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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 CFR §§ 50.90, 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 CFR § 50.91. These considerations are broadly identified in 10 CFR § 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 CFR Part 51 (governing environmental protection) have been satisfied. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 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, 10581059 (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 and 2), LBP--86-21, 23 NRC 849, 855, 859 (1986).

6.1.1 Staff Review of Proposed Amendments

(RESERVED)

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).

(RESERVED)

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 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 environmental impact statement or an environmental impact appraisal and negative declaration pursuant to 10 CFR § 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 Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-94-35, 40 NRC 180, 188 (1994).

6.1.4 Hearing Requirements for License/Permit Amendments

The Atomic Energy Act of 1954, as amended, 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 CFR § 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 CFR § 2.105(a)(6),(7).

Section 189a 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 like the one involved here, and the Commission cannot effect such modifications without complying with the statute's notice and hearing provisions. Id. 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 Atomic Energy Act § 189a, 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).

A prior hearing is not required under Section 189a of the Atomic Energy Act, 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 and 2), CLI-86-12, 24 NRC 1, 11 (1986), rev'd and remanded on other grounds, 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 Atomic Energy Act of 1954, 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 189a 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 CFR 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 CFR § 52.97(b)(2)(ii)1, 57 Fed. Reg. 60975, 60978 (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 189a 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 Licensing Board granted a petition for a hearing in a license amendment application case where the petitioner established the threshold standing requirements. Energy Fuels Nuclear, Inc., LBP-94-33, 40 NRC 151, 156-57 (1994).

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 and 2), ALAB-422, 6 NRC 33, 80 (1977).

A license amendment initiated by staff order may become immediately effective under 10 CFR § 2.204 (now § 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 Company (Bailly Generating Station, Nuclear 1), LBP-80-22, 12 NRC 191, 195 (1980).

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 CFR § 2.749(d).

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 CFR 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. Enrico Fermi, supra, 7 NRC at 392.

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 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, following a determination by Staff that there are no significant hazards considerations involved. Immediate effectiveness findings are not subject to review by licensing boards. 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)). 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 and 2), ALAB-291, 2 NRC 404, 41-5 (1975). See also Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 844 (1987), citing, 10 CFR § 50.58(b)(6), aff'd in part on other grounds, ALAB-869, 26 NRC 13 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-LOA, 27 NRC 452, 457 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-89-15, 29 NRC 493, 499500 (1989). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 90-91 (1990). 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 and 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 CFR § 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).

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 environmental impact statement or environmental impact appraisal and negative declaration pursuant to 10 CFR § 51.5(b) and (c). Portland General Electric Company (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, 9 NRC at 289, cited in Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 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-IOA, 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 CFR § 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 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 CFR 50.90. Consolidated Edison Co. of N.Y. (Indian Point Station, 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 CFR § 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' complaint in this regard might more appropriately have been directed, in the first instance, to the Staff under 10 CFR § 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 Company (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 100-01 (1994).

6.2 Amendments to License/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 and 2), ALAB-516, 9 NRC 5 (1979).

6.3 Antitrust Considerations

Section 105(c)(6) of the Atomic Energy Act of 1954 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 and 3), LBP-77-7, 5 NRC 452 (1977). Note that reactors licensed as research and development facilities under Section 104b of the Atomic Energy Act 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 Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), LBP-77-24, 5 NRC 804 (1977). The Commission's statutory obligation, pursuant to Section 105c, 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 and 3), ALAB-385, 5 NRC 621, 632-633 (1977).

Under Section 105c of the Atomic Energy Act of 1954, 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 and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 10 (1977).

One of the policies reflected in Section 105c of the Atomic Energy Act is that a government-developed monopoly -- like nuclear power electricity generation -- should not be used to contravene the policies of the antitrust laws. Section 105c 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 Company (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 105c(5) of the Atomic Energy Act. 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 Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3) and Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-560, 10 NRC 265, 272 (1979). However, where the Licensing Board's jurisdiction over an antitrust proceeding does not rest upon Section 105c(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 Company (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 105c(5) of the Atomic Energy Act of 1954, 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 and Light Co. (St. Lucie Plant, Unit No. 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 105c 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) and Cleveland Electric Illuminating Co. and Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), 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 and 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 Davis-Besse, 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.) Perry and Davis-Besse, supra, 36 NRC at 290 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

In order to conduct a Section 105c 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 105c which is inconsistent with the antitrust laws. South Texas, supra, 10 NRC at 570. 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 at 1368. Perry, Davis-Besse supra, 36 NRC at 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. South Texas, supra, 10 NRC at 577.

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. South Texas, supra, 10 NRC at 577.

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 Atomic Energy Act. Florida Power and Light Co. (St. Lucie Plant, Unit No. 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, 126 (2d ed. 1970). Perry, Davis-Besse, supra, 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., 119 L.Ed. 265, 294 (1992); Otter Tail Power Co., 410 U.S. at 377. Perry, Davis Besse, 36 NRC at 291 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

AEA section 105c 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. Perry, Davis-Besse, supra, 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. Perry, Davis-Besse, supra, 36 NRC at 291 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

Nothing in AEA section 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 section 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. Perry, Davis-Besse, 36 NRC at 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. Perry, Davis-Besse, supra, 36 NRC at 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 at 1368. Perry, Davis-Besse, supra, 36 NRC at 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 Atomic Energy Act, 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 Atomic Energy Act effectively preclude the Commission from instituting a second antitrust hearing in conjunction with an operating license application for the plant. Florida Power and Light Co. (St. Lucie Plant, Unit No. 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 and 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 CFR § 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 CFR § 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. South Texas, CLI-77-13, supra, 5 NRC at 1319.

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. CLI-77-13, supra, 5 NRC at 1317. 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, Atomic Energy Act 189a and 10 CFR § 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) 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, 239-44 (1991), aff'd in part and appeal denied, CLI-92-11, 36 NRC 47 (1992).

Under license renewal provisions of the Atomic Energy Act, 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).

Section 105 of the Atomic Energy Act and its implementing regulations contemplate that mandatory antitrust review be conducted early in the construction permit process. Florida Power & Light Company (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 OL 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 105c(1) of the Atomic Energy Act requiring antitrust review of "any license application." As such, it triggers an opportunity for intervention based on the antitrust aspects of adding new coowners. 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 Company (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 and Gas Company (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 and Gas Company (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 105c of the Atomic Energy Act 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. Summer, supra, 11 NRC at 824-825.

Under Section 105c(2) of the Atomic Energy Act, a second formal antitrust review at the operating stage of a reactor licensing proceeding is the exception, not the rule. A petition for determination of significant changes is characterized as an informal adjudicatory process and is not governed by the Commission's Rules of Practice for formal procedures (10 CFR Part 2, Subpart G). Central Electric Power Cooperative, Inc. (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787, 792 (1981).

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. Summer, supra.

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. Central Electric Power Cooperative, supra, at 829.

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 and Light Co. (St. Lucie Plant, Unit 2), ALAB-665, 15 NRC 22, 29 (1982), citing, Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 574575 (1975).

Although Section 105 of the Atomic Energy Act 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 105c and the strength of particular claims justifying late intervention. Florida Power & Light Company (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 946 (1978).

The criteria of 10 CFR § 2.714 for late petitions are as appropriate for evaluation of late antitrust petitions as in health, safety and environmental licensing, but the 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 special factors set forth within 10 CFR § 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 Regulating Commission and petitioner has not shown that the remedy is insufficient. Florida Power and 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. St. Lucie, supra, 9 NRC at 175.

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 CFR § 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 Company (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. St. Lucie, supra, 9 NRC at 168.

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. St. Lucie, supra, 9 NRC at 172.

6.4 Attorney Conduct

6.4.1 Practice Before Commission

10 CFR § 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 Company of Oklahoma (Black Fox Station, Units 1 and 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 ABA Model Rules of Professional Conduct (1983).

Canon 7 of the ABA Code of Professional Responsibility, which exhorts lawyers to represent their clients "zealously within the bounds of the law," and its Associated Ethical Considerations and Disciplinary Rules provide the standards by which attorneys should abide in the preparation of testimony for NRC proceedings. Consumers Power Co. (Midland Plant, Units 1 and 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. Midland, supra, 16 NRC at 918.

Counsel have an obligation to keep adjudicatory boards informed of the material facts which are relevant to issues pending before them. The Regents of the University of California (UCLA Research Reactor), LBP-84-22, 19 NRC 1383, 1401 (1984), citing, Midland, supra, 16 NRC at 910; Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387 (1982); Consumers Power Co. (Midland Plant, Units 1 and 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. UCLA, supra, 19 NRC at 1405.

Counsel's obligations to disclose all relevant and material factual information to the Licensing Board under the Atomic Energy Act 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. UCLA, supra, 19 NRC at 1406-07.

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 and 2), ALAB-691, 16 NRC 897,

916 (1982), citing, 10 CFR 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 and Power Co. (South Texas Project, Units 1 and 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).

The Commission generally follows the American Bar Association's Code of Professional Responsibility in judging lawyer conduct in NRC proceedings. Midland, supra, 16 NRC at 916, citing, Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 838 (1974).

Gamesmanship and "sporting conduct" between or among lawyers and parties is not condoned in Nuclear Regulatory Commission proceedings. Midland, supra, 16 NRC at 919.

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 CFR § 2.718(e); Consumers Power Co. (Midland Plant, Units 1 and 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 and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-592, 11 NRC 744, 750 (1980).

Parties should not impugn one another's integrity without first submitting supporting evidence. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 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 CFR § 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 and 2), LBP-82-87, 16 NRC 1195, 1201 (1982).

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 and 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 and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 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 and Power Co. (South Texas Project, Units 1 and 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. Zimmer, supra, 16 NRC at 1514 n.1, citing, 45 Fed. Reg. 3594 (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 CFR § 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. Zimmer, supra, 16 NRC at 1514 n.1 citing, 45 Fed. Reg. 3594 (1980).

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. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-332, supra. The Commission's discovery rules are applicable to the proceeding and all parties have the right to present evidence and cross-examine witnesses. Id. 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. Id.

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 and 3), ALAB-378, 5 NRC 557 (1977). As to costs incurred from an attorney discipline proceeding, there is no basis on which 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. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-332, supra. 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. Id.

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 and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 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 and Power Co. (South Texas Project, Units 1 and 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

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. §§ 2.780, 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. § 2.781(a). Communications between Commission adjudicatory employees and other NRC employees within the NRC are subject to the "separation of functions" restrictions in 10 C.F.R. § 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. § 2.780.

Although the separation of functions and ex parte contact restrictions are subject to different regulations, caselaw 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 caselaw arising in both areas.

6.5.1 Ex Parte Communications Rule

10 CFR § 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. 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 and 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 CFR § 2.780(a).

Nothing in the Commission's ex parte rule pursuant to 10 CFR § 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 and 3), ALAB-680, 16 NRC 127, 144 (1982). See also Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 378 (1983), citing, 10 CFR 2.780; San Onofre, supra, 16 NRC at 144.

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 CFR 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 CFR § 2.780. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 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 the submission of 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 and 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. § 2.781(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." Id. at 571 (quoting Press Broadcasting Co., Inc v. FCC, 59 F.3d 1365, 1369 (D.C. Cir. 1995)(citation omitted)). The Commission retains the power, pursuant to 10 CFR § 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).

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 the conference call, all parties must be on the line. For example, when a prehearing conference is conducted via telephone, the Licensing Board must insure that representatives of all parties concerned are on the line unless that representation has been waived. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-334, 3 NRC 809 (1976). 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. Id.; 10 CFR § 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 CFR § 2.101(a)(1), 2.102(a).

A Licensing Board has held that the Staff may continue to confer privately with the applicant even after a hearing has been noticed. In addition, the Board

ruled that, 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 Domestic License Applications, Open Meetings and Statement of NRC Staff Policy. 43 Fed. Reg. 28058 (June 28, 1978); incorporated into and superseded by Staff Meetings Open to the Public; Final Policy Statement, 59 48,340 (Aug. 20, 1994).

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. of N.Y. (Indian Point, 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 CFR § 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 and 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. of N.Y. (Indian Point Station, Units 1, 2 & 3), CLI-77-2, 5 NRC 13 (1977); Louisiana Power and 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 and 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 materials licensing proceedings in which the Staff has "a continuing duty to keep the hearing file up to date", 10 CFR § 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 and 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 and 3), ALAB-677, 15 NRC 1387, 1388, 1394 (1982), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 406 n.26 (1976); Georgia Power Co. (Alvin W. Vogtle Nuclear Plant,

Units 1 and 2), ALAB-291, 2 NRC 404, 411 (1975); and Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625 (1973); Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), ALAB-752, 18 NRC 1318, 1320 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 656 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 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 (Sept. 13, 1984), the 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 inspector 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 and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 7 (1986). See Louisiana Power and 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 and 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 and 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 and 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 and 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 Atomic Energy Act, 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, McGuire, supra, 6 AEC at 625 n.15; and Consumers Power Co. (Midland Plant, Units 1 and 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 and 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 CFR § 50.72. Three Mile Island, supra, 19 NRC at 1359 n.8.

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 and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1114 n.59 (1983), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 710 (1979); Louisiana Power and 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 Dart 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 and Power Co. (South Texas Project, Units 1 and 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 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. Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. 39,278, 39,280 (July 19, 1996). 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. Id. If all fuel has been permanently removed from the reactor in accordance with 10 C.F.R. § 50.82(a)(1), any hearing on the termination plan will be subject to the more informal hearing requirements in Subpart L. 10 C.F.R. § 2.1201(a)(3).

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. Pursuant to 10 C.F.R. § 2.1201(a)(3), once fuel has been permanently removed from the Part 50 facility to an authorized facility, any amendment proceeding would be subject to Subpart L procedures. It is conceivable that pre-1996 caselaw will remain useful to some extent and is included in the following section.

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, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 365 (1994). The NRC, like all other federal administrative agencies, is a statutory creature whose powers are controlled by legislative grants of authority. Id. at 361.

Section 50.82(e) of 10 C.F.R. expressly requires that decommissioning be performed in accordance with the regulations, including the 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).

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).

6.6.1.2 Decommissioning Funding

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." CLI-96-1, 43 at 9. 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).

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).

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).

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 CFR § 2.101(a-1), §§ 2.600-2.606. The early site review procedures, which differ from those set forth in Subpart A of 10 CFR Part 52 and Appendix Q to 10 CFR Part 52 (formerly, 10 CFR 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 a limited work authorization. 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 CFR Part 51, which implements NEPA. Philadelphia Electric Company (Fulton Generating Station, Units 1 and 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 applicant with information of value to 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. Fulton, supra.

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 Company (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). Carroll County Site, supra, 12 NRC at 26.

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 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 Interior and then make its decision. A Licensing Board may not approve relevant action until Interior has been consulted. Approval by a Licensing Board which is conditioned on later approval by the Department of 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." Id. 7 NRC at 363-364.

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. Hartsville, supra, 7 NRC at 361. 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." Hartsville, supra, 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. Id. at 366-367, n.114.

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 Atomic Energy Act of 1954 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 Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 8, 9 (1978). The relevant implementing regulation is 10 CFR 50.33(f) which is amplified by Appendix C to 10 CFR Part 50. Id.

The "reasonable assurance" requirement set forth 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. A "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. Seabrook, supra, 7 NRC at 18. See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 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).

Non-utility applicants for operating licenses are required by the NRC's financial qualifications rule to demonstrate adequate financial qualifications before operating a facility. 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. Moreover, the Commission has recognized that a license 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), LBP-95-10, 41 NRC 460, 473 (1995).

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 September 12, 1984, the Commission issued amendments to 10 CFR § 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. 35747 (September 12, 1984), as corrected, 49 Fed. Reg. 36631 (September 19, 1984); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-784, 20 NRC 845, 847 (1984); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 84 & n.126 (1985).

Commission regulations recognize that underfunding can affect plant safety. Under 10 CFR § 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 CFR § 2.758(b), of the exemption from financial qualifications review for an electric utility operating license applicant. 49 Fed. Reg. 35747, 35751 (September 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 and 2), ALAB-895, 28 NRC 7, 17, 21-22 (1988). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-10, 29 NRC 297, 302-03 (1989), aff'd in Dart 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 CFR § 2.758. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 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 Company, et al. (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31 (1994); aff'd, CLI-94-10, 40 NRC 43 (1994).

The special circumstances which may justify a waiver under 10 CFR 2.758 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. Seabrook, CLI-88-10, supra, 28 NRC at 596-97, reconsid. denied, CLI-89-3, 29 NRC 234 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-10, 29 NRC 297, 300, 301 (1989), aff'd in Dart and rev'd in part, ALAB-920, 30 NRC 121, 133 (1989). 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 of the exemption from financial qualifications review for public utility operating license applicants. 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 and 2), CLI-89-20, 30 NRC 231, 240-41 (1989).

A waiver petition under 10 CFR § 2.758 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. Seabrook, CLI-88-10, supra, 28 NRC at 597, reconsid. denied, CLI-89-3, 29 NRC 234 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-920, 30 NRC 121, 133-35 (1989).

In order to obtain a waiver, pursuant to 10 CFR § 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. Seabrook, supra, 28 NRC at 18-19.

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 and 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 and 2), CLI-89-3, 29 NRC 234, 239 (1989).

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 CFR § 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 and 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, supra -- 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, supra, 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 and 2), CLI-88-10, 28 NRC 573, 584-86 (1988), reconsid. denied, CLI-89-3, 29 NRC 234 (1989), second motion for reconsideration denied, CLI-89-7, 29 NRC 395 (1989).

Decommissioning funding costs exclude the cost of removal and disposal of spent fuel (10 CFR § 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 do not appear to be excluded. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 218 (1993).

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 special nuclear material 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).

6.10 Generic Issues

A generic issue may be defined as one which is applicable to the industry as a whole (e.g., GESMO) 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 and Power Co. (South Texas Project, Units 1 and 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 and 2), LBP-82-1A, 15 NRC 43, 45 (1982); South Texas, supra, 23 NRC at 186. 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 and 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 Company (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 311 (1979). See Houston Lighting and Power Co. (South Texas Project, Units 1 and 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 and Light Co. (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1559 (1982), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 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 and 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 CFR § 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 and 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 CFR § 50.109 for backfitting and the procedures of 10 CFR 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 Safety

Evaluation Report. 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

(RESERVED)

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. Davis-Besse, supra, 2 NRC at 768.

More recently, 10 CFR Part 2 has been amended to provide 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 CFR § 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 CFR § 2.722(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. Three Mile Island, supra, 16 NRC at 289.

6.13 Enforcement

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, Oklahoma Site), CLI-97-13, 46 NRC 195, 221 (1997).

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 and 2), ALAB-778, 20 NRC 42, 48 (1984). See 10 CFR §§ 70.23, 70.31. Cf. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895-96 (1981) (analogous to the regulatory scheme for the issuance of operating licenses under 10 CFR § 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 Atomic Energy Act of 1954, 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 CFR Parts 40 and 70 specifically provide for the domestic licensing of source and special nuclear material respectively.

In this regard, 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 Atomic Energy Act 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 CFR § 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 CFR § 71.12. State of New Jersey (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 293-94 (1993).

"The fundamental purpose of the financial qualifications provision of...section [182a of the AEA] is the protection of public health and safety and the common defense and security." 33 Fed. Reg. 9704 (July 4, 1968). Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 303 (1997). The shorter, more flexible language of Part 70, as compared to Part 50, allows a less rigid, more individualized approach to determine whether an applicant has demonstrated that it is financially qualified to construct and operate an NRC-licensed facility. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 298 (1997).

Thus, 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 No. 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, 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, supra, 38 NRC at 294.

6.14.1 Materials Licensing Proceedings - Subpart L

In the case of materials licenses, the Commission has the legal latitude under Section 189a of the Atomic Energy Act to use informal procedures (instead of the formal trial-type hearing specified in Section 554 of the A.P.A.) to fully apprise it of the concerns of a party challenging the licensing action and to provide an adequate record for determining their validity. Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 253 (1982), aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983); Rockwell International (Energy Systems Group Special Nuclear Materials License No. SNM-21), CLI-83-15, 17 NRC 1001, 1002 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 651 (1984). See Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-14, 47 NRC 376 (1988). The informal hearing procedures applicable to materials licensing proceedings are specified in 10 CFR Part 2, Subpart L (2.1201 - 2.1263), 54 Fed. Reg. 8269 (February 28, 1989). However, the consistent agency practice is for Licensing Boards, already presiding at operating license hearings, to act on requests to raise Part 70 issues involving the same facility. Limerick, supra, 19 NRC at 651-52; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 48 (1984).

A presiding officer determines areas of concern. During the proceeding, proof may be submitted to supplement the application. Hence, the Presiding Officer's determination does not depend solely on whether an application is complete or orderly. Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-14, 47 NRC 376 (1988).

6.14.2 Intervention in Materials Proceedings

In the absence of a valid petition to intervene under 10 CFR § 2.714, there is no authority to hold a hearing. Rockwell International Corp. (Energy Systems Group Special Nuclear Materials License No. SNM-21), LBP-83-65, 18 NRC 774, 777-78 (1983). A petition to intervene in a materials licensing proceeding must: (1) establish the petitioner's standing or interest in the proceeding; (2) provide a brief statement of how the petitioner's interest plausibly may be affected by the outcome of the proceeding; and (3) a concise statement of the petitioner's areas of concern sufficient to establish that the issues sought to be raised are germane to the proceeding. Combustion Engineering Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 143, 145-146, 147-148 (1989), citing, 10 CFR § 2.1205(d); Umetco Minerals Corp., LBP-92-20, 36 NRC 112, 115 (1992); Umetco Minerals Corp., LBP-94-7, 39 NRC 112, 113 (1994). See Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-25, 30 NRC 187, 189 (1989). A petitioner's statement of

concerns must provide the presiding officer with the minimal information needed to ensure that the issues sought to be litigated are germane to the proceeding. Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 47 (1990); Curators of the University of Missouri, LBP-90-18, 31 NRC 559, 568 (1990); Sequoyah Fuels Corp., LBP-91-5, 33 NRC 163, 166-67 (1991); Sequoyah Fuels Corp., LBP-94-39, 40 NRC 314 (1994); aff'd, CLI-94-12, 40 NRC 64 (1994); Curators of University of Missouri, CLI-95-1, 41 NRC 71, 165 (1995). A petitioner may raise only substantive concerns about the licensing activity and not procedural concerns about the adequacy of the hearing process. Pathfinder, supra, 31 NRC at 50, 51.

Petitioners may not obtain participation in the agency's proceedings on behalf of persons they are not authorized to represent. Umetco Minerals Corp., LBP-94-18, 39 NRC 369, 370 (1994); Advanced Medical Systems, Inc. (Source Material License, Cleveland, Ohio), LBP-95-3, 41 NRC 195, 196-97 (1995).

Petitions for Intervention in Materials Proceedings submitted by Native American may be treated somewhat differently than for other petitioners. The NRC has for years recognized a unique relationship with peoples and considered this special status in adjudicative decisions, and while that status is not of itself sufficient foundation for ignoring the Commission's rules, every precaution should be taken to ensure that Native Americans are not excluded from the proceeding simply because of ignorance of the ingredients of a legally complete petition to intervene, citing Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-552, 10 NRC 1, 10 (1979); Hydro Resources, Inc. (12750 Merit Drive, Suite 1210 LB12, Dallas, Texas 75251), LBP-95-2, 41 NRC 38, 40 (1995).

At the intervention petition stage of the proceeding requestors need only identify the areas of concerns they wish to raise. They need only provide minimal information to ensure that the areas of concern are germane to the proceeding. [citing Statement of Considerations, Informal Hearing Procedures for Materials Licensing Adjudications, 54 Fed. Reg. 8269, (February 28, 1989)]. Babcock and Wilcox Co. (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-94-12, 39 NRC 215, 217 (1994); International Uranium (USA) Corp. (Receipt of Material from Tonawanda, New York), LBP-98-20, 48 NRC 137, 142 (1998).

With respect to standing, the "fifty-mile" presumption utilized for commercial power reactors does not apply in materials licensing actions. However, "[a] presumption of standing based on geographic proximity may be applied in cases involving nonpower reactors where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences." Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), CLI-95-12, 42 NRC 111, 116 (1995) (citing Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994); Armed Forces Radiobiology Institute (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 153-54 (1982); Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 43 n.1 45 (1990); cf. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2142-43 n.7 (1992)). "Whether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking account the nature of the proposed action and the significance of the radioactive source." Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), CLI-95-12, 42 NRC 111, 116-117 (1995) (citations omitted).

Persons with standing to intervene have a right to the commencement of a hearing even if they have no genuine dispute with an applicant for a license. However, once the hearing is ordered it is the Intervenors' responsibility to place their concerns into

controversy if they want those concerns examined in the hearing. The presiding officer has no authority to examine or decide matters not put into controversy the parties. 10 CFR § 2.1251(d). Babcock and Wilcox Co. (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-95-1, 41 NRC 1, 3 (1995).

6.14.3 Written Presentations in Materials Proceedings

After the Hearing File is made available, Intervenors may file a written presentation. They 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. Babcock and Wilcox Co. (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-95-1, 41 NRC 1, 3 (1995). Since it is the Licensee, however, who is seeking a right (license renewal) from the NRC, it has the burden of proof with respect to the controversies placed into issue by the Intervenors. Id.

Section 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, Pennsylvania), LBP-95-1, 41 NRC 1, 5 (1995).

Subpart L does not accord intervenors the right to speak last regarding the issues in a materials license proceeding. Section 2.1233(a) expressly 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 does not apply to informal hearings conducted pursuant to Subpart L. Instead, the intervenors are entitled only to some sort of procedures for notice, comment, and statement of reasons for the agency action. Id at 119. Parties to a subpart L proceeding have no right to require a formal hearing. Rather, the Commission alone has the authority to require such a hearing. 10 CFR § 2.1209(k). Under Subpart L's procedures, the Commission will generally exercise this authority only in situations where the Presiding Officer requests permission to conduct a formal adjudication using the rules of Subpart G. Curators of University of Missouri, CLI-95-1, 41 NRC 71, 119 (1995).

In promulgating Subpart L, the Commission contemplated that the Presiding Officer would base his decision on a written record. Consequently, the Commission accorded the Presiding Officer with wide discretion to decide whether oral presentations are necessary to create an adequate record. 10 CFR § 2.1235(a). Curators of University of Missouri, CLI-95-1, 41 NRC 71, 120 (1995). Parties have no fundamental right to cross-examination even in a formal Subpart G proceeding. The Commission has made clear that, in a Subpart L proceeding, the responsibility for the examination of all witnesses rests with the Presiding Officer, not with the parties. Curators of University of Missouri, CLI-95-1, 41 NRC 71, 120 (1995); Advanced Medical Systems, Inc. (1020 London Rd., Cleveland Ohio), LBP-98-32, 48 NRC 374, 379 (1988).

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 2.1233(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. Curators of University of Missouri, CLI-95-1, 41 NRC 71, 114, n. 48 (1995).

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 2.1233(a). 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. Id. at 117, n. 54 (1995).

6.14.4 Time for Filing Intervention Petitions- Materials Proceedings

A petition to intervene in a materials licensing proceeding must be filed within 30 days after the petitioner receives actual notice of a pending application or an agency action granting an application; or one hundred and eighty (180) days after agency action granting an application. 10 CFR § 2.1205(c)(2)(I). Umetco Minerals Corp., LBP-94-7, 39 NRC 112, 113 (1994); Atlas Corp. (Moab, UT), LBP-98-18, 48 NRC 78, 79 (1998); International Uranium (USA) Corp. (Receipt of Material from Tonawanda, New York), LBP-98-20, 48 NRC 137, 139 (1998). Actual notice does not require notice of the legal right to challenge the application or of the period of time within which a challenge must be filed. Nuclear Metals, Inc., LBP-91-27, 33 NRC 548, 549, 550 (1991). A petitioner still may be admitted to the proceeding if the Commission or presiding officer determines that the delay in filing the petition is excusable. 10 CFR § 2.1205(k)(1)(I). The existence of negotiations between the applicant and the petitioner to resolve the issues does not excuse the petitioner's failure to file a timely petition. Nuclear Metals, supra, 33 NRC at 549, 550-51.

A delay in filing a request for a hearing may not be excused because petitioner chose to work with the NRC to protect his interests. Atlas Corp. (Moab, UT), LBP-98-18, 48 NRC 78, 79 (1998).

Once the deadline has passed for the filing of an intervention petition in a materials licensing proceeding, 10 CFR § 2.1205(c), the petitioner may amend or supplement a timely filed petition only at the discretion of the presiding officer, 10 CFR § 2.1209. Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-9224, 36 NRC 149, 152 (1992). However, before untimely requests for hearing may be granted, the presiding officer must find that the intervenors have established that any delay was excusable and that granting the untimely request will not injure or prejudice other parties. 10 CFR § 2.1205(k)(1). Babcock and Wilcox Co. (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-95-1, 41 NRC 1, 5 (1995).

6.14.5 Stays of Material Licensing Proceedings

A motion for a stay in a materials licensing proceeding must comply with the requirements of 10 CFR § 2.1263 which incorporate the four stay criteria of 10 CFR 2.788. Umetco Minerals Corp., LBP-92-20, 36 NRC 112, 115-116 (1992). The movant has the burden of persuasion on the four stay criteria. 10 CFR § 2.1237(b). Umetco, supra, 36 NRC at 116. (See 5.7.1).

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 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 CFR § 2.1263; Babcock and Wilcox (Apollo, Pennsylvania 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)).

Section 2.1263 specifies that a stay request must be submitted promptly, at the later of either (1) the time a hearing or intervention petition is to be filed, or (2) ten (10) days from the Staff's grant of the requested licensing action. The first time limit generally applies if a Staff licensing action is taken more than 10 days before a hearing or intervention petitions due to be filed. Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 225, 261-262 (1992).

The application of the time limits in 10 CFR § 2.1263 for filing a stay request presumes that a hearing petitioner or intervenor has some kind of reasonably prompt notice, either actual or constructive, that a contested request for licensing action has been approved and made effective. Compare 10 CFR § 2.1205(c)(2). Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 225, 262 (1992).

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, New York), LBP-98-19, 48 NRC 83, 84-85 (1998).

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 CFR §§ 2.711, 2.1203(d). Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 262 (1992). [See also section 2.9.3.8.1 regarding informal proceedings and petitions to intervene therein.]

The standard for obtaining a stay, which is set forth in 10 CFR § 2.788 and is incorporated into the Subpart L Rules of Practice section by § 2.1263, specifies that the movants must demonstrate (1) a strong showing that they are likely to prevail on the merits; (2) that unless a stay is granted they will be irreparably injured; (3) that the granting of the stay will not harm other parties; and (4) where the public interest lies. Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 262-253 (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, Pennsylvania 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)).

6.14.6 Reopening the Record - Materials Proceedings

It is appropriate to use the standards for set forth in 10 C.F.R. § 2.734 to determine whether to reopen a closed record in a materials proceeding. See Radiology Ultrasound Nuclear Consultants, P.A. (Strontium-90 Applicator), LBP-88-3, 27 NRC 220, 222-23 (1988) (In accordance with direction from the Commission on remand, the presiding officer considered whether applicant's tardy responses to questions posed by the presiding officer during the informal hearing satisfied the formal substantive criteria specified in 10 CFR 2.734 for reopening the record).

6.14.7 Scope of Materials Proceedings/Authority of Presiding Officer

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

A 10 CFR Part 70 materials license is an "order" which under 10 CFR § 2.717(b) may be "modified" by a Licensing Board delegated authority to consider a 10 CFR Part 50 operating license. Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 228 (1979).

There is no reason to believe that the granting of a Special Nuclear Material (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 and 2), LBP-83-38, 18 NRC 61, 65 (1983).

6.14.8 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 and 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 environmental impact statement is not required for a Special Nuclear Material (SNM) license to receive fuel at a new facility. When an environmental impact statement 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 and 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).

6.14.9 Materials License - Renewal

Pursuant to the former 10 CFR § 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 CFR § 40.42(c) which became effective August 1994. Sequoyah Fuels Corp. (Source Material License, Gore, Oklahoma site), CLI-95-2, 41 NRC 179, 183, n.10, 187 (1995).

The automatic license extension provision under 10 CFR § 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. (Source Material License, Gore, Oklahoma 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 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. (Source Material License, Gore, Oklahoma 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. (Source Material License, Gore, Oklahoma site), CLI-95-2, 41 NRC 179, 189 (1995).

Pursuant to 10 CFR § 2.1205(a), any person whose interest may be affected by a proceeding for the renewal of a license may file a request for hearing. In a request for hearing filed by other than an applicant, the requestor must describe in detail (1) the interest of the requestor in the proceeding; (2) how that interest may be affected by the results of the hearing, including the reasons the requestor should be permitted a hearing; (3) the requestor's areas of concern about the licensing activity that is the subject of the proceeding; and (4) the circumstances establishing that the request for a hearing is timely. Advanced Medical Systems, Inc. (Source Material License, Cleveland, Ohio), LBP-95-3, 41 NRC 195, 196 (1995); Advanced Medical Systems, Inc. (1020 London Rd., Cleveland Ohio), LBP-98-32, 48 NRC 374, 376 (1988).

6.14.10 Commission Review - Materials Proceedings

Final orders on motions pertaining to Part 70 materials licenses issued during an operating license hearing are appealable upon issuance. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-16, 19 NRC 857, 876 (1984), aff'd, ALAB-765, 19 NRC 645, 648 n.1 (1984). In a Subpart L proceeding, a petitioner's appeal of a licensing board's final order is subject to dismissal if the petitioner fails to file a Statement of Appeal within the time period specified in 10 CFR § 2.1205(n) or within an extended time period permitted by Commission order. Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), CLI-93-9, 37 NRC 190, 191 (1993).

6.14.11 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 CFR § 2.730. Motion practice before the Commission involves only a motion and an answer; movants who do not seek leave to file a reply are expressly denied the right to do so. 10 CFR § 2.730(c). Detroit Edison Co. (Enrico Fermi Atomic Plant, Unit 2), ALAB-469, 7 NRC 470, 471 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71 (1981).

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 and 2), LBP-82-72, 16 NRC 968, 971 (1982), citing, 10 CFR § 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 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. The intervenors must 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. Allens Creek, supra, 10 NRC at 525.

6.15.1 Form of Motion

The requirements with regard to the form and content of motions are set forth in 10 CFR § 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 Company (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-457, 7 NRC 70, 71 (1978).

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 CFR § 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 CFR § 2.712 would indicate that the time for response does not begin to run since implicit in that rule is that documents mailed are complete, otherwise service is not effective. Consumers Power Company (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 Association (Marble Hill Nuclear Generating Station, Units 1 and 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 Company (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 CFR § 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 and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 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 and 2), LBP-86-34, 24 NRC 549, 553 (1986), aff'd, ALAB-854, 24 NRC 783 (1986).

6.16 NEPA Considerations

NEPA expanded the Commission's regulatory jurisdiction beyond that conferred by the Atomic Energy Act or the Energy Reorganization Act. Detroit Edison Company (Greenwood Energy Center, Units 2 and 3), ALAB-247, 8 AEC 936 (1974). 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 and 2), CLI-77-8, 5 NRC 503 (1977).

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 and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 93 (1993); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331, 341-42 (1996).

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 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 Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 393 (1978), citing, Georgia Power Company (Alvin W. Vogtle Nuclear Plant, Units 1 and 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 and 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 and Gas Company (Salem Nuclear Generating Station, Unit 1), LBP-80-27, 12 NRC 435, 456 (1980); Portland General Electric Company (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 264-268 (1979).

"[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 Atomic Energy Act (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...." Phipps Bend, 8 NRC at 541-544. 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 NRC, which also has full NEPA responsibilities. Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), LBP-77-14, 5 NRC 494 (1977).

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 environmental impact statement (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 CFR § 51.109(c). To the extent that the NRC adopts the EIS prepared by DOE, it has fulfilled all of its NEPA responsibilities. 10 CFR § 51.109(d); 54 Fed. Reg. 27864, 27871 (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 and 2), ALAB-506, 8 NRC 533, 545 (1978).

NEPA cannot logically impose requirements more stringent than those contained in the safety provisions of the Atomic Energy Act. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 696 n.10 (1985), citing, Public Service Electric and Gas Co. (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 39 (1979).

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 Company of Oklahoma (Black Fox Station, Units 1 & 2), LBP-78-28, 8 NRC 281, 282 (1978).

NRC regulations pertaining to environmental assessments do not require consultation with other agencies. They only require a "list of agencies and persons consulted, and identification of sources used." 10 CFR § 51.30(a)(2). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 245 (1993).

The NRC cannot delegate to a local group the responsibility under NEPA to prepare an environmental assessment (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).

In contrast to safety questions, the environmental review at the operating license stage need not duplicate the construction permit review, 10 CFR § 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 and Power Co. (South Texas Project, Units 1 and 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 and 2), LBP-82-43A, 15 NRC 1423, 1473, 1475 (1982).

Insofar as environmental matters are concerned, under the National Environmental Policy Act (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 and 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 Dart, sub nom., Western Oil and Gas Association v. Alaska, 439 U.S. 922 (1982); NRDC v. Morton, 458 F.2d 827, 835, 837-838 (D.C. Cir. 1972).

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, and 3), LBP-82-117A, 16 NRC 1964, 1992 (1982).

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 Environmental Assessment (EA) and, where appropriate, an Environmental Impact Statement (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).

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 (EIS)

The activities for which environmental statements need be prepared and the procedures for preparation are covered generally in 10 CFR 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 Atomic Energy Act, NEPA, nor the Commission's regulations require that there be a hearing on an environmental impact statement. Public hearings are held on an EIS only if the Commission finds such hearings are required in the public interest. 10 CFR § 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).

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

Under the plain terms of NEPA, the environmental assessment 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 Company (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 Company (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 48, 49 (1978).

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, 195198 (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 and 2), LBP-82-43A, 15 NRC 1423, 1467-1468 (1982), citing, Federal Trade Commission 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 and 2), ALAB-785, 20 NRC 848, 868 n.65 (1984). However, to the extent possible, the NRC will adopt the environmental impact statement prepared by the Department of Energy to evaluate the environmental impact related to the development and operation of a geologic repository for high-level radioactive waste. 10 CFR § 51.109, 54 Fed. Reg. 27864, 27870-71 (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 Company of Oklahoma (Black Fox Station, Units 1 & 2), LBP-78-26, 8 NRC 102, 141 (1978).

An adequate final environmental impact statement 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 and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 795 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

6.16.1.1 Need to Prepare an EIS

Federal agencies are required to prepare an environmental impact statement 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).

The purpose of an applicant's environmental report is to inform the Staff's preparation of an Environmental Assessment (EA) and, where appropriate, an Environmental Impact Statement (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 environmental impact statement is not by itself a final agency action which requires the preparation of an environmental impact statement. 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 environmental impact statement 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.

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 environmental assessment or environmental impact statement. 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 environmental impact statement pursuant to NEPA. New Jersey, supra, 30 F.3d at 416.

An agency cannot skirt NEPA or other statutory commands by essentially exempting a licensee from regulatory compliance, and then simply labelling 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 environmental impact statement falls initially upon the Staff, that determination may be made an issue in an adjudicatory proceeding. Consumers Power Company (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. Palisades, id.

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 and 2), LBP-82-76, 16 NRC 1029, 1076 (1982), citing, Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 539 (1978).

The test of whether benefits of a proposed action outweigh its costs is distinct from the primary question of whether an environmental impact statement 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 significant so 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 environmental impact statement. Virginia Electric Power Co. (Surry Nuclear Power Station, Units 1 & 2), CLI-80,4, 11 NRC 405 (1980).

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

The NRC Staff is not required to prepare a complete environmental impact statement if, after performing an initial environmental assessment, it determines that the proposed action will have no significant environmental impact. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 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 Environmental Impact Statement (EIS) is neither required nor categorically excluded, a contention seeking an EIS, filed prior to the Staff's issuance of an Environmental Assessment (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 and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 36 (1993).

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 environmental impact statement or an environmental report. A construction period recapture amendment only requires the Staff to prepare an environmental assessment. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 97 (1990).

A separate environmental impact statement is not required for a Special Nuclear Material (SNM) license. When an environmental impact statement 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 and 2), LBP-83-38, 18 NRC 61, 65 (1983).

A supplemental Environmental Impact Statement (EIS) or an Environmental Impact Appraisal (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 CFR § 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 and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 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 and 2), CLI-89-10, 30 NRC 1, 5-6 (1989), reconsid. denied and stay denied, CLI-8915, 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 environmental impact statement 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 and 2), ALAB-875, 26 NRC 251, 258-59 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 4181'9 (1989).

The NRC Staff is not required to prepare an environmental impact statement 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 CFR §§ 51.23(1), 51.53(a). Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 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 Cooperative (LaCrosse Boiling Water Reactor), LBP-88-15, 27 NRC 576, 580 (1988), citing, 10 CFR § 51.23.

An environmental impact statement need not be prepared with respect to the expansion of the capacity of a spent fuel pool if the environmental impact appraisal 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 and 3), LBP-83-36, 18 NRC 45, 49 (1983), citing, Warm Spring Task Force v. Gribble, 621 F.2d 1017, 1023-36 (9th Cir. 1981).

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 and 3), LBP-83-36, 18 NRC 45, 49-50 (1983), citing, California v. Watt, 683 F.2d 1253, 1268 (9th Cir. 1982). See 40 CFR § 1502.9(c).

The standard for issuing a Supplemental Environmental Impact Statement 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).

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 environmental impact statement 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 Corporation (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); and 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 environmental impact statements 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 and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75 (1981); Public Service Electric & Gas Company (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 38 (1979); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-705, 16 NRC 1733, 1744 (1982), citing, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551 (1978), quoting NRDC v. Morton, 458 F.2d 827, 837-838 (D.C. Cir. 1972); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 696-97 & n.12 (1985); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998). See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-877, 26 NRC 287, 293-94 (1987). Moot or farfetched alternatives need not be considered under NEPA. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 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).

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 and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-81-14, 13 NRC 677, 684-685 (1981), citing, Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 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 CFR § 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 and 3), ALAB-562, 10 NRC 437, 446 (1979).

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 and 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 Company of Oklahoma (Black Fox Station, Units 1 and 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 decision making process. Louisiana Energy Services, L.P. (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 environmental impact statement 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 Statement (FES)

In certain instances, an FES may be so defective as to require redrafting, recirculation for comment and reissuance in final form. Possible defects which could render an FES 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) (FES 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 Assn'n. v. Campbell, 536 F.2d 956, 961 (1st Cir. 1976) (new FES required when there is significant new information or a significant change in circumstances upon which original FES was based); NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (existence of unexamined but viable alternative could render FES inadequate). A new FES may be necessary when the current situation departs markedly from the positions espoused or information reflected in the FES. Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671 (1975); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-3, 21 NRC 244, 256 (1985).

Even though an FES 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 FES, in which event the FES is simply deemed amended pro tanto. Barnwell, supra, 2 NRC at 671; Louisiana Power and 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 FES where different therefrom, amendment and recirculation of the FES is not always necessary, particularly where the hearing will provide the public ventilation that recirculation of an amended FES would otherwise provide. Limerick, supra, 1 NRC at 163. Defects in an FES can be cured by the receipt of additional evidence subsequent to issuance of the FES. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-3-36, 18 NRC 45, 47 (1983). See Ecology Action v. AEC, 492 F.2d 998, 1000-02 (2nd Cir. 1974); Florida Power and Light Co. (Turkey Point Nuclear Generating Station, Units 3 and 4), ALAB-660, 14 NRC 987, 1013-14 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-262, 1 NRC 163, 195-97 (1975).

Such modification of the FES by Staff testimony or the Licensing Board's decision does not normally require recirculation of the FES. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 372 (1975), unless the modifications are truly substantial. Barnwell, supra, 2 NRC at 671; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 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 FES 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 Company 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 and 2), ALAB-819, 22 NRC 681, 705-07 (1985), citing, 10 CFR § 51.102 (1985).

If the changes contained in an errata document for an FES 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 FES. Nor is it necessary to issue a supplemental FES when timely comments on the DES have not been adequately considered. The Licensing Board may merely effect the required amendment of the FES 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 and 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 final environmental statement (FES), where the Staff has prepared and circulated for public comment a supplemental final environmental statement (SFES) which addresses and evaluates the matters raised by the comments on the FES. 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 Company 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 FES, therefore, is not grounds for requiring preparation and circulation of a supplemental FES. 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).

For a more recent case discussing recirculation of an FES, see Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 786 (1979).

6.16.3.1 Effect of Failure to Comment on Draft Environmental Statement (DES)

Where an intervenor received and took advantage of an opportunity to review and comment on a DES 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 FES. Public Service Company 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 Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 539 (1977).

Comments on a DES which fail to meet the standards of CEQ Guidelines (40 CFR § 1500.9(e)) on responsibilities of commenting entities to assist the Staff need not be reviewed by the Staff. Thus, where comments which suggest that the Staff consider collateral State proceedings on the environmental effects of a proposed reactor do not specify the parts of the collateral proceedings which should be considered and the parts of the DES which should be revised, the Staff need not review the collateral proceedings. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), LBP-77-21, 5 NRC 684 (1977).

6.16.3.2 Stays Pending Remand for Inadequate EIS

Where judicial review disclosed inadequacies in an agency's environmental impact statement 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 Company (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).

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).

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 Company 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 and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 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 Company (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 Company 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 FES, 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 Company 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 Company 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 Company 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 and 2), ALAB-584, 11 NRC 451, 456-458 (1980); Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 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 and Power Co. (North Anna Power Station, Units 1 and 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), reconsidered, 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).

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 No. 1), CLI-80-23, 11 NRC 731, 736 (1980).

The application of the Commission's "obviously superior" standard for alternative sites (see 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. Sterling, supra, 11 NRC at 735.

Whether or not the parties to a particular licensing proceeding may agree that none of the alternatives (in 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 is so. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 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. Florida Power and Light Co. (Turkey Point Nuclear Generating, Units 3 and 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). 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. Turkey Point, supra.

Issues concerning alternative energy sources in general may no longer be considered in operating license proceedings. Dairyland Power Cooperative (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 CFR §§ 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, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 97 (1998).

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. Id., at 526. Standards of acceptability, instead of optimality, apply to approval of plant designs as well. Id. 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 Company 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 Company 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 Company 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 No. 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 and Light Co. (Turkey Point Nuclear Generating Plant, Units No. 3 and 4), ALAB-660, 14 NRC 987, 1004 (1981), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155 (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. Seabrook, supra, 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 and Electric Corporation (Sterling Power Project, Nuclear Unit No. 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. Sterling, supra, 8 NRC at 395.

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 and Electric Corporation (Sterling Power Project, Nuclear Unit No. 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 Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 533-536 (1977); Sterling, supra, 8 NRC at 398. Indeed, unless an alternative site is shown to be environmentally superior, comparisons of economic costs are irrelevant. Sterling, supra, 8 NRC at 395, n.25.

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 Company (Byron Nuclear Power Station, Units 1 and 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 Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 527-528 (1982); Carolina Power and Light Co. and 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 CFR §§ 51.95, 51.106.

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, L.P. (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 CFR Part 51, 49 Fed. Reg. 9363 (March 12, 1984); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998).

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 Company 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 and 3), LBP-82-117A, 16 NRC 1964, 1993 (1982), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 162 (1978). Only after an environmentally superior alternative has been identified do economic considerations become relevant. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 527 (1982).

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 and 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 and 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. Shearon Harris, supra, 17 NRC at 974.

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 and 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 environmental impact statement 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, L.P. (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 and 2), LBP-82-63, 16 NRC 571, 586-87 (1982), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 534 (1977); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-95, 16 NRC 1401, 1404-1405 (1982).

An adequate final environmental impact statement 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 and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 795 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

6.16.6.1 Consideration of Specific Costs Under NEPA

When water quality decisions have been made by the EPA pursuant to the Federal Water Pollution Control Act 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 No. 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 and 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. Susquehanna, supra, 9 NRC at 314.

6.16.6.1.1 Cost of Withdrawing Farmland from Production

(SEE 3.7.3.5.1)

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 in an Environmental Impact Statement

The ECCS Final Acceptance Criteria as set forth in 10 CFR § 50.46 and Appendix K to 10 CFR Part 50 assume that 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 environmental impact statements and proceedings thereon. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 221 (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 environmental impact statements 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 Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 529 (1982); 45 Fed. Reg. 40101 (June 13, 1980). The subsequent Commission requirement that NEPA analysis include consideration of Class 9 accidents (45 Fed. Reg. 40101) 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 and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 826-828 (1984), affirming in part (full power license for Unit 1), LBP-82-70, 16 NRC 756 (1982). See also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 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 and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 870 (1986), citing, 50 Fed. Reg. 32,144, 32,144-45 (August 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), reconsidered, 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 and 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, supra, 25 NRC at 854-55, aff'd in Dart 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 Severe Accident Policy Statement, 50 Fed. Reg. 32138 (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, supra, 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 environmental impact statement 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. 40101 (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, supra, 26 NRC at 283-85; Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-877, 26 NRC 287, 293-94 (1987); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 458-460 (1987), affirming, LBP-87-24, 26 NRC 159 (1987), remanded on other grounds, 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), reconsidered, 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 and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-IOA, 27 NRC 452, 458-59 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988).

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 some day have an impact on the amount of effluent available. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 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 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), citing, Gage v. United States Atomic Energy Commission, 479 F.2d 1214, 1220 n.19 (D.C. Cir. 1972); 39 Fed. Reg. 14506, 14507 (April 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).

The National Environmental Policy Act (NEPA) requires that the Commission prepare an environmental impact statement only for major actions significantly affecting the environment. Clinch River, supra, 16 NRC at 424.

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, Department of Energy, Project Management Corporation. Tennessee Valley Authority (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 and 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). Braidwood, supra, 22 NRC at 810-12.

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 and 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 Environmental Assessment. 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 and 2), LBP-83-11, 17 NRC 413, 435 (1983).

6.16.8.1 Powers in General

Commensurate with the Commission's obligation to comply with NEPA in licensing nuclear facilities is an implicit power to impose permit and license conditions indicated by the NEPA analysis.

The Commission may prescribe such regulations, orders and conditions as it deems necessary under any activity authorized pursuant to the Atomic Energy Act of 1954, as amended, 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. of N.Y., Inc. (Indian Point Nuclear Generating Station, 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 Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, Unit 2), ALAB-399, 5 NRC 1156 (1977), the Appeal Board dealt with the question as to the degree to which NEPA allows the NRC to preempt State and local regulation with respect to nuclear facilities. Therein, 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. Id. at 1169-1170.

The Appeal Board stated:

> ...NEPA gave this Commission both the power and the duty to interpret and administer with the Atomic Energy Act and its own regulations in accordance with the policies of NEPA. Among the policies of NEPA are to 'fulfill the responsibilities of each generation as trustee of the environment for succeeding generations,' to 'attain the widest range of beneficial uses of the environment without degradation...,' and to 'enhance the quality of renewable resources....' ...State or local regulation is preempted where it 'produces a result inconsistent with the objective of the Federal statute,' where it 'frustrates the full effectiveness of Federal law,' or where it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' ...(footnotes omitted). 5 NRC 1169.

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. Id. at 1170. To the same effect in this regard is Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, Unit 2), ALAB-453, 7 NRC 31, 35 (1978), where 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. of New York, Inc. (Indian Point Station, 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, NRC may allow construction to continue at that facility only if NRC's NEPA analysis encompasses all likely outcomes of the other agency's review. Public Service Company 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 FES 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 and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-80-18, 11 NRC 906, 909 (1980).

Neither NEPA nor the Atomic Energy Act applies to activities occurring in foreign countries and subject to their sovereign control. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 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 and 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).

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. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1 (1977). 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. Id. 10 CFR § 50.10(c), which broadly prohibits any substantial action which would 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 is involved. Id. In those situations where the Commission does approve offsite activities (e.g., through an LWA or a CP), conditions may be imposed to minimize adverse impacts. Id.

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 Company 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 NRC and EPA in this area, see Seabrook, supra, 7 NRC at 23-26. Briefly, that relationship in the present setting may be described thusly: EPA determines what cooling system a nuclear power facility may use and NRC factors the impacts resulting from use of that system into the NEPA cost-benefit analysis. Id. 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 (see Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 23, 24 (1978)) was upheld in New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 98 (1st Cir. 1978).

The Commission may rely on final decisions of the Environmental Protection Agency prior to completion of judicial review of such decisions. Public Service Company 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).

NRC need not re-litigate 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 and 2), LBP-82-72, 16 NRC 968, 970 (1982), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 24 (1978).

6.16.8.5 NRC Power Under NEPA With Regard to the FWPCA

The spread of the Federal responsibility for water quality standards and pollution control among various licensing agencies, which resulted from the reading given NEPA by the Calvert Cliffs court, has been curtailed. That

responsibility has shifted to EPA as its exclusive province. 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 and 2), ALAB-515, 8 NRC 702, 712-13 (1978).

Section 511(c)(2) of the FWPCA requires that the Commission and the Appeal Board accept EPA's determinations on effluent limitations. 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 NRC from considering noise impacts of the cooling water system on the surrounding environment. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-11, 17 NRC 413, 419 (1983).

When water quality decisions have been made by the EPA pursuant to the Federal Water Pollution Control Act 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 No. 2), ALAB-569, 10 NRC 557, 561-62 (1979).

6.16.8.6 Environmental Justice

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, L.P. (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).

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, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 102 (1998)

"Disparate impact" analysis is the principal tool for advancing environmental justice under NEPA. 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. Louisana Energy Services, L.P. (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).

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).

6.16.9 Spent Fuel Pool Proceedings

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 Company (Prairie Island Nuclear Generating Plant, Units 1 and 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. Trojan, supra. 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. Trojan, supra, 9 NRC at 265-266; 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).

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).

6.16.10 Certificate of Compliance/Gaseous Diffusion Plant

No environmental assessment or environmental impact statement 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. (Paducah, Kentucky, and Piketon, Ohio), CLI-96-12, 44 NRC 231, 238-39 (1996).

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 and 3), ALAB-680, 16 NRC 127, 143 (1982), citing, South Carolina Electric and 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 and 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 and Power Co. (South Texas Project, Units 1 and 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 CFR § 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 and 2), ALAB-678, 15 NRC 1400, 1420 n.36 (1982), citing, South Carolina Electric and 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 CFR 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 and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895-96 (1981). The same procedure applies under 10 CFR § 70.23, 70.31 in the case of an application for a materials license. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 48 (1984).

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 CFR § 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 and 2), LBP-86-31, 24 NRC 451, 453-54 (1986), citing, 10 CFR § 50.57(c). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 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 CFR § 50.47(d), only as to matters which are in controversy); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-892, 27 NRC 485, 49093 (1988) (to authorize low-power operation pursuant to 10 CFR § 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 and 2), LBP-88-20, 28 NRC 161, 166-67 (1988), aff'd, ALAB-904, 28 NRC 509, 511 (1988).

A Licensing Board (OL-3) presiding 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 CFR § 50.57(c), the Board authorized the Director of Nuclear Reactor Regulation to make the required findings under 10 CFR § 50.57(a) and to issue a 25% power license. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-8830, 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 CFR § 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 on the basis of a novel question of procedure, 10 CFR § 2.785(d), involving the interpretation and application of 10 CFR § 50.57(c). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-908, 28 NRC 626, 633-35 (1988). The Commission 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.

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 and 2), ALAB-770, 19 NRC 1163, 1168-69 (1984), 5 U.S.C. 555(e), 10 CFR § 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. of N.Y., Inc. (Indian Point Nuclear Generating Station, Units 2 & 3), ALAB-304, 3

NRC 1, 6 (1976); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-268, 1 NRC 383, 399 (1975); 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), 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 and 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 and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 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 and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 956 n.7 (1982), citing, 10 CFR § 50.40(d); 10 CFR § 50.57; Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 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, preparation of an environmental impact statement 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).

The Staff produces, among other documents, the Safety Evaluation Report (SER) and the Draft and Final Environmental Statements (DES and FES). The studies and analyses which result in these reports are made independently by the Staff, and Licensing Boards have no rule 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 and 3), LBP-83-36, 18 NRC 45, 48-49 (1983), citing, New England Power Co. (NEP Units 1 and 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 and 2), ALAB-785, 20 NRC 848, 865 n.52 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 56 (1985), citing, Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516-17 (1980).

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 License for Beaver Valley Power Station, Unit 1), 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 and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 55-56 (1985). See Florida Power and 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 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, Units 1, 2, 3 and 4), 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., Inc. (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 and 2), LBP-89-4, 29 NRC 62, 73 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, 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 and 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, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 33-34 (1980), reconsidered, ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

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 Atomic Energy Act of 1954 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, Larsen Laboratories, Orion Chemical Co., and John P. Larsen, 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 environmental impact statements 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).

6.17.1.2 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 CFR § 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 and 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 CFR § 2.720(h)(2)(i); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 500-501 (1985) (Mere disagreement among NRC Staff members is not an exceptional circumstance); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (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 and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 323 (1980).

6.17.1.3 Post Hearing 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 post hearing approach should be employed sparingly and only in clear cases, for example, where minor procedural deficiencies are involved. Louisiana Power and Light

Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103 (1983), citing, Consolidated Edison Co. of New York (Indian Point Station, Unit No. 2), CLI-74-23, 7 AEC 947, 951 n.8, 952 (1974); accord, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-298, 2 NRC 730, 736-37 (1975); Washington Public Power Supply System (Hanford No. 2 Nuclear Power Plant), ALAB-113, 6 AEC 251, 252 (1973); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-84-2, 19 NRC 36, 210 (1984), rev'd on other grounds, ALAB-793, 20 NRC 1591, 1627 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 494 (1986).

On the other hand, with respect to emergency planning, the Licensing Board may accept predictive findings and post hearing verification of the formulation and implementation of emergency plans. Byron, supra, 19 NRC at 212, 251-52, citing, Waterford, supra, 17 NRC at 1103-04; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1600, 1601 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 494-95 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 569, 594 (1989), rev'd in part on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd, ALAB-947, 33 NRC 299, 318, 346, 347, 348-349, 361362 (1991).

Completion of the minor details of emergency plans are a proper subject for post hearing resolution by the NRC Staff. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-26, 20 NRC 53, 61-62 (1984), citing, Waterford, supra, 17 NRC 1076.

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 post hearing resolution. Such referral should be used sparingly, however. Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 951-52 (1974); Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 318 (1978); 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 REA rather than delegating that responsibility to the Staff for post hearing resolution. Marble Hill, supra.

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 on-site 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 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 and 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 and 2), LBP-85-32, 22 NRC 434, 436 & n.2, 440 (1985), citing, Consolidated Edison Co. of New York (Indian Point Station, 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 post hearing 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) (post hearing procedures may be used for confirmatory tests); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 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 and 2), ALAB-841, 24 NRC 64, 79-80 (1986).

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. of N.Y., Inc. (Indian Point, 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 and 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. Indian Point, supra, 3 NRC at 190.

6.17.2 Status of Staff Regulatory Guides

(See General Matters 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. of N.Y., Inc. (Indian Point, 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 are not met; applicants are free to select other methods to comply with the G.D.C. The G.D.C. 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 and Gas Company, Atlantic City Electric Company (Hope Creek Generating Station, Units 1 and 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 Company 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. Seabrook, supra, 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 and 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 CFR § 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 CFR § 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 and n.5 (1982). See 10 CFR § 2.713(a).

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 and 2), LBP-83-18, 17 NRC 501, 504 (1983).

6.19 Precedent and Adherence to Past Agency Practice

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).

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 Company (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 and 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 para. 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 environmental impact statements 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-Permit 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. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1 (1977). 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. Id. The Commission may authorize certain site-related work prior to issuance of a construction permit pursuant to

10 CFR § 50.10(c) and (e). 10 CFR § 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 is involved. Wolf Creek, supra.

Commission regulations provide means for an applicant to obtain prelicensing authorization to engage in certain specified construction activities. These include obtaining an exemption from licensing requirements under 10 CFR § 50.12, pleading special circumstances under 10 CFR § 2.758, and demonstrating that proposed activities will have only de minimus or "trivial" environmental effects. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-321, 3 NRC 293 (1976); Washington Public Power Supply System (Nuclear Projects 3 & 5), LBP-77-15, 5 NRC 643 (1977). 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., CLI-77-1, 5 NRC 1 (1977).

The limited work authorization procedure under 10 CFR § 50.10(e)(1) and (2) ("LWA-1") and the 10 CFR § 50.12(b) exemption procedure are independent avenues for applicants to begin site preparation in advance of receiving a construction permit. United States, Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 423 (1982).

A request for an exemption from any Commission regulation in 10 CFR Part 50, including the general prohibition on commencement of construction in 10 CFR § 50.10(c), may be granted under 10 CFR § 50.12(a). United States Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 418 (1982).

The Commission may apply 10 CFR § 50.12 to a first of a kind project. There is no indication in 10 CFR § 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. Clinch River, supra, CLI-82-23, 16 NRC at 419.

In determining whether to grant an exemption pursuant to 10 CFR § 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. United States Department of Energy Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-83-1, 17 NRC 1, 4-6 (1983), citing, Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-74-22, 7 AEC 938 (1974); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), CLI-76-20, NRC 476 (1976); Washington Public Power Supply System (WPPSS Nuclear Project Nos. 3 and 5), CLI-77-11, 5 NRC 719 (1977).

Use of the exemption authority under 10 CFR § 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 applicants 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 CFR § 50.10 under 10 CFR § 50.12(b) is a stringent one: exemptions of this sort are to be granted sparingly and only in extraordinary circumstances. Clinch River, supra, 16 NRC at 425, 426, citing, Washington Public Power Supply System (WPPSS Nuclear Power Projects Nos. 3 ,and 5), CLI-77-11, 5 NRC 719 (1977).

6.20.1 Pre-LWA Activity

Unlike authorization of activities under an LWA, pre-LWA activities may be authorized prior to issuance of a partial initial decision on environmental issues. Washington Public Power Supply System (Nuclear Projects 3 & 5), LBP-77-15, 5 NRC 643 (1977). Permission to commence activities preparatory to construction in advance of an LWA can be sought by three different methods. One method is to seek a determination by the Licensing Board that the proposed activities are not barred by 10 CFR § 50.10(c) because their impacts are de minimus (the so-called "trivial impact" standard) or minor and fully redressible.

This is the preferred method when the issues involved are essentially factual. The second method is to proceed in accordance with 10 CFR § 2.758(b) under which a waiver or exemption may be obtained from the Commission if the Board certifies the

issue presented in accordance with 10 CFR § 2.758(d). This method should be used when an interpretation or application of a regulation to particular facts is called into question. The third method is to seek an exemption from the Commission under 10 CFR § 50.12. The Commission has stated that this method is extraordinary and emphasized that it should be used sparingly. Washington Public Power Supply System (WPPSS Nuclear Projects 3 & 5), CLI-77-11, 5 NRC 719, 723 (1977).

10 CFR § 50.10(c) permits only that pre-LWA activity with so trivial an impact that it can be safely said that no conceivable harm would have been done to any of the interests sought to be protected by NEPA should the application for the facility ultimately be denied. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-331, 1 NRC 6 (1976), aff'd in part, CLI-77-1, 5 NRC 1 (1977). For purposes of authorization of pre-LWA activity under 10 CFR § 50.10(c), redressibility is a factor to be considered. Where the potential damage from the pre-LWA activity is fully redressible and the applicant is willing to commit to restoration of the site, a Licensing Board can permit the applicant to proceed accordingly. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1 (1977).

The governing standard with regard to pre-LWA activity is "trivial impact," not zero impact. Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 & 2), ALAB-446, 6 NRC 870 (1977), reversing in part, LBP-77-61, 6 NRC 674 (1977). The fact that certain activities would entail the removal of some trees which could not be replaced within a short span of time does not necessarily mean that such activities cannot be conducted prior to issuance of an LWA. Id.

The proscriptions in the Wild and Scenic River Act against any form of assistance by a Federal agency in the construction of a water resource project which might have a direct and adverse impact on a river designated under the Act precludes the granting by a Licensing Board of pre-LWA authority for constructing a proposed sewer line to service a proposed nuclear plant where the nuclear plant itself is considered to be a "water resource project." Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 & 2), LBP-77-61, 6 NRC 674, 678 (1977), rev'd in part, ALAB-446, 6 NRC 870 (1977).

6.20.2 Limited Work Authorization

Under 10 CFR § 50.10(e), the Commission may authorize certain site-related pre-permit work which is more substantial than that permitted under 10 CFR § 50.10(c). Prior to granting such "limited work authorization" (LWA), the presiding officer in the proceeding must have made certain environmental findings and, in some instances, health and safety findings. See 10 CFR § 50.10(e)(1) through (3). Notice to all parties of the proposed action is necessary. Carolina Power & Light Co. (Shearon-Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-184, 7 AEC 229 (1974).

A limited work authorization 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 Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-688, 16 NRC 471, 473 n.1 (1982), citing, 10 CFR § 50.10(e)(1); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 778 (1979).

The cost-benefit analysis which must be performed prior to issuance of an LWA requires a determination as to whether construction of certain site-related facilities should be permitted prior to issuance of a construction permit but subsequent to a determination resulting from a cost-benefit analysis that the plant should be built. The cost-benefit analysis relevant to issuance of an LWA has been handled generically under 10 CFR § 51.52(b). Thus, the cost-benefit balance required for an LWA need not be specifically performed for each LWA. Rather, once a Licensing Board has made all the findings on environmental and site suitability matters required by Section 51.52(b) and (c), the cost-benefit balancing implicit in those regulations has automatically been satisfied. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-380, 5 NRC 572, 579-80 (1977).

Applicants are not required to have every permit in hand before a Limited Work Authorization can be granted. Public Service Company 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 CFR § 50.10(e), and certain other possible issues for a limited work authorization. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (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. United States Department of Energy Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-761, 19 NRC 487, 492 (1984), citing, 10 CFR § 2.718, 2.714(f),(g) (formerly, 10 CFR § 2.714(e),(f)).

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 by an Appeal Board to the Licensing Board for further consideration, an outstanding LWA may remain in effect pending resolution of the CP 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 and 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 non-compliance 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, and 3), ALAB-615, 12 NRC 350, 352 (1980), which quotes, Houston Lighting and 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 and 2), ALAB-704, 16 NRC 1725, 1732 n.9 (1982), citing, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 51 (1978), remanded on other grounds sub nom., Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 695 (1985), citing, Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 82-83 (1974).

6.21.3 Regulatory Guides

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); 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, 129899 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983); Umetco Minerals Corp. LBP-93-7, 37 NRC 267 (1993); Porter County Chapter of the Izaak Walton League of America v. AEC, 633 F.2d 1011 (7th Cir. 1976); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-229, 8 AEC 425, 439, rev'd on other gnds., CLI-74-40, 8 AEC 809 (1974); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-217, 8 AEC 61, 68 (1974); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 28 n.76 (1974); Consolidated Edison Co. of N.Y., Inc. (Indian Point, Unit 2), ALAB-188, 7 AEC 323, 333 n.42, rev'd in part on other gnds., CLI-74-23, 7 AEC 947 (1974); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 174 n.27 (1974); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 737 (1985). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251, 260-61 (1987); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 463-64 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 214 (1993). Nevertheless, regulatory guides are entitled to considerable prima facie weight. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 811 (1974), clarified as to other matters, CLI-74-43, 8 AEC 826 (1974).

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, L.P. (Claiborne Enrichment Center), LBP-96-7, 43 NRC 142 (1996).

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 No. 1), ALAB-698, 16 NRC 1290, 1299 (1982) (rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983)), citing, 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. Three Mile Island, supra, 16 NRC at 1299, citing,

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 and 2), ALAB-819, 22 NRC 681, 737 (1985).

Nonconformance with regulatory guides or Staff positions does not mean that the General Design Criteria (G.D.C.) are not met; applicants are free to select other methods to comply with the G.D.C. The G.D.C. 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, Larsen Laboratories, Orion Chemical Co., and John P. Larsen, 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).

In Curators, the fact that the emergency planning regulations had not yet gone into effect when the University filed its applications did not preclude the Commission from seeking technical guidance from a NUREG that provided the scientific foundation for those regulations. Id. at 397-98.

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. of N.Y. (Indian Point, Unit 2) and Power Authority of the State of N.Y. (Indian Point, 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 and 2), ALAB-819, 22 NRC 681, 710 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-86-11, 23 NRC 294, 367-68 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 487 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 238 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (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 absence of other evidence, adherence to NUREG-0654 may be sufficient to demonstrate compliance with the regulatory requirements of 10 CFR § 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), Commission Mem. & Order, 2 CCH At. Eng. L. Rep. 11,578.02 (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 CFR § 2.758, challenges to the regulations would be permitted in only three limited situations:

(1) where the regulation was claimed to be outside the Commission's authority;

(2) where it was claimed that the regulation was not promulgated in accordance with applicable procedural requirements;

(3) in the case of radiological safety standards, where it was claimed that particular standards were not within the broad discretion given to the Commission by the Atomic Energy Act to establish.

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 and 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 Company (Three Mile Island Nuclear Station, Unit 2), ALAB-456, 7 NRC 63, 65 (1978); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-25, 24 NRC 141, 144 (1986); American Nuclear Corporation (Revision of Orders to Modify Source Materials Licenses), CLI-86-23, 24 NRC 704, 709-710 (1986); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-4, 31 NRC 54, 71 (1990), aff'd, ALAB-950, 33 NRC 492, 502-503 (1991). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251, 256 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 416-17 (1989). Consequently, under current regulations, there can be no challenge of any kind by discovery, proof, argument, or other means

except in accord with 10 CFR § 2.758. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 88-89 (1974); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 204 (1975); Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), LBP-82-92, 16 NRC 1376, 1385, aff'd, ALAB-704, 16 NRC 1725 (1982); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 804 n.82 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1104 n.44 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-24, 24 NRC 132, 136, 138 (1986).

Under Section 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 CFR § 2.758(b)); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-25, 24 NRC 141, 145 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 16 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 595 (1988), reconsid. denied, CLI-89-3, 29 NRC 234 (1989). Pursuant to 10 CFR § 2.1239(b), the same standard is applicable to the waiver of a regulation in a materials licensing proceeding conducted under the Subpart L informal adjudicatory procedures. 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. Seabrook, CLI-88-10, supra, 28 NRC at 596-97, 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 (not to the Appeal Board - 10 CFR § 2.758(d)) for determination. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 804 n.82 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983); Georgia Power Co. (Vogtle Nuclear Plant, Units 1 and 2), LBP-84-35, 20 NRC 887, 890 (1984); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-85-33, 22 NRC 442, 445 (1985); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251, 256 (1987). 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 and 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 CFR Part 1, Subpart H (2.800-2.807).

The provisions of 10 CFR § 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 and 2), LBP-87-12, 25 NRC 324, 326 (1987).

An attack on a Commission regulation is prohibited unless the petitioner can make a prima facie showing of special circumstances such that applying the regulation would not serve the purpose for which it was adopted. The prima facie showing must be made by affidavit. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-83-52A, 18 NRC 265, 270 (1983), citing, 10 CFR § 2.758. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-12, 25 NRC 324, 326 (1987).

To make a prima facie showing under 10 CFR § 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 and Power Co. (South Texas Project, Units 1 and 2), LBP-83-49, 18 NRC 239, 240 (1983).

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 and 2), LBP-87-12, 25 NRC 324, 328 (1987). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 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 CFR § 50.12 rather than 10 CFR § 2.758. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-85-33, 22 NRC 442, 444-45 (1985).

A request for an exception is properly filed pursuant to 10 CFR § 50.12, and not 10 CFR § 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. Perry, supra, 22 NRC at 445-46.

An Appeal Board has determined that it has the authority to consider a motion for interlocutory review of a Licensing Board's scheduling order involving a Section 2.758 petition. The Board found that the only express limitation on its normal appellate

jurisdiction is the requirement, pursuant to footnote 7 of Section 2.758, of directed certification to the Commission of a Licensing Board's determination that a prima facie showing has been established. The Board determined that, except in that specific situation, it could exercise its normal appellate authority, including its authority to consider interlocutory Licensing Board rulings through directed certification. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-860, 25 NRC 63, 67 (1987).

The ECCS Final Acceptance Criteria as set forth in 10 CFR § 50.45 and Appendix K to 10 CFR Part 50 assume that ECCS will operate during an accident. On the other hand, Class 9 accidents postulate the failure of 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 environmental impact statements and proceedings thereon. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 221 (1978).

6.21.5 Agency's Interpretation of its Own Regulations

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

Where 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 and 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).

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 Corporation 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).

6.22 Rulemaking

Rulemaking procedures are covered, in general, in 10 CFR § 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 Corporation, LBP-94-2, 39 NRC 11 (1994).

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 and 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. Midland, supra, 16 NRC at 2038.

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 and 2), LBP-82-63, 16 NRC 571, 584-585 (1982); LBP-82-118, 16 NRC 2034, 2037 (1982).

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).

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), cited in Fire Protection, supra, and 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, supra, 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 CFR § 2.802. If the issue is sufficiently urgent, petitioner may request suspension of the licensing proceeding while the rulemaking is pending. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-57, 14 NRC 1037, 1038-39 (1981).

6.23 Research Reactors

10 CFR § 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 103 of the Atomic Energy Act rather than 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 Atomic Energy Act, 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 Assoc. v. NRC, 990 F.2d 1309, 1313 (D.C. Cir. 1993).

The Atomic Energy Act does not require antitrust review for applications for renewal of research and development nuclear plant licenses. Id. at 1314.

6.24 Disclosure of Information to the Public

10 CFR § 2.790 deals generally with NRC practice and procedure in making NRC records available to the public. 10 CFR Part 9 specifically establishes procedures for implementation of the Freedom of Information (10 CFR § 9.3 to 9.16) and Privacy (10 CFR § 9.50, 9.51) Acts.

Under 10 CFR § 2.790, hearing boards are delegated the authority and obligation to determine whether proposals of confidentiality filed pursuant to 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 and 2), LBP-81-62, 14 NRC 1747, 1755-56 (1981). Pursuant to 10 CFR § 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 and 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. A Freedom of Information Act (FOIA) request for disclosure of the materials is required only for those materials which an agency reasonably withholds pursuant to a 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, 60 L.Ed.2d 208, 99 S. Ct. 1705 (1979), neither the Privacy Act nor the Freedom of Information Act 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 and 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 quest 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 and 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 and 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 2.790 of the Rules of Practice is the NRC's promulgation in obedience to the Freedom of Information Act. Palisades, supra, 12 NRC at 120.

Section 2.744 of the Rules of Practice provides that a presiding officer may order production of any record exempt under 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 License for Beaver Valley Power Station, Unit 1), LBP-87-28, 26 NRC 297, 299 (1987).

Although 10 CFR § 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 and 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, supra, 931 F.2d at 945-947, citing, National Parks and Conservation Association 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, supra, 498 F.2d at 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 under 10 CFR § 2.744(d), has adopted traditional work product/executive privilege exemptions from disclosure. Palisades, supra, 12 NRC at 123.

The Government is no less entitled to normal privilege than is any other party in civil litigation. Palisades, supra, 12 NRC at 127.

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. Palisades, supra, 12 NRC at 129.

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 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 Department 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, supra, 920 F.2d at 68.

6.24.2 Privacy Act Disclosure

(RESERVED)

6.24.3 Disclosure of Proprietary Information

10 CFR § 2.790, which deals generally with public inspection of NRC official records, provides exemptions from public inspection in appropriate circumstances. Specifically, Section 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 CFR § 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 Section 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 CFR § 2.790(b)(1), for withholding a security plan from public disclosure, since 10 CFR § 2.790(d) deems security plans to be commercial or financial information exempt from public disclosure. Louisiana Energy Services. L.P. (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.

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 and 2), LBP-82-5A, 15 NRC 216 (1982).

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 and 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, affirmed by the Commission, 4 AEC 440 (1970); 10 CFR § 2.744(d), § 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. South Texas, supra.

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 (Point Beach Nuclear Plant, Units 1 and 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 CFR § 2.790(b)(6); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-435, 6 NRC 541, 544 n.12 (1977).

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 and 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 and 2), LBP-81-55, 14 NRC 1017 (1981).

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 CFR § 2.790(d)

Plant security plans are "deemed to be commercial or financial information" pursuant to 10 CFR § 2.790(d). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-80, 16 NRC 1121, 1124 (1982). Since 10 CFR § 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 CFR § 2.790(b)(1), for withholding a security plan from public disclosure. Louisiana Energy Services. L.P. (Claiborne Enrichment Center), LBP-92-ISA, 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. Claiborne, supra, 36 NRC at 11.

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 and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 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. Shoreham, supra, 16 NRC at 1124.

Commission regulations, 10 CFR § 2.790, contemplate that sensitive information may be turned over to intervenors in NRC proceedings under appropriate protective orders. Shoreham, supra, 16 NRC at 1124; Louisiana Energy Services. L.P. (Claiborne Enrichment Center), LBP-92-15A, 36 NRC 5, 11 (1992), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 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. Diablo Canyon, supra, 11 NRC at 778.

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. Diablo Canyon, supra, 11 NRC at 778.

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 161b, 161i(3), and 186a of the Atomic Energy Act are wide ranging, perhaps uniquely so. Oncology Services Corporation, 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 Atomic Energy Act 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 (One Hurley Plaza, Flint, Michigan), 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 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. (One Factory Row, Geneva, Ohio 44041), 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 result in a requirement that a license be suspended. Both the Atomic Energy Act 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 CFR § 50.100. Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 405 (1978).

6.25.2 Enforcement Procedures

On August 15, 1991, the Commission completed final rulemaking which revised the Commission's procedures for initiating formal enforcement action. 56 Fed. Reg. 40664 (August 15, 1991). Pursuant to 10 CFR § 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 CFR § 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 CFR § 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 CFR § 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. In re 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 Cooperative (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 CFR 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 CFR. See All Chemical Isotope Enrichment, Inc., LBP-90-26, 32 NRC 30, 36-38 (1990), citing, Atomic Energy Act 186(a), 49 U.S.C. § 2236(a).

There is no statutory requirement under Section 189a of the Atomic Energy Act of 1954 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 and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 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).

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., Inc. (Sheffield, Illinois LowLevel 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. In re 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 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). One who seeks the imposition of stricter requirements should file a petition pursuant to 10 CFR § 2.206. Sequoyah Fuels Corp. (UFh Production Facility), CLI-86-19, 24 NRC 508, 513-514 (1986), citing, Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1982).

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 Corporation 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).

The requirements for standing in an enforcement proceeding are no stricter than those in the usual licensing proceeding. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 374 (1980); Sequoyah Fuels Corporation 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. Marble Hill, supra, 11 NRC at 440-41. 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, 40 NRC at 70.

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, Oklahoma Site), CLI-94-12, 40 NRC 64, 69 (1994).

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 Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 442-43 (1980).

6.25.3 Petitions for Enforcement Action Under 10 CFR 2.206

Although the 10 CFR § 2.206 forum 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 CFR § 2.206(c)(1) and (2); Heckler v. Cheney, 470 U.S. 821 (1985). The Commission has agreed that section 2.206 actions 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." Id. at

1178. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 18 (1993).

Under 10 CFR § 2.206, members of the public may request the NRC Staff to issue an enforcement order. Consolidated Edison Co. of New York (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, Unit 3), CLI-83-16, 17 NRC 1006, 1009 (1983); Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 (1994). 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 for suspension, revocation or modification of an operating license or a construction permit. 10 CFR § 2.206, 10 CFR § 2.202 et seq.

However, the Commission's long standing 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. Id.

Although petitions for enforcement action are filed with the NRC Staff, the Commission retains the power to rule directly on enforcement petitions. 10 CFR § 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).

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 Company (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 APA, 5 U.S.C. 551 et seq., particularly Section 554, and the Commission's regulations, particularly 10 CFR § 2.719, deal specifically with on-the-record adjudication and 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 Atomic Energy Act and 20 years 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 CFR § 2.206. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 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 and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 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 show cause proceeding set out in 10 CFR § 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 CFR § 2.206, requesting that the Commission initiate enforcement action pursuant to 10 CFR § 2.202. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 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 Director of Nuclear Reactor Regulation under 10 CFR § 2.206 asking the Director 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 show cause 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 and 2), CLI-82-29, 16 NRC 1221, 1228-1229 (1982). See also Porter County Chapter of the Izaak Walton League of America, Inc. v. Nuclear Regulatory Commission, 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 CFR § 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 and 2), CLI-80-10, 11 NRC 438, 442-43 (1980).

The mechanism for requesting an enforcement order is a petition filed pursuant to 10 CFR § 2.206. See, e.g., Consolidated Edison Co. of New York (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, 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. of N.Y., Inc. (Indian Point, Units 1, 2 & 3), CLI-75-8, 2 NRC 173, 177 (1975); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-6, 13 NRC 443, 446 (1981); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Units 1 and 2) and (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 and 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 Company, et al. (Hatch Nuclear Plant, Units 1 and 2; Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-15, 38 NRC 1, 2 (1993).

Nonparties to a proceeding are also prohibited from using 10 CFR § 2.206 as a means to reopen issues which were previously adjudicated. General Public Utilities, supra, 21 NRC at 564. 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).

Under 10 CFR § 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 CFR § 2.206, members of the public may request the NRC Staff to issue such an order. Consolidated Edison Co. of New York (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, 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).

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).

6.25.3.1 Commission Review of Director's Decisions Under 10 CFR 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 CFR § 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 CFR § 2.206(c)(1). No other petition or request for Commission review will be entertained. 10 CFR § 2.206(c)(2).

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 CFR § 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).

Prior to the amendment of Section 2.206, that regulation was silent as to Commission review. At that time, the Commission indicated that its review of a decision of the Director 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. of N.Y., Inc. (Indian Point, 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. Licenses 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. Id. at 5 NRC 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).

NRC regulations specifically provide that the Commission will not entertain appeals from the Director's decisions, see 10 C.F.R. § 2.206(c)(2) (1995); however, the Commission may undertake sua sponte review of each denial of a 2.206 petition to ensure that the Director has not abused his discretion. See 10 C.F.R. § 2.206(c)(1) (1995). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-6, 43 NRC 123, 127 (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, two 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), where 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 Atomic Energy Act, 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.

Boards normally lacks 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 CFR § 2.206(c). Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-466, 7 NRC 457 (1978).

6.25.4 Grounds for Enforcement Orders

Under 10 C.F.R. § 30.10(c)(2), 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 CFR § 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 will not be 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. In re. 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 CFR § 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).

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. 10 CFR § 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).

A decision on whether to suspend a permit pending a decision on remand must be based on (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. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-623, 12 NRC 670, 677 (1980).

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 and 2), ALAB-789, 20 NRC 1443, 1447 (1984). See also Pacific Gas and 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 Missouri), 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 Missouri), 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).

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. Three Mile Island, supra, 21 NRC at 1123-24 n.2. See 10 CFR § 2.202(a)(5), implementing 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. Three Mile Island, supra, 21 NRC at 1124. 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., International 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. Three Mile Island, supra, 21 NRC at 1149.

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. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 677 (1979). In civil proceedings, action taken by a licensee in the belief that it was legal does not preclude a finding of

willfulness. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 678 (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 Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 677 (1979), citing, Consumers Power Co. (Midland Plant, Units 1 and 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 Company, Inc. (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. 20194 (May 12, 1992)

(See § 6.25.10). Pursuant to 10 CFR § 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 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 20197. 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 20196. 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 CFR § 2.202(c)(2)(ii).

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 CFR § 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 Associate, Inc. and Joseph L. Fisher, M.D. (d.b.a. St. Joseph Radiology Associates, Inc. and Fisher Radiological Clinic), LBP-92-34, 36 NRC 317 (1992).

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. (d.b.a. St. Joseph Radiology Associates, Inc., and Fisher Radiological Clinic), 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. (Upper Montclair, New Jersey), 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 CFR § 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., et al. supra.

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 CFR 2.202(b) may result in dismissal of the proceeding. St. Joseph Radiology Associates, Inc. and Joseph L. Fisher, M.D. (d.b.a. St. Joseph Radiology Associates, Inc., and Fisher Radiological Clinic) 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. 20194, 20196 (May 12, 1992). St. Joseph Radiology Associates, Inc., et al. supra.

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 CFR § 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. (Upper Montclair, New Jersey), 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 CFR § 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. (Upper Montclair, New Jersey), LBP-97-15, 46 NRC 60, 64 (1997).

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. 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 Company 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).

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), citing, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 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).

In a proceeding regarding an NRC Staff enforcement order, consistent with the analogous agency rules regarding contentions filed by intervenors, see 10 CFR § 2.714(d)(2)(ii), if it can be established that there is no set of facts that would entitle a party to relief relative to a proposed issue, then dismissal of that issue is appropriate. See Oncology Services Corp., LBP-94-2, 39 NRC 11, 23 n.8 (1994); Indiana Regional Cancer Center, supra, 40 NRC at 33.

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. In re. 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. In re 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 CFR § 2.202. 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).

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 189b of the Atomic Energy Act and cannot serve as the basis of

a valid contention in an enforcement proceeding. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 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 CFR 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. Id.

6.25.7 Burden of Proof

The Atomic Energy Act 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 Company (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 Cooperative (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 and 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 Atomic Energy Act 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, supra, 40 NRC at 34 & n.5.

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, Larsen Laboratories, Orion Chemical Co., and John P. Larsen, 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 Corporation 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).

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 NMSS 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). Piping Specialists, Inc., et al (Kansas City Missouri), LBP-92-25, 36 NRC 156 (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).

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 presiding officer may delay an enforcement proceeding for good cause. 10 CFR § 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 Corporation, CLI-93-17, 38 NRC 44, 50-51 (1993). Followed by Licensing Board in 3rd request for stay by NRC staff in Oncology proceeding, LBP-93-20, 38 NRC 130 (1993).

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, CLI-93-17 at 57, supra. Followed by Licensing Board in 3rd request for stay by NRC staff in Oncology proceeding, LBP-93-20, 38 NRC 130 (1993).

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, CLI-93-17 at 58, supra. 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. Oncology, 93-17 at 59-60, supra. This Commission decision was followed by the Licensing Board in a third request for a stay by the NRC staff in the Oncology proceeding, LBP-93-20, 38 NRC 130 (1993).

Although it is not unusual for an adjudicatory proceeding and an OI 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 OI investigation. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-9, 41 NRC 404, 405 (1995).

6.25.10 Civil Penalty Proceedings

Section 234 of the Atomic Energy Act 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 Company, 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. 19122, 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. 16894, Dec. 17, 1970). These two formal actions fulfill the legal requirements for standards utilized in civil penalty proceedings. Radiation Technology, Inc., ALJ-78-4, 8 NRC 655, 663 (1978). See also Pittsburgh-Des Moines Steel Company, ALJ-78-3, 8 NRC 649, 653 (1978).

Under Section 234 of the Atomic Energy Act, 42 U.S.C. § 2282(b), and 10 CFR § 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, New Jersey), 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 Director of Inspection and Enforcement, decides on the basis of the record whether the charges are sustained and whether civil penalties are warranted. In re 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, supra, 10 NRC at 541.

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).

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 Administrative Law Judge may substitute his own judgment for that of the Director. Atlantic Research Corporation, ALAB-594, 11 NRC 841, 849 (1980).

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).

Civil penalties may be imposed for the violation of regulations or license conditions without a finding of fault on the part of the licensee, so long as it is believed such action will positively affect the conduct of the licensee, or serve as an example to others. It matters not that the imposition of the civil penalty might be viewed as punitive. 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. In re Atlantic Research Corp., CLI-80-7, 11 NRC 413 (1980); Pittsburgh-Des Moines Steel Company, ALJ-78-3, 8 NRC 649, 651-52 (1978).

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 CFR § 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, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994).

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).

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); Union Electric Co. (Callaway Plant, Units 1 & 2), LBP-78-31, 8 NRC 366, 377 (1978). In addition, a licensee's submission to all applicable NRC regulations constitutes advance consent to lawful inspections, and therefore, no warrant is required for such inspections. Callaway, supra, 8 NRC at 377.

Proposed investigation of the discharge by a licensee's contractor of a worker who reported alleged construction problems to the Commission was within the Commission's statutory and regulatory authority to assure public health and safety. Union Electric Co. (Callaway Plant, Units 1 & 2), LBP-78-31, 8 NRC 366, 376 (1978). 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. Callaway, supra, 8 NRC at 378.

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. Callaway, supra, 8 NRC at 378.

An agency investigation must be conducted for a legitimate purpose. However, section 161c of the AEA, 42 USC § 2201(c) does not require that the precise nature and extent of an NRC investigation be articulated in a specific provision of the AEA or the ERA. Rather, § 2201(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).

A search warrant is not needed for inspections of licensed activities. Id. at 538-540.

The Executive Director of Operations is authorized by the Commission to issue subpoenas pursuant to Section 161c of the Atomic Energy Act where necessary or

appropriate for the conduct of inspections or investigations. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-87-8, 26 NRC 6, 9 (1987).

The NRC Staff does inspect construction activities and reports. Where weaknesses or errors which substantially affect safety are detected, the Staff requires the applicant to take appropriate action. Deliberate or careless failure of applicants to adhere to the program is the basis for the imposition of penalties. Illinois Power Co. (Clinton Power Station, Unit No. 1), LBP-82-103, 16 NRC 1603, 1614 (1982).

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. In the Matter of Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 427 (1993).

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 U.S.C.C.A.N. 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 at 234.

6.26 Stay of Agency Licensing Action - Informal Hearings

As 10 CFR § 2.1205(l) makes clear, for a requested materials (or reactor operator) licensing action that is subject to challenge in a Subpart L informal adjudication, 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, Pennsylvania

Fuel Fabrication Facility), LBP-92-31, 36 NRC 225, 261 (1992). Section 10 CFR 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, Pennsylvania 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 § 2.788. The participants should use affidavits to support any factual presentations that may be subject to dispute. See 10 CFR § 2.788(a)(3). Babcock & Wilcox (Apollo, Pennsylvania 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 and 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 and 2), CLI-90-3, 31 NRC 219, 260 (1990). Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 263 (1992).

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, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 264 (1992).

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, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 266 (1992).

As 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 and 2), ALAB-808, 21 NRC 1595, 1602-03 (1985). Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 267 (1992).

6.27 [Reserved]

6.28 Technical Specifications

10 CFR § 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. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 272 (1979).

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. 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. Trojan, supra, 9 NRC at 273; Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-831, 23 NRC 62, 65-66 & n.8 (1986) (fire protection program need not be included in technical specification).

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, Trojan, supra, 9 NRC at 272-73.

6.29 Termination of Facility Licenses

Termination of facility licenses is covered generally in 10 CFR § 50.82.

The Commission considers the license termination plan (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).

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 CFR § 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).

6.30.2 Export Licensing

Individual fuel exports are not major Federal actions. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-15, 11 NRC 672 (1980). (See also 3.4.6)

Commission regulations provide in 10 CFR § 110.82(c)(2) that hearing requests on applications to export nuclear fuel are to be filed within 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 nonproliferation 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 nonproliferation goals underlying the NNPA, the Commission is reluctant to grant late hearing requests 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). 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. Id.

Under 10 CFR § 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. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 328 (1994). 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. Id.

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. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 329 (1994). 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. Id. Also, in the absence of evidence that a hearing would generate significant new information or analyses, a public hearing would be inconsistent with the Nuclear Non-Proliferation Act. Id. at 334.

6.30.2.1 Jurisdiction of Commission re Export Licensing

The Commission is neither required nor precluded by the Atomic Energy Act 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. Id., 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. Id., 11 NRC at 648.

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. Exports to the Philippines, supra, 11 NRC at 656.

6.30.2.2 Export License Criteria

The AEA of 1954, 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).

The Commission may not issue a license for component exports unless it determines that the three specific criteria in 109(b) of AEA are met and also determines that the export won't be inimical to common defense. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 654 (1980).

6.30.3 High-Level Waste Licensing

The procedures for the conduct of the adjudicatory proceeding on the application for a license to receive and possess high-level radioactive waste at a geologic repository operations area are specified in Subpart J of 10 C.F.R. Part 2 (10 C.F.R. §§ 2.1000 - 2.1023). These procedures take precedence over the rules of general applicability in 10 C.F.R. Part 2, Subpart G, although 10 C.F.R. § 2.1000 specifies many of the rules of general applicability which will continue to apply to high-level waste licensing proceedings.

Subpart J provides procedures for the development and operation of the Licensing Support Network (LSN), an electronic information management system, that will make documentary material relevant to the proceeding electronically available to the participants. See 2.11.7, 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. 71729 (Dec. 30, 1998).

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. at 186-87.

6.30.5 Informal Hearings

The "areas of concern" specified in support of a hearing request under Subpart L "need not be extensive, but [they] must be sufficient to establish that the issues the requester wants to raise fall generally within the range of matters that properly are subject to challenge in such a proceeding." 54 Fed. Reg. 8269, 8272 (1989). Like the requirement that a 10 CFR Part 2, Subpart G formal hearing petition must define the "specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene," 10 CFR § 2.714(a)(2), the Subpart L direction to define "areas of concern" is only intended to ensure that the matters the petitioner wishes to discuss in his or her written presentation are generally within the scope of the proceeding. Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 422-23 (1997).

A request to use other procedures in a 10 CFR Part 2, Subpart L proceeding should involve consideration of whether, given the particular circumstances involved in the proceeding, permitting the use of additional, trial-type procedures such as oral cross-examination would add appreciably to the factfinding process. See Sequoyah Fuels Corp. (Sequoyah UF to UF Facility), CLI-86-17, 24 NRC 489, 497 (1986). Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 423 (1997).

6.30.6 Certification of Gaseous Diffusion Plants

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).

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).

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, and Piketon, Ohio), CLI-96-12, 44 NRC 231, 234, 236 (1996).

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).

6.31 Transfers of Licenses (Directly and Indirectly)

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 Atomic Energy Act 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 11s of the Atomic Energy Act 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. Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 457 (1995). Corporate law principles, which are applicable only to the corporate from of organization, are entitled to no consideration under section 184 and do not thwart NRC regulatory jurisdiction over a corporation for violating that provision. Id. 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. Id.

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. Atomic Energy Act § 189a(1); 42 U.S.C. § 2239. The NRC has strictly construed 189a(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).

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. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-14, 44 NRC 3, 6 (1996). 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). Id.

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. 44 NRC at 6.

As provided in the 1978 Commission policy statement, 43 Fed. Reg. 4294 (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. Yankee Atomic Electric Co., 44 NRC at 6 n.2. 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. Id.

6.33 National Historic Preservation Act Requirements

The National Historic Preservation Act 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 disctrict, 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. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 323 n.15 (1998).

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. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 323 (1998).

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AEA = Atomic Energy Act of 1954
FOIA = Freedom of Information Act
NEPA = National Environmental Policy Act

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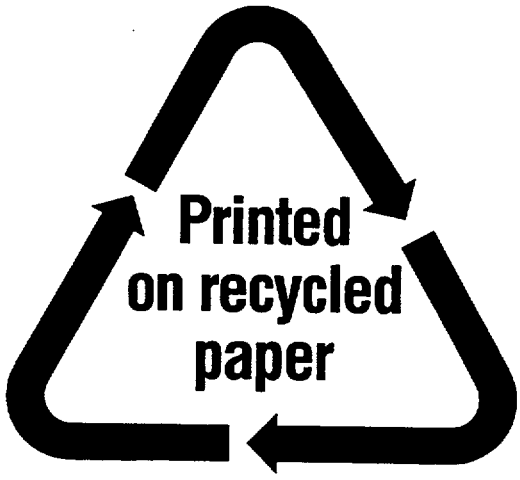

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