 14, 1987).

Deferred and terminated status plants are reminded to ensure that their CPs do not expire. 52 Fed. Reg. 38,078 (Oct. 14, 1987). On a case-by case basis, the Commission under its interpretation of the broad discretion provided by the AEA has authorized the reinstatement of the CPs of deferred plants that had voluntarily surrendered their unexpired CPs, or extension to the completion date of a plant that had inadvertently allowed its CP to lapse for a short period of time. See e.g., Tennessee Valley Authority (Bellefonte Nuclear Plants Units 1 & 2), CLI-10-6, 71 NRC at _ (slip op) (2010); and Texas Utilities Electric Company (Comanche Peak Electric Station Unit 1), CLI-86-14, 23 NRC 113 (1986), aff'd in Citizens Association for Sound Energy v. NRC, 821 F.2d 725 (D.C. Cir. 1987).