NUCLEAR REGULATORY COMMISSION ISSUANCES

December 1994

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

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

MASTER

U.S. NUCLEAR REGULATORY COMMISSION

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B. Paul Cotter, Jr., Chief Administrative Judge, Atomic Safety and Licensing Board Panel

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**Commission
Issuances**

COMMISSION

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
E. Gail de Planque

In the Matter of

Docket Nos. 50-424-OLA-3
50-425-OLA-3

GEORGIA POWER COMPANY, *et al.*
(Vogtle Electric Generating Plant,
Units 1 and 2)

December 21, 1994

The Commission denies a petition for interlocutory review filed by the Intervenor. The petition requested interlocutory review of an Atomic Safety and Licensing Board order, LBP-94-37, 40 NRC 288 (1994), which granted in part the Georgia Power Company's motion for summary disposition of one of the Intervenor's allegations. The Commission finds that the Intervenor did not demonstrate a need for interlocutory review.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

The Commission has long disfavored interlocutory review.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

A Licensing Board decision rejecting or admitting particular issues for consideration does not in and of itself indicate that a proceeding will be affected in a pervasive or unusual manner. The basic structure of an ongoing adjudication is not changed merely because an interlocutory Licensing Board ruling is incorrect, even if it conflicts with case law or Commission regulations.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

The Commission will step into interlocutory situations only when a licensing board ruling creates immediate irreparable injury or fundamentally impacts the course of a proceeding.

MEMORANDUM AND ORDER

The Commission has before it a petition for interlocutory review filed by the Intervenor, Allen L. Mosbaugh. The Intervenor seeks review of LBP-94-37, 40 NRC 288 (1994), an Atomic Safety and Licensing Board Memorandum and Order that granted in part the Georgia Power Company's motion for summary disposition of the Intervenor's transfer-of-license allegations. Both the NRC Staff and the Licensee oppose the Intervenor's petition. For the reasons stated in this Order, we deny the Intervenor's petition.

This proceeding involves the Georgia Power Company's (GPC) request to transfer its operating authority over the Vogtle Electric Generating Plant, Units 1 and 2, to the Southern Nuclear Operating Company, Inc. (Southern Nuclear). The Licensing Board admitted one consolidated contention, which alleges that Southern Nuclear lacks the "requisite character, competence, and integrity, as well as the necessary candor, truthfulness and willingness to abide by regulatory requirements." The contention relied upon two bases. The first alleged that, in violation of section 184 of the Atomic Energy Act, GPC transferred its control over the Vogtle facility to Southern Nuclear, without first obtaining the written consent of the NRC. The second alleged that certain GPC officials, who now may be in key management positions at Southern Nuclear, submitted false information to the NRC about Vogtle's diesel generators. The Licensing Board structured the proceeding to address these two general allegations in separate phases, in effect in separate hearings. The Intervenor's petition for review involves only the Licensing Board's treatment of the first basis, the illegal-transfer-of-control allegation, which will be the focus of a hearing currently scheduled to begin in early January. The Licensing Board will receive arguments on the diesel generator claim only in a separate and later hearing.

Following discovery, GPC submitted a motion for summary disposition of the illegal transfer issue. In LBP-94-37, the Licensing Board granted the Licensee's summary disposition motion in part, albeit on a ground not urged by GPC itself. The Board concluded that the legality of GPC's transfer of operations was irrelevant to the outcome of the proceeding, because no remedy for an illegal transfer was available and because the Intervenor allegedly had dropped his claim of a safety nexus. The Board allowed the Intervenor to proceed only on the theory that actual misrepresentations were made to the NRC about who

was in control of the Vogtle facility's nuclear operations. The Board, in short, ordered that the hearing on the illegal transfer claim be limited to a single issue — whether individuals through false statements or omissions misled the NRC about who was running the facility.

The Intervenor filed his petition pursuant to 10 C.F.R. § 2.786(g), which allows interlocutory review only under limited circumstances. Under the regulation, a decision may warrant interlocutory review if it (1) threatens the party adversely affected with "immediate and serious irreparable" impact, or (2) affects the basic structure of the proceeding in a "pervasive or unusual manner."

The Commission has long disfavored interlocutory appellate review. *See Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994) (*Rancho Seco*). We find no reason here to depart from that policy. Although aspects of the Licensing Board's decision relating to available remedies and burdens of proof appear highly questionable, the Intervenor has not demonstrated why we should take the extraordinary step of taking appellate review at this time.

We note, in response to the first prong of the test, that the Board's decision poses no irreparable harm. Indeed, the Intervenor does not argue otherwise. He may still go forward in presenting a case about the Applicant's character qualifications. If the Intervenor prevails before the Licensing Board, his concerns will have become moot. If he loses before the Board, he may then again petition the Commission for review and raise anew the question whether the Board improperly restricted his illegal transfer claim.

The Intervenor bases his petition for review on the second prong of the test, arguing that the decision will affect the structure of the proceeding in a pervasive or unusual manner. But a licensing board decision rejecting or admitting particular issues for consideration does not in and of itself indicate that a proceeding will be affected in a pervasive or unusual manner. *See Rancho Seco*, CLI-94-2, 39 NRC at 94. The basic structure of an ongoing adjudication is not changed merely because an interlocutory licensing board ruling is incorrect, even when it conflicts with case law or Commission regulations. *See id.*

In addition, the potential prejudicial impact of the decision is unclear at this point, and is not well outlined in the Intervenor's petition. Even under the decision, the Intervenor appears free to submit any evidence he has of misrepresentations — through acts or omissions — made to the NRC about the actual control of the Vogtle facility. It may turn out that there is a near total overlap between the evidence that the Intervenor would have submitted in the absence of the Board decision and the evidence now permitted under

that decision.¹ But, whether or not that proves true, we do not sit simply to correct erroneous interlocutory licensing board rulings. We will step into interlocutory situations only when a Board ruling creates immediate irreparable injury or fundamentally impacts the course of a proceeding. *See Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 85-86 (1992) (conversion of a Subpart L proceeding into a Subpart G proceeding affected proceeding in pervasive and unusual manner). Accordingly, we find it appropriate here to reserve review, if necessary, to a more fully developed record and a merits-based decision.

By declining review, we intimate no judgment on the soundness of the Licensing Board's decision. Our decision today stems solely from a reluctance to take interlocutory review except in extraordinary situations.

CONCLUSION

For the reasons stated herein, the Intervenor's petition for review is *denied*. It is so ORDERED.

For the Commission

JOHN C. HOYLE
Acting Secretary of the
Commission

Dated at Rockville, Maryland,
this 21st day of December 1994.

¹ If the Board, based upon LBP-94-37, excludes any evidence that the Intervenor seeks to introduce, we can review that action upon appeal of the entire decision. The Intervenor may also raise at that time the same issues he has raised in his petition for review here.

Atomic Safety and Licensing Boards Issuances

ATOMIC SAFETY AND LICENSING BOARD PANEL

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*Permanent panel members

LICENSING BOARDS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of

Docket No. IA-94-011
(ASLBP No. 94-696-05-EA)

DR. JAMES E. BAUER
(Order Prohibiting Involvement in
NRC-Licensed Activities)

December 9, 1994

In this proceeding concerning an NRC Staff enforcement order prohibiting the involvement of Dr. James E. Bauer in NRC-licensed activities, the Licensing Board rules on prediscovery dispositive motions regarding a number of the issues specified by the parties for litigation.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

Claiming a constitutional deprivation arising from a delayed adjudication generally requires some showing of prejudice. *See Oncology Services Corp.*, CLI-93-17, 38 NRC 44, 50-51 (1993).

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

The pendency of a related criminal investigation can provide an appropriate basis for postponing litigation on a Staff enforcement order. *See id.* at 53-56.

ENFORCEMENT ACTIONS: SUFFICIENCY OF CHARGES

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. *Indiana Regional Cancer Center*, LBP-94-21, 40 NRC 22, 31 (1994).

LICENSING BOARDS: AUTHORITY TO DISMISS ISSUES IN ENFORCEMENT PROCEEDING

RULES OF PRACTICE: DISMISSAL OF ISSUES IN ENFORCEMENT PROCEEDING

If it can be shown there is no set of facts that would entitle a party to relief relative to proposed issue in an enforcement proceeding, then dismissal of that issue is appropriate. See *Indiana Regional Cancer Center*, LBP-94-21, 40 NRC at 33 & n.4; *Oncology Services Corp.*, LBP-94-2, 39 NRC 11, 23 & n.8 (1994).

LICENSING BOARDS: AUTHORITY TO DISMISS ISSUES IN ENFORCEMENT PROCEEDING

RULES OF PRACTICE: DISMISSAL OF ISSUES IN ENFORCEMENT PROCEEDING

Consistent with the analogous agency rules regarding contentions filed by intervenors, see 10 C.F.R. § 2.714(d)(2)(ii), issues that would constitute "defenses" to an enforcement order are subject to dismissal under the appropriate circumstances. See *Indiana Regional Cancer Center*, LBP-94-21, 40 NRC at 33 n.4.

ENFORCEMENT ACTIONS: SCOPE OF PROCEEDINGS

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. See *id.* at 33-34.

ENFORCEMENT ACTIONS: SCOPE OF PROCEEDINGS

In proceedings involving challenges to Staff enforcement orders, the overarching matter for consideration is whether the order should be sustained and the presiding officer's authority regarding this question "is to consider 'whether the facts in the order are true and whether the remedy selected is supported by those

facts.'” *Oncology Services Corp.*, LBP-94-2, 39 NRC at 25 (quoting *Boston Edison Co. (Pilgrim Nuclear Power Station)*, CLI-82-16, 16 NRC 44, 45 (1982), *aff’d*, *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983)). The bases asserted in an enforcement order thus do provide the principal framework for the proceeding. As a consequence, any legal or factual issue a party wants to propose in challenging (or supporting) an enforcement order must bear some relationship to those bases by tending to establish, either alone or with other issues, that some explicit or implicit legal or factual predicate to the order should not (or should) be sustained. Further, a party called upon to demonstrate this relationship must be able to do so by more than a bald pronouncement that the issue is “relevant.” Cf. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 308 (1994) (mere assertions of dispute over material facts do not invalidate grant of summary disposition).

MEMORANDUM AND ORDER **(Ruling on Prediscovery Dispositive Motions)**

The parties to this proceeding, petitioner James E. Bauer, M.D., and the NRC Staff, have filed motions seeking dispositive resolution of certain issues concerning the May 10, 1994 Staff enforcement order that is the locus of this litigation. In that order, the Staff alleges that certain of Dr. Bauer’s actions regarding regulated nuclear materials demonstrate he cannot conduct NRC-licensed activities in conformity with agency requirements. As a consequence, the immediately effective order imposes several restrictions on Dr. Bauer, including barring him from conducting any NRC-licensed activities for a period of five years.

In their dispositive motions, both parties seek a ruling on the jointly identified litigation issue of whether the order can be based on Staff allegations regarding (1) Dr. Bauer’s actions while serving as radiation safety officer (RSO) and sole authorized user on a byproduct materials license permitting the Indiana Regional Cancer Center (IRCC) to use a strontium-90 source to treat specified medical conditions, and (2) his involvement in a November 1992 misadministration incident at IRCC under a different NRC license authorizing the use of iridium-192 to provide high dose rate (HDR) brachytherapy treatments. In addition, the Staff asserts that it is entitled to summary disposition on the jointly identified issue of whether the treatment of superficial skin lesions with strontium-90 violates the terms of IRCC’s license. Finally, the Staff asks for dismissal of eight other issues identified by Dr. Bauer as appropriate litigation questions.

For the reasons given below, we find that the Staff is not precluded as a matter of law from relying on Dr. Bauer’s purported involvement in the November

1992 incident or his alleged activities under the IRCC strontium-90 license as a basis for its May 1994 order. Further, on the joint issue of whether the treatment of superficial skin lesions with strontium-90 violates the terms of IRCC's license, we request that the parties address several questions regarding that matter. Finally, for the eight Dr. Bauer litigation issues that the Staff seeks to expel, we conclude that three should be consolidated with other issues and three should be dismissed *in toto*.

I. BACKGROUND

The May 1994 order at issue here is the third recent Staff enforcement directive involving Dr. Bauer. The first was a January 1993 order that suspended the license of Oncology Services Corporation (OSC) authorizing it to provide iridium-192 HDR brachytherapy treatments at six OSC Pennsylvania facilities, including IRCC. *See* 58 Fed. Reg. 6825 (1993). One of the cited grounds for this suspension was a November 1992 incident at IRCC in which IRCC personnel allegedly failed to detect an iridium-192 source that remained in a patient's body after she received an HDR brachytherapy treatment with an Omnitron 2000 remote afterloader machine. The Staff contended that as the authorized user under the license who was supervising the patient's treatment, Dr. Bauer did not conduct an adequate survey of the patient before permitting her to return to her nursing home, which resulted in significant radiation exposures to the patient and members of the general public. *See id.* at 6825-26.

In November 1993, the Staff issued a second enforcement order that suspended IRCC's license to use a strontium-90 source to treat specified medical conditions and modified that license to preclude Dr. Bauer, the RSO and the only authorized user named in the license, from undertaking any activities under the strontium-90 license. *See* 58 Fed. Reg. 61,932 (1993). The Staff asserted that this suspension and modification was necessary because of the use of strontium-90 to treat skin lesions, an activity it contends was not authorized under the license, and the failure of Dr. Bauer during a November 1993 inspection to provide agency inspectors with accurate and complete information regarding skin lesion treatments. The Staff also based this order on Dr. Bauer's purported involvement in the November 1992 brachytherapy treatment incident outlined in the January 1993 enforcement order. *See id.* at 61,932-33.

The third enforcement order, which is now before us, is directed solely to Dr. Bauer. *See* 59 Fed. Reg. 25,673 (1994). Relying essentially on the allegations regarding the brachytherapy treatment and strontium-90 use incidents specified in the two previous orders, the Staff has directed that for five years Dr. Bauer cannot be named in any NRC license to act in any capacity or otherwise conduct any NRC-licensed activities. In addition, to permit the agency to monitor his

compliance with regulatory requirements, for two years thereafter Dr. Bauer must inform the NRC within twenty days of accepting employment concerning, or otherwise becoming involved in, NRC-licensed activities. *See id.* at 25,673-74.

The licensees and/or Dr. Bauer sought a hearing to contest each of these three orders. The *OSC* and *IRCC* proceedings recently were dismissed prior to any dispositive adjudication on the merits based on licensee requests for termination of the licenses involved. *See Oncology Services Corp.*, LBP-94-29, 40 NRC 123 (1994); *Indiana Regional Cancer Center*, LBP-94-36, 40 NRC 283 (1994). Dr. Bauer, however, continues to contest the validity of the May 1994 order in this proceeding.¹

In that regard, acting pursuant to a Board directive, *see* Memorandum and Order (Initial Prehearing Order) (June 8, 1994) at 4-6 (unpublished), on June 24, 1994, Dr. Bauer and the Staff filed a joint prehearing report in which they specified the central issues for litigation in this proceeding. *See* Joint Prehearing Report (June 24, 1994) at 1-6 [hereinafter Joint Prehearing Report]. Subsequently, in accord with a Board prehearing order, *see* Order (Establishing Schedule for Prediscovery Dispositive Motions and Filings Concerning Consolidation and Discovery) (July 1, 1994) at 1 (unpublished), both the Staff and Dr. Bauer filed dispositive motions regarding a number of those issues, as well as responses and replies to those motions. *See* NRC Staff Motion for Summary Disposition and NRC Staff Motion for Dismissal (July 29, 1994) [hereinafter Staff Dispositive Motions]; Motion to Eliminate Basis for Suspension (July 29, 1994) [hereinafter Bauer Dispositive Motion]; Response to NRC Staff Motion for Summary Disposition and NRC Staff Motion for Dismissal (Aug. 29, 1994) [hereinafter Bauer Response]; NRC Staff's Response to Motion to Eliminate Basis for Suspension (Aug. 29, 1994) [hereinafter Staff Response]; NRC Staff's Reply to James E. Bauer's Response to NRC Staff's Motions (Sept. 12, 1994); Reply to NRC Staff's Response to Motion to Eliminate Basis for Suspension (Sept. 12, 1994) [hereinafter Bauer Reply].

In their dispositive motions, Dr. Bauer and the Staff seek a ruling on the jointly identified central issue of whether, as a legal matter, the Staff can rely on Dr. Bauer's purported involvement in the incidents concerning OSC's iridium-192 license and IRCC's strontium-90 license as bases for its May 1994 order barring him from all NRC-licensed activities for a five-year period (Joint Issue 4). Additionally, the Staff requests that we enter summary disposition in its favor on the jointly identified issue of whether the treatment of superficial skin

¹ Although the Board was considering whether to consolidate this proceeding with the *IRCC* proceeding, *see* Order (Establishing Schedule for Prediscovery Dispositive Motions and Filings Concerning Consolidation and Discovery) (July 1, 1994) at 1-2 (unpublished), the dismissal of the *IRCC* case renders that question moot.

lesions with strontium-90 constitutes a violation of the terms of IRCC's license (Joint Issue 1).

Finally, the Staff asks that we dismiss eight of Dr. Bauer's proposed litigation issues. This includes issues concerning the medical appropriateness of using strontium-90 as a skin lesion treatment (Bauer Issue 16); the risk to the public health and safety from using strontium-90 for skin lesion treatments (Bauer Issue 17); the possibility that the Omnitron 2000 brachytherapy afterloader machine used during the November 1992 incident was defective (Bauer Issue 35); Omnitron's duty to notify Dr. Bauer and OSC about Omnitron 2000 source wire deterioration (Bauer Issue 37); Omnitron 2000 design, manufacturing, and/or warning defects as the cause of the November 1992 incident (Bauer Issue 38); unanticipated Omnitron 2000 retraction mechanism failure and Dr. Bauer's reliance on Omnitron procedures that did not anticipate such an emergency as causes of the November 1992 incident (Bauer Issue 40); the applicability of 10 C.F.R. Part 35, Subpart G to the use of iridium-192 as a brachytherapy remote afterloader sealed source in human HDR treatments (Bauer Issue 48); and, if 10 C.F.R. Part 35, Subpart G applies to the use of iridium-192 as a remote afterloader sealed source in human HDR treatments, the applicability of the specific survey requirement of 10 C.F.R. § 35.404(a) to such treatments (Bauer Issue 49).

II. ANALYSIS

A. Dr. Bauer Motion to Eliminate Basis and Staff Motion for Summary Disposition of Joint Issue 4

1. *The Improper Bases Issue*

The parties' prehearing report jointly identifies the following as the fourth issue for litigation in this proceeding:

Whether conduct which is subject to pending litigation, i.e., Dr. Bauer's alleged conduct under License No. 37-28540-01 (HDR license) and under License No. 37-28179-01 (strontium-90 license), can, as a matter of law, be a basis for the [May 10, 1994] Order Prohibiting Involvement in NRC-Licensed Activities.

Joint Prehearing Report at 2. Both the Staff and Dr. Bauer seek a dispositive ruling in their favor on this issue.

In a pleading called "Motion to Eliminate Basis for Suspension," IRCC and Dr. Bauer contended in the IRCC proceeding that it was inappropriate to use allegations set forth in the OSC proceeding relating to activities under OSC's iridium-192 license as a basis for the November 1993 order regarding IRCC and Dr. Bauer's activities under the separate strontium-90 license because the

allegations (1) had not been adjudicated; (2) were based solely upon hearsay; and (3) lacked any substantive relationship to the license suspension/modification at issue in the proceeding. See *Indiana Regional Cancer Center*, LBP-94-21, 40 NRC 22, 28-31 (1994). In an identically titled pleading, Dr. Bauer essentially reprises these themes. He asserts that the Staff should be prevented from utilizing any of the allegations from either the January 1993 OSC order or the November 1993 IRCC order in support of the May 1994 order because (1) constitutional due process bars the use of unlitigated, hearsay allegations as the basis for an agency enforcement action; (2) Dr. Bauer has been deprived of his due process right to a timely opportunity to litigate these allegations; and (3) the allegations do not relate in any substantive way to the penalty in the May 1994 order, which bars Dr. Bauer from participating in all NRC-licensed activities. See Bauer Dispositive Motion at 4-11; see also Bauer Reply at 2-5.

Declaring that there are no material issues of fact relative to Joint Issue 4, the NRC Staff asserts that it is entitled to summary disposition on this issue.² According to the Staff, the Commission's wide-ranging authority under the Atomic Energy Act to protect the public health and safety, in conjunction with its authority under 10 C.F.R. § 2.202(a)(1) to consider any facts deemed sufficient grounds for a proposed action, is more than adequate to permit it to base the May 1994 order on Dr. Bauer's alleged conduct under the separate iridium-192 and strontium-90 licenses. In addition, the Staff declares that the "unlitigated" or "hearsay" nature of the allegations is no bar to their use because, in accordance with the requirements of due process, Dr. Bauer has been presented with understandable charges and a fair, timely opportunity to litigate those charges. The Staff further maintains that Dr. Bauer's activities under the two licenses cannot be labelled as irrelevant or immaterial to the prohibition on participation in all licensed activities imposed by the May 1994 enforcement order because there is a sufficient nexus between his alleged actions and that sanction. See Staff Dispositive Motions at 8-12; Staff Response at 3-9. Finally, the Staff asserts that if we agree with its arguments regarding Joint Issue 4, three related litigation issues propounded by Dr. Bauer — Issues 19, 20, and 22 — also must be summarily resolved in the Staff's favor. See Staff Dispositive Motions at 8 n.3. Dr. Bauer has recorded those issues as follows:

19. Whether admission of evidence regarding Dr. Bauer's conduct on November 16, 1992 is improperly prejudicial given the posture of this proceeding and the confusion of issues likely to arise from the admission of that evidence?

² In two of its statements of material fact, the Staff references the pendency of the OSC and IRCC litigation. See Staff Dispositive Motions at 5-6. As we noted above, however, those cases have been dismissed at the parties' request. See *supra* p. 327.

20. Whether the admission of evidence regarding Dr. Bauer's conduct on November 16, 1992 amounts *per se* to a denial of the due process rights of Dr. Bauer?
.....
22. Whether allegations regarding Dr. Bauer's conduct on November 16, 1992 are admissible in this proceeding in that Dr. Bauer has [not] yet had the opportunity to contest any implication of fault at a hearing and there has been no finding of fault against him?

Joint Prehearing Report at 3-4.

2. *The Board's Determination*

As the Staff points out, we previously have dealt with most of the substance of Dr. Bauer's claims regarding this issue in the IRCC proceeding. There we found that the "unlitigated" and "hearsay" nature of the Staff's allegations concerning the November 1992 iridium-192 misadministration incident were not sufficient to bar their use as a basis for an enforcement order directed to IRCC and Dr. Bauer relative to IRCC's strontium-90 license. *See Indiana Regional Cancer Center*, LBP-94-21, 40 NRC at 30-31. Those findings are applicable here, and need not be repeated.

Two aspects of Dr. Bauer's claims do merit additional discussion, however. The first is his concern that he (along with licensees OSC and IRCC) has not been afforded a timely opportunity to contest the Staff's allegations regarding the November 1992 misadministration incident and his alleged improper activities under the IRCC strontium-90 license. In this regard, Dr. Bauer correctly notes that some of these allegations involve events that occurred more than two years ago and that their validity has not yet been litigated despite being the basis for several contested Staff enforcement orders.

We conclude, however, that given the basis for and the current length of this delay, dismissal of the Staff's allegations on constitutional due process grounds is not warranted. Claiming a constitutional deprivation arising from a delayed adjudication generally requires some showing of prejudice. *See Oncology Services Corp.*, CLI-93-17, 38 NRC 44, 50-51 (1993). As the Commission already has noted in this regard, "[i]t is certainly conceivable that the passage of time may affect some witnesses' memories. However, the extent of prejudice from any potentially faded memories is far from clear." *Id.* at 59. Dr. Bauer has not made any assertion regarding the memory of any particular witness or, indeed, made any other specific claim of prejudice arising from the delay. Moreover, it has been recognized that the pendency of a related criminal investigation — the principal reason for the delay here, *see* Order (Granting Stay of Discovery) (July 18, 1994) (unpublished) — provides an appropriate basis for

postponing this litigation.³ See *Oncology Services Corp.*, CLI-93-17, 38 NRC at 53-56. We thus are unable to conclude at this juncture that the delay that has accrued in adjudicating the Staff's allegations constitutes a constitutional violation or mandates, as a matter of law, that we refuse to consider the Staff's allegations.

The other matter that requires some explication is the question of the relationship of the Staff's allegations to the penalty imposed. In our prior *IRCC* determination, we considered the issue of whether Staff allegations regarding the November 1992 brachytherapy misadministration incident could be used as a basis for the November 1993 enforcement order regarding *IRCC's* strontium-90 license. We concluded there was a "sufficient nexus" between those allegations and the regulated activities that formed the focus of the Staff's order such that we would not, as a matter of law, preclude the Staff's use of the allegations. *Indiana Regional Cancer Center*, LBP-94-21, 40 NRC at 31.

Dr. Bauer's concern here is somewhat different — i.e., that the allegations regarding his activities under licenses involving only iridium-192 and strontium-90 cannot be used as a basis to preclude him from *all* regulated activities. Analyzing this contention, however, we find that it warrants the same resolution we reached in the *IRCC* proceeding. If, for the purpose of ruling on Dr. Bauer's motion, we accept what has been pled by the Staff in the order as true, the factual circumstances set forth in the order regarding Dr. Bauer's involvement in the November 1992 incident and his activities under the strontium-90 license have a sufficient link to the challenged penalty to permit them to provide a basis for that penalty.

For both sets of allegations and the proposed penalty, the central connecting factor is Dr. Bauer and his activities with licensed materials. In each instance, it is alleged that Dr. Bauer, as an authorized user under the license in question, was substantially involved (either as a supervisor or the administering physician) in providing treatments employing licensed materials in a manner that the Staff concludes was not in conformance with agency requirements. And, contrary to Dr. Bauer's assertion, the fact that the Staff's allegations concern Dr. Bauer's activities under two separate licenses does not attenuate this link. Indeed, this broader base for the allegations seemingly provides more support for suspending Dr. Bauer's authority for "all" licensed activities than might be the case with allegations relating to activities under only one license.

Consequently, we deny Dr. Bauer's motion to eliminate the allegations regarding the November 1992 incident and Dr. Bauer's activities under the *IRCC* iridium-192 license as bases for the May 1994 enforcement order. Further, there being no material factual issues in dispute concerning Joint Issue 4, we find in

³ Indeed, in this instance Dr. Bauer has relied upon the pending criminal investigation as a basis for obtaining the postponement of Staff discovery. See Request to Stay Proceeding and Discovery (July 13, 1994) at 2-3.

favor of the Staff on that issue. Of course, the Staff continues to bear the burden of demonstrating that the allegations it has put forward in support of its May 1994 order are sufficient to sustain that enforcement order, including the penalties imposed under the order. In turn, Dr. Bauer may offer any appropriate legal or factual information challenging those allegations in an effort to show that they are insufficient to sustain the order.

Finally, regarding the Staff's assertion that the three related Dr. Bauer issues should be dismissed, as we found previously in the *IRCC* proceeding, those issues embody particular arguments about why Dr. Bauer should prevail on the general issue set forth in Joint Issue 4. *See Indiana Regional Cancer Center*, LBP-94-21, 40 NRC at 32. As there, we conclude that by addressing those assertions in ruling in the Staff's favor on Joint Issue 4, those particular issues are for all practical purposes moot and so can be dismissed from this proceeding.

B. Staff Motion for Summary Disposition of Joint Issue 1

In addition to the improper bases issue, the Staff seeks summary disposition concerning the first issue jointly identified by the parties for litigation in this proceeding. The parties delineate this issue as "[w]hether the treatment of superficial skin lesions with strontium-90 is a violation of License No. 37-28179-01?" Joint Prehearing Report at 1.

In support of its motion for summary disposition on this issue, the Staff sets forth two statements of material fact not in issue. The first declares that section 9 of the license, which is entitled "Authorized Use," contains the following statement regarding the licensed strontium-90: "For use in Atlantic Research Corporation Model B1 Medical Eye Applicator for treatment of superficial eye conditions." *See* Staff Dispositive Motion at 5.⁴ The second Staff statement asserts that "[t]here are no other authorized uses for the strontium-90 in License No. 37-28179-01." *Id.* The Staff argues that because these statements are true, it is entitled to summary disposition in its favor on Joint Issue 1.

In response, Dr. Bauer points to section 13 of the license, which states that "[t]his license is based on the licensee's statements and representations listed below: A. Application dated March 28, 1988." Dr. Bauer asserts that because paragraph 6 in the attachment to IRCC's March 1988 application states that the purpose for which licensed material will be used is "[t]reatment of superficial tissues of the eye and skin," the Staff's section 13 declaration that the license was based on the IRCC application means that the application's statement of purpose was incorporated into the license in its entirety and cannot now be disavowed by the Staff. *See* Bauer Response at 2.

⁴ A copy of NRC License No. 37-28179-01 containing this provision and IRCC's March 1988 application for the license are included as Attachments 1 and 2, respectively, to the Staff's motion.

In reviewing the parties' arguments, we find that neither has addressed a matter that may be pivotal in resolving their conflicting interpretations. Section 2.103(b) of 10 C.F.R. provides that if the Staff determines that an application for a materials license does not meet statutory or regulatory requirements, the Staff is to issue a notice of denial or proposed denial that informs the applicant of the reasons for the Staff's action and offers the opportunity for a hearing on the denial or proposed denial. In this instance, as we have noted, IRCC applied for the authority to provide both eye and skin treatments. If, as the Staff asserts, it intended that IRCC should not receive the requested authority to provide skin treatments, the following questions merit further exploration:

1. Under 10 C.F.R. § 2.103(b), was IRCC entitled to notice that its request for authority to provide skin treatments was not being granted and that it had a right to a hearing on that determination?
2. If IRCC was entitled under section 2.103(b) to the notice described in question 1, was IRCC given that notice and how was that notice provided?
3. If IRCC was entitled under section 2.103(b) to the notice described in question 1 but that notice was not provided, what impact does the failure to provide that notice have on the Staff's assertion that License No. 37-28179-01 issued to IRCC does not provide authority for skin treatments?

As the proponent of the motion for summary disposition from which these questions arise, the Staff will have the initial opportunity to address them. Dr. Bauer will then have an opportunity to respond. The schedule for the parties' filings regarding these questions is set forth below.

C. Staff Motion to Dismiss

In addition to its summary disposition requests, the Staff has moved for dismissal of eight issues identified by Dr. Bauer as central to this litigation. Dr. Bauer has delineated these issues as follows:

16. Whether the use of strontium-90 as treatment for skin lesions on the two identified patients was medically appropriate treatment?
17. Whether there was any risk to the public health, safety or other interest by virtue of the use of strontium-90 as treatment for skin lesions on the two identified patients?
.....
35. Whether the Omnitron 2000 HDR unit was defective?
.....
37. Whether despite Omnitron's knowledge of deterioration of the source wire due to a chemical reaction resulting from its packaging, Omnitron failed to notify Dr.

Bauer of the defect and OSC was not otherwise informed of the possibility of deterioration?

38. Whether any of the Omnitron 2000 design, manufacturing and/or warning defects was a cause of the November 16, 1992 incident?
.....
40. Whether the November 16, 1992 incident at IRCC occurred because of an unanticipated failure of the Omnitron 2000 retraction mechanism and a reliance by Dr. Bauer on Omnitron procedures which did not anticipate or cover this emergency?
.....
48. Whether the regulations in 10 C.F.R. Part 35 Subpart G "Sources for Brachytherapy" apply to the use of Iridium-192 as a sealed source in a brachytherapy remote afterloader for the High Dose Radiation treatment of humans ("HDR").
.....
49. If the regulations in 10 [C.F.R.] Part 35 Subpart G "Sources for Brachytherapy" apply to the use of Iridium-192 as a sealed source in a brachytherapy remote afterloader for the treatment of humans (HDR) then whether the specific survey requirement of 10 C.F.R. § 35.404(a) applies to Iridium-192 HDR.

Joint Prehearing Report at 3-6. As we have previously established in the *OSC* and *IRCC* proceedings, if it can be shown there is no set of facts that would entitle Dr. Bauer to relief relative to these proposed issues, then dismissal is appropriate. See *Indiana Regional Cancer Center*, LBP-94-21, 40 NRC at 33 & n.4; *Oncology Services Corp.*, LBP-94-2, 39 NRC 11, 23 & n.8 (1994).⁵

1. Bauer Issues 16 and 17

Bauer Issues 16 and 17 concerning the medical appropriateness and public health and safety risk of using strontium-90 as a skin lesion treatment are identical to issues posed in the *IRCC* proceeding. See *Indiana Regional Cancer Center*, LBP-94-21, 40 NRC at 32-33. There, we refused to dismiss these issues, finding that 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. See *id.* at 33-34. Because the same result obtains here, we decline to dismiss Bauer Issues 16 and 17 as well.

⁵ As he did in the *IRCC* proceeding, Dr. Bauer asserts that dismissal of these issues is inappropriate because they constitute defenses. Compare LBP-94-21, 40 NRC at 33 n.4 with Bauer Response at 3-5. As we noted there, as well as in the *OSC* proceeding, consistent with the analogous agency rules regarding contentions filed by intervenors, see 10 C.F.R. § 2.714(d)(2)(ii), these issues are subject to dismissal under the appropriate circumstances. See LBP-94-21, 40 NRC at 33 n.4.

2. *Bauer Issues 35, 37, 38, and 40*

Bauer Issues 35, 37, and 38 regarding the Omnitron 2000 remote afterloader also are identical to issues previously specified for litigation, although in the OSC proceeding. See *Oncology Services Corp.*, LBP-94-2, 39 NRC at 28. As was described earlier, the Omnitron 2000 afterloader was in use at the time of the November 1992 incident that resulted in an IRCC brachytherapy patient receiving a significant (and apparently fatal) radiation overdose. The focus of these issues is the condition of the machine at the time of the incident (i.e., was it defective) and the duties and actions of the manufacturer relative to that condition (i.e., did Omnitron know of any defect and fail to warn users, including OSC and IRCC personnel, about such an imperfection).

As in the OSC proceeding, in framing its May 1994 enforcement order relative to the November 1992 incident the Staff has not put forth any charges that dictate an inquiry into whether the Omnitron afterloader was defective or whether the machine's manufacturer breached some duty to warn about the purported defect. Instead, looking to the time after the iridium-192 source became detached from the Omnitron machine and lodged in the patient, the Staff has charged that Dr. Bauer "failed to cause a survey to be performed which was required by 10 CFR 20.201 and which could have prevented the exposures [to the patient and other members of the public.]" 59 Fed. Reg. at 25,673. As then effective,⁶ section 20.201 provided that "[e]ach licensee shall make or cause to be made such surveys as (1) may be necessary for the licensee to comply with the regulations in this part, and (2) are reasonable under the circumstances to evaluate the extent of radiation hazards that may be present." 10 C.F.R. § 20.201(b). Given the Staff's reliance on this provision, a central matter in controversy thus becomes whether Dr. Bauer's actions relative to such a survey were "reasonable under the circumstances."

We concluded in the OSC proceeding that these "defect" issues focusing on the condition of the Omnitron afterloader at IRCC and the knowledge of Omnitron personnel about the afterloader's condition had nothing to do with this question (or any other relevant matter regarding the Staff's order). We found the pertinent "circumstances" were those existing at the time of the incident relative to the actual state of knowledge of OSC personnel, including Dr. Bauer,

⁶ Beginning on January 1, 1994, section 20.201 and various other provisions of 10 C.F.R. Part 20 were replaced by revised standards. See 58 Fed. Reg. 67,657 (1993). Section 20.1501, the apparent analog to section 20.201, now provides in pertinent part:

- (a) Each licensee shall make or cause to be made, surveys that —
 - (1) May be necessary for the licensee to comply with the regulations in this part; and
 - (2) Are reasonable under the circumstances to evaluate —
 - (i) The extent of radiation levels; and
 - (ii) Concentrations or quantities of radioactive materials; and
 - (iii) The potential radiological hazards that could be present.

about the Omnitron afterloader and any possible Omnitron afterloader defects and problems. As a consequence, the "defect" issues put forth by OSC (and by Dr. Bauer here) shed no light on any relevant issue. As we noted, "for the purposes of this action, even if it is assumed that the answers to each of these three 'defect' issues is 'yes,' we would be no closer to resolving the focal issue of whether the actions of OSC personnel regarding the survey were 'reasonable under the circumstances.'" *Oncology Services Corp.*, LBP-94-2, 39 NRC at 29. The same is true in this proceeding regarding these issues. We thus dismiss Bauer Issues 35, 37, and 38 as not relevant to this proceeding.⁷

Bauer Issue 40, the wording of which was not the subject of litigation in the OSC proceeding, is stated somewhat differently than Issues 35, 37, and 38 in that it does not refer to "defects." Instead, as the Staff points out, this issue would have us inquire into whether the November 1992 incident occurred because of (1) the "unanticipated failure" of the Omnitron 2000 retraction mechanism, and (2) Dr. Bauer's reliance on Omnitron procedures that did not anticipate or cover that emergency. See Staff Dispositive Motion at 16. The Staff asserts that both portions should be dismissed, the first because it raises a "defect" issue and the second because it is better covered by other issues.

Viewing the two subparts of this issue separately, we conclude that the first suffers from the same problem plaguing Bauer Issues 35, 37, and 38. A "yes" answer would not provide any relevant information regarding the focal matter of whether Dr. Bauer acted reasonably under section 20.201 relative to taking a survey.⁸ Thus, this portion of the issue can be dismissed.

⁷ In contesting the Staff's request to dismiss these and other issues, Dr. Bauer also makes the general argument that his right to raise issues as part of his defense cannot be limited solely to those matters that directly contradict the bases set forth by the Staff in its enforcement order. According to Dr. Bauer, the Staff's "Order does not state the entire universe of facts and issues relevant to determining the existence of any supposed violation of the HDR license or the IRCC strontium-90 license" Bauer Response at 8-9 (footnote omitted).

As we have noted elsewhere, the Commission has made it clear that in proceedings involving challenges to Staff enforcement orders, the overarching matter for consideration is whether the order should be sustained and "our authority pursuant to this directive is to consider 'whether the facts in the order are true and whether the remedy selected is supported by those facts.'" *Oncology Services Corp.*, LBP-94-2, 39 NRC at 25 (quoting *Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 45 (1982), *aff'd*, *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983)). The bases asserted in an enforcement order thus do provide the principal framework for the proceeding. As a consequence, any legal or factual issue a party wants to propose in challenging (or supporting) an enforcement order must bear some relationship to those bases by tending to establish, either alone or with other issues, that some explicit or implicit legal or factual predicate to the order should not (or should) be sustained. Further, a party called upon to demonstrate this relationship must be able to do so by more than a bald pronouncement that the issue is "relevant." Cf. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 308 (1994) (mere assertions of dispute over material facts do not invalidate grant of summary disposition).

⁸ As we have indicated previously, what Dr. Bauer knew about possible Omnitron 2000 defects and failures is generally relevant to determining whether his actions relative to any survey were reasonable under 10 C.F.R. § 20.201(b). See *supra* pp. 335-36. Although it might be argued that the use of the term "unanticipated" in the first part of Bauer Issue 40 is directed at such an inquiry, the question of Dr. Bauer's knowledge about and reasonable reliance regarding the performance of the Omnitron 2000 is more properly framed in Bauer Issue 36, as it refers to reliance on the "specific features of the Omnitron," and Bauer Issue 33, which refers to purported Omnitron training that the Omnitron 2000 "source wire could not break." Joint Prehearing Report at 5.

The second segment of Issue 40 must be treated somewhat differently. As we noted in the *OSC* proceeding, Dr. Bauer's actual state of knowledge about the afterloader may be relevant in determining whether his actions relative to taking a survey were "reasonable under the circumstances." As the Staff recognizes in its dismissal motion, *see* Staff Dispositive Motion at 16, under this formulation it is possible that information regarding Dr. Bauer's reliance on Omnitron procedures could be relevant to this litigation. The Staff also asserts, however, that the second statement in Bauer Issue 40 is duplicative of other issues that the Staff has not made part of its dismissal request and so should be dismissed. *See id.* at 16-17. We agree. Nonetheless, to ensure that the particular theme of this issue is not lost, we include certain of its language in another concern — Bauer Issue 36 — to incorporate fully the concept behind this portion of Issue 40. The wording of this amended issue is set forth below.⁹

3. *Bauer Issues 48 and 49*

Bauer Issues 48 and 49 present the questions whether the provisions of Subpart G of 10 C.F.R. Part 35 apply generally to the use of iridium-192 as a brachytherapy remote afterloader sealed source in human HDR treatments and, if so, whether the specific survey requirement of 10 C.F.R. § 35.404(a) applies to iridium-192 HDR treatments. In the *OSC* proceeding, we dismissed these issues because we found that the matters they sought to raise were better stated in other specified issues. *See* LBP-94-2, 39 NRC at 26-27. The Staff asks that we dismiss those issues from this proceeding as well.

In this case, as in the *OSC* proceeding, whether compliance with 10 C.F.R. Part 35, Subpart G, and in particular section 35.404(a), would satisfy any survey requirement under 10 C.F.R. Part 20, including section 20.201, has been identified as an issue that the party contesting the Staff enforcement order wants to raise.¹⁰ We found in the *OSC* proceeding that dismissal was appropriate because this matter was more clearly articulated through other issues; however, Dr. Bauer has not incorporated all those other issues here. To ensure again that the relevant issues for litigation are stated as clearly as possible, in this instance we sanction a somewhat different approach. Because Bauer Issues 48 and 49, in combination with Bauer Issue 8, best articulate this "section 35.404(a) compliance" issue, we incorporate their essential elements into Issue 8. The terms of amended Issue 8 are set forth below.

⁹ If either party disagrees with our formulation of this issue (or Bauer Issue 8 discussed below), it is free to seek timely reconsideration of the matter. *See* 10 C.F.R. § 2.771.

¹⁰ As is evidenced by his Issues 9, 45, and 47, to complete his "section 35.404(a) compliance" rationale, Dr. Bauer apparently will seek to establish that a PrimAlert radiation monitor mounted on the wall of the IRCC brachytherapy treatment room was a "radiation survey detection instrument" within the meaning of section 35.404(a) that afforded compliance with 10 C.F.R. § 20.201.

III. CONCLUSION

After considering the parties' filings, we have concluded that under the particular circumstances here, there is no current legal impediment to the Staff relying upon allegedly improper conduct detailed in one enforcement action as a basis for a different enforcement action. We thus deny Dr. Bauer's request that the Staff be precluded from using the cited circumstances regarding the November 1992 incident and his actions concerning the IRCC strontium-90 license as bases for its May 1994 enforcement order. Moreover, finding no material issues in dispute, we grant the Staff's summary disposition motion on the same point. This ruling in favor of the Staff also compels us to dismiss related Bauer Issues 19, 20, and 22 as moot.

In contrast, we find that we now are unable to resolve the Staff's request for summary disposition on Joint Issue 1. To aid us in reaching that determination, however, we ask the parties to address several questions regarding the applicability and impact of 10 C.F.R. § 2.103(b) to the issue of what medical conditions Dr. Bauer was authorized to treat under the IRCC strontium-90 license.

Finally, acting on the Staff's motion to dismiss, we grant the Staff request relative to Bauer Issues 35, 37, 38, 40, 48, and 49, albeit with the condition that Bauer Issues 8 and 36 are to be reworded to incorporate certain concepts from Bauer Issues 40, 48, and 49. On the other hand, having found they involve matters that may entitle Dr. Bauer to some relief, we deny the Staff's motion to dismiss Bauer Issues 16 and 17.

For the foregoing reasons, it is this ninth day of December 1994, ORDERED, that

1. Dr. Bauer's July 29, 1994 motion to eliminate basis is *denied*.
2. The Staff's July 29, 1994 motion for summary disposition is *granted* as to Joint Issue 4, and related Bauer Issues 19, 20, and 22 are *dismissed* as moot.
3. Regarding Joint Issue 1 that is the subject of the Staff's July 29, 1994 motion for summary disposition, on or before *Friday, January 6, 1995*, the Staff shall file a pleading addressing the questions set forth at page 333 *supra*. Dr. Bauer shall have up to and including *Friday, February 3, 1995*, within which to file a response to that pleading. In addition to regular service by mail on each Board member and the opposing party, each party should send a copy of its pleading to the Board and the opposing party by facsimile transmission or other means that will ensure receipt by 4:30 p.m. EST on the day of filing.
4. The Staff's July 29, 1994 motion to dismiss is *granted* as to Bauer Issues 35, 37, 38, 40, 48, and 49, and is *denied* as to Bauer Issues 16 and 17.
5. Bauer Issue 36 is *amended* to incorporate language from Bauer Issue 40 so that Issue 36 reads as follows:

36. Whether reliance by Dr. Bauer on specific features of the Omnitron and on Omnitron procedures that did not anticipate or cover a failure of the Omnitron 2000 retraction mechanism was reasonable in November 1992?

6. Dr. Bauer Issue 8 is *amended* to incorporate language from Bauer Issues 48 and 49 so that Issue 8 reads as follows:

8. Regarding the use of Iridium-192 as a sealed source in a brachytherapy remote afterloader for the High Dose Radiation treatment of humans ("HDR"):
- a. Is 10 C.F.R. Part 35, Subpart G, including the specific survey requirement in section 35.404(a), applicable?
 - b. As a matter of law, does fulfilling any of the applicable survey requirements in 10 C.F.R. Part 35, Subpart G, control and/or satisfy the reasonableness standard in 10 C.F.R. § 20.201?

THE ATOMIC SAFETY AND
LICENSING BOARD¹¹

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Charles N. Kelber
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 9, 1994

¹¹ Copies of this memorandum and order are being sent this date to counsel for Dr. Bauer by facsimile transmission and to Staff counsel by E-mail transmission through the agency's wide area network system.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Frederick J. Shon
James H. Carpenter

In the Matter of

Docket Nos. 030-05980-OM&OM-2
030-05981-OM&OM-2
030-05982-OM&OM-2
030-08335-OM&OM-2
030-08444-OM&OM-2
030-05980-ML&ML-2
030-05982-ML&ML-2
030-05980-EA
030-05982-EA
(ASLBP Nos. 89-590-01-OM
90-598-01-OM-2
92-659-01-ML
92-664-02-ML-2
93-675-04-EA)

SAFETY LIGHT CORPORATION, *et al.*
(Bloomsburg Site Decontamination,
Decommissioning, License Renewal
Denials, and Transfer of Assets)

December 28, 1994

ORDER

(Approving Settlement Agreement and Terminating Proceedings)

On September 20, 1994, the NRC Staff, Safety Light Corporation ("SLC"), Metreal, Inc., and USR Industries, Inc., USR Lighting Products, Inc., USR

Chemical Products, Inc., USR Metals, Inc., and U.S. Natural Resources, Inc. ("USR Companies"), filed a joint motion for approval of a settlement agreement in the five pending *Safety Light* proceedings. Thereafter, on October 18, 1994, we held a brief hearing on the parties' joint motion and the proposed settlement agreement. At the hearing, the parties requested that we withhold final action on the joint motion until all outstanding matters relating to the Trust Agreement referenced in the Settlement Agreement had been resolved. On December 22, 1994, Staff counsel informed us that the Trust Agreement had been executed.

Upon consideration of the joint motion and the proffered settlement agreement, we find that the settlement agreement comports fully with the public interest. *See* 10 C.F.R. § 2.203. Accordingly, we approve the attached settlement agreement and incorporate its terms into this order with the following minor amendments agreed to by the parties:

(1) In line 7 of numbered paragraph 7, the date "May 31, 1995" should be amended to read "September 30, 1995."

(2) In the second sentence of numbered paragraph 8, the portion of the sentence beginning with the word "unless" should be amended to read "unless otherwise prohibited by law or court order."

(3) In numbered paragraph 9, subparagraph (a), line 13, the word "February" should be amended to read "March."

(4) In numbered paragraph 14, the language inside the parentheses should be amended to read "(except as modified by the letters referenced in Footnote 6 above)."

Further, the request of SLC and the USR Companies to withdraw their requests for hearing on the Staff's orders of March 16, 1989, August 21, 1989, and January 29, 1993, and their request that they be dismissed as parties to the proceedings on those orders is *granted*. The proceedings on these three Staff orders are hereby *dismissed with prejudice*.

In view of the Staff's rescission of its denial of SLC's applications to renew License Nos. 37-00030-02 and 37-00030-08 ("the 02 and 08 Licenses"), the Staff's rescission of its decommissioning order of February 7, 1992, and the Staff's commitment to renew the 02 and 08 Licenses for a 5-year period following the issuance of this order, the request of SLC and the USR Companies to withdraw their requests for hearing on the license renewal denials and the February 7, 1992 decommissioning order is *granted*. The proceedings on the license renewal denials and the decommissioning order are hereby *dismissed with prejudice*.

Finally, the parties are directed to revise the dates specified in the settlement agreement so that the monthly obligations of SLC and USR Industries will commence on the first day of the month immediately following the date of this order. The parties are also directed to revise the 5-year license renewal period

specified in the agreement to commence on the first business day of the month immediately following the date of this order.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Thomas S. Moore
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

James H. Carpenter
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 28, 1994

SETTLEMENT AGREEMENT

THIS AGREEMENT is made by and between Safety Light Corporation ("SLC"); USR Industries, Inc., USR Lighting, Inc., USR Chemical Products, Inc., USR Metals, Inc., and U.S. Natural Resources, Inc. (the "USR Companies"); Metreal, Inc.;¹ and the Staff of the United States Nuclear Regulatory Commission ("NRC Staff" or "Staff"), to wit:

WHEREAS SLC is the named licensee on Byproduct Material License Nos. 37-00030-02 (the "-02 License"), 37-00030-08 (the "-08 License"), 37-00030-09G, and 37-00030-10G, issued by the NRC, which licenses authorize the possession and use of byproduct material at SLC's facility located at 4150-A Old Berwick Road, Bloomsburg, PA 17815 (the "Bloomsburg facility" or "Bloomsburg site"); and

WHEREAS the -02 License, as amended on August 5, 1969, authorizes the possession, storage, and use of any byproduct material for purposes of decontamination, clean-up, and disposal of equipment and facilities previously used for research, development, manufacturing, and processing at the Bloomsburg

¹ SLC, the USR Companies, United States Radium Corporation, Lime Ridge Industries, Inc., and Metreal, Inc. are collectively referred to herein as the "Respondents"; however, the parties recognize that United States Radium Corporation and Lime Ridge Industries, Inc. have ceased to exist as corporate entities.

site, which license was last renewed on January 25, 1979, and which license has been under timely renewal since February 29, 1984; and

WHEREAS the -08 License authorizes research and development activities and the manufacture of various devices containing tritium, which license was last renewed on January 6, 1983, and which license has been under timely renewal since December 31, 1987; and

WHEREAS on March 16, 1989, the Staff issued an Order to the Respondents, requiring them, *inter alia*, to control access to the Bloomsburg site, prepare and implement a site characterization plan, and prepare and implement a site decontamination plan, due to the presence of radiological contamination in the soil, groundwater, buildings and equipment at the Bloomsburg facility;² and

WHEREAS on August 21, 1989, the Staff issued a second Order, requiring the Respondents, *inter alia*, to set up a trust fund and to deposit \$1,000,000 into that fund according to a specified schedule to cover the cost of implementing a site characterization plan and of taking necessary immediate actions to remediate any significant health and safety problems that might be identified during site characterization;³ and

WHEREAS on February 7, 1992, the Staff denied the applications submitted by SLC to renew the -02 License and the -08 License, based on the Staff's determination that the Respondents had failed to comply with the Commission's regulations requiring financial assurance for decommissioning funding as set forth in 10 C.F.R. § 30.35;⁴ and

WHEREAS also on February 7, 1992, the Staff issued an Order requiring the Respondents, *inter alia*, to decommission the Bloomsburg site in accordance with the requirements of 10 C.F.R. § 30.36 and the schedule and criteria provided with that Order, so that the site may be released for unrestricted use;⁵ and

WHEREAS on January 29, 1993, the Staff issued an Order which, *inter alia*, prohibited SLC from implementing its Asset Purchase Agreement of January 4, 1993, prohibited SLC from implementing any transfer of major assets other than in the normal course of business for full fair value, and required SLC to set aside in a separate account any and all funds which it received or may receive under the above-mentioned Asset Purchase Agreement;⁶ and

² "Order Modifying Licenses (Effective Immediately) and Demand for Information," dated March 16, 1989, at 5-6, 54 Fed. Reg. 12035 (March 23, 1989).

³ "Order Modifying Licenses (Effective Immediately)," dated August 21, 1989, at 6-12, 54 Fed. Reg. 36078 (Aug. 31, 1989).

⁴ Letter from Robert M. Bernero (Director, Office of Nuclear Material Safety and Safeguards), to Jack Miller (President, Safety Light Corporation), *et al.*, dated February 7, 1992.

⁵ "Order Establishing Criteria and Schedule for Decommissioning the Bloomsburg site," dated February 7, 1992, at 6, 57 Fed. Reg. 6136 (Feb. 20, 1992).

⁶ "Order to Safety Light Corporation Prohibiting the Transfer of Assets and Requiring the Preservation of the Status Quo (Effective Immediately) and Demand for Information," dated January 29, 1993, 58 Fed. Reg. 7268 (Feb. 5, 1993). *See also*, (1) letter from Robert M. Bernero to C. Richter White, dated May 20, 1993, authorizing

WHEREAS SLC and/or the USR Companies have requested a hearing on each and every one of the Staff's Orders and license renewal denials described above, in response to which proceedings have been convened and remain pending before a Licensing Board at this time; and

WHEREAS the undersigned parties recognize that certain advantages and benefits may be obtained by each of them through settlement and compromise of some or all of the matters now pending in litigation between them, including, without limitation, the completion of a radiological characterization study of the Bloomsburg site, the dedication and expenditure of certain funds for the purposes specified herein, the elimination of further litigation expenses, uncertainty and delay, and other tangible and intangible benefits, which the parties recognize and believe to be in the public interest;

IT IS NOW, THEREFORE, AGREED AS FOLLOWS:

1. The Staff hereby agrees, as set forth in *Paragraph 9* below, (a) to rescind its denial of SLC's applications to renew the -02 and -08 Licenses, and to grant a renewal of those licenses for a period of five years (until August 31, 1999), upon SLC's satisfaction of the Respondent(s)' obligations with respect to all outstanding fees and charges that have been assessed or levied by the NRC, and (b) in connection with the issuance of said renewal, to issue an exemption from the requirements of 10 C.F.R. §§ 30.32(h) and 30.35 limited to the five-year renewal period, in accordance with the following provisions.

2. SLC and the USR Companies hereby agree that during the five-year renewal period, they will (a) set aside from operating revenues (or any source other than their insurance litigation, any judgments or settlements they may receive with respect thereto, or amounts they may receive as a result of any claims they may have against agencies or departments of the U.S. Government), certain sums as set forth in *Paragraph 3* below, to be paid on the first day of each successive month commencing September 1, 1994 (for a total of \$396,000), to be used for the purposes specified in *Paragraph 17* below, (b) complete a site characterization study, to be performed by Monserco Limited ("Monserco"), a Canadian corporation, or any other company selected by SLC and approved by the Staff, which adequately describes the nature, extent, quantities, and location of the contamination present at the Bloomsburg site in accordance with an approved site characterization plan, as set forth in *Paragraph 7* herein, (c) vigorously pursue their claims in any present or future insurance litigation pertaining to the Bloomsburg site, and any other claims against third parties which they may believe themselves to have, the proceeds of which are to be set aside in accordance with the terms of this Agreement as set forth below,

return of the purchase money deposit to Shield Source, Inc. (SSI) upon rescission of the January 4, 1993, Asset Purchase Agreement (APA), and (2) letter from C. R. White to Robert M. Bernero, dated May 21, 1993, rescinding the APA and informing the NRC that SLC is returning the deposit money to SSI.

and submit quarterly reports to the NRC Staff describing in detail the progress and accomplishments achieved in that litigation during each preceding 90-day period.

3. Pursuant to *Paragraph 2* herein, SLC and the USR Companies agree to set aside and deposit the following sums in an escrow account or trust fund approved by the NRC Staff, in accordance with the following schedule:

(a) *SLC*

September 1, 1994, and on the first day of each month thereafter, for 24 months	\$5,000
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September 1, 1996, and on the first day of each month thereafter, for 24 months	\$6,000
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September 1, 1998, and on the first day of each month thereafter, for 12 months	\$7,000
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(For a total of \$348,000)

(b) *The USR Companies*

September 1, 1994, and on the first day of each month thereafter, for 48 months	\$1,000
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(For a total of \$48,000)

In connection herewith, it is expressly understood and agreed that the financial contributions specified herein do not in any manner represent or reflect the NRC Staff's view of the Respondents' respective responsibility or liability for the Bloomsburg site, the contamination present there, or the NRC licenses issued with respect thereto, nor do they represent or reflect any admission by the USR Companies of NRC jurisdiction over the USR Companies, as set forth in *Paragraphs 10 and 15* herein.

4. It is expressly understood and agreed that no further renewal of the -02 License or the -08 License beyond the five-year renewal period will be issued, unless the Respondents, or any of them, have, in addition to demonstrating compliance with all other applicable requirements, first submitted a decommissioning funding plan, including financial assurance for decommissioning, which complies with the requirements of 10 C.F.R. § 30.35 to the satisfaction of the NRC Staff, or have obtained a further exemption from the requirements of that regulation. The failure to submit such a decommissioning funding plan to the satisfaction of the NRC Staff or to obtain a further exemption will result in

expiration, revocation or suspension of the -02 and -08 Licenses as of August 31, 1999, and will cause the requirements of 10 C.F.R. § 30.36 to apply.

5. SLC agrees to be responsible for undertaking all necessary and proper radiation safety precautions, or assuring that such precautions are taken, and to implement an adequate radiation safety program during the performance of the site characterization study, regardless of whether that study is performed by SLC or a third party acting under contract to SLC.

6. SLC has submitted to the Staff for its review and approval, a plan for a site characterization study, developed by Monserco, to determine the nature, extent, quantities, and location of the contamination present at the Bloomsburg site, which plan, as revised in written communications between the parties, has been approved by the Staff. SLC represents that it and Monserco have contracted for the performance of a site characterization study consistent with the aforesaid plan, contingent upon the Licensing Board's approval of this Agreement, and it is further understood and agreed that SLC and the USR Companies hereby consent to the use of funds previously set aside from the proceeds of their insurance litigation in Princeton Bank and Trust Company, Custodial Account 44-01-000-8690771, up to a maximum of \$450,000, as may be necessary to complete the site characterization study.

7. SLC agrees that it will undertake to conduct the aforesaid site characterization study, to be performed by Monserco or any other company selected by SLC and approved by the Staff, sufficient to determine the nature, extent, quantities, and location of the contamination present at the Bloomsburg site, which study it agrees to complete and submit for NRC Staff approval on or before May 31, 1995, and thereafter to promptly modify or supplement that study in accordance with any Staff requests, comments or conclusions, so long as the cost of such modified or supplemental studies, together with the original study, does not exceed \$450,000 plus any sums set aside pursuant to *Paragraphs 3 and 8* herein.

8. SLC and the USR Companies agree to use their best efforts to set aside and deposit in a trust fund or escrow account, as set forth in *Paragraph 16* below, from the proceeds of their insurance litigation and claims against third parties, as specified herein, realized during the five-year license renewal period and the subsequent decommissioning period, including any judgments or settlements pertaining thereto (after deduction of legal fees and expenses directly related to such litigation), a percentage equal to 25% of such amounts, or any larger percentage of such amounts as may be specified in said judgments or settlements to pertain to the Bloomsburg site. Notwithstanding anything to the contrary which may be contained in this Agreement, it is further understood and agreed that SLC and the USR Companies shall deposit and set aside said 25% or other portion of such proceeds unless prohibited from doing so by the insurers or other parties to such litigation or claims.

9. The parties agree that, as an integral part of this Agreement, they will take the following actions with respect to the adjudicatory proceedings now pending before the Licensing Board:

(a) Upon execution of this Agreement, and subject to its approval by the Licensing Board, (1) SLC and the USR Companies will withdraw their requests for hearing on the Staff's Orders of March 16, 1989, August 21, 1989, and January 29, 1993, and request that they be dismissed as parties in the proceedings pertaining to those Orders, and (2) the parties will file a joint request for dismissal of the proceedings on those Orders, with prejudice, it being understood and agreed that the parties shall oppose any vacation of the prior rulings and decisions on jurisdiction entered in these proceedings, and it being further understood and agreed that this Agreement resolves all outstanding issues with respect to the Staff's Orders of February and August 1989, and the Staff will take no enforcement or other action against SLC and the USR Companies in connection with those Orders;⁷

(b) Also upon execution of this Agreement, and subject to its approval by the Licensing Board, (1) the Staff will rescind its license renewal denials and decommissioning order of February 7, 1992, (2) SLC and the USR Companies will withdraw their requests for hearing on the license renewal denials and the Staff's decommissioning order of February 7, 1992; and (3) the parties will file a joint request that the Licensing Board dismiss, with prejudice, all matters pertaining to the denials and decommissioning order of February 7, 1992; and

(c) Also upon execution of this Agreement, and subject to its approval by the Licensing Board, the Staff will grant a renewal of the -02 and -08 Licenses as set forth in *Paragraph 1*.

10. It is understood and agreed that, notwithstanding any other provision in this Agreement, following execution of this Agreement, SLC and the USR Companies will pursue no other litigation or claim in connection with any Staff Order or other action referenced herein, and it is further understood and agreed that the USR Companies hereby agree not to contest the NRC's jurisdiction to take enforcement or other actions with respect to the terms of this Agreement, provided, however, that nothing contained in this Agreement shall be understood or construed to otherwise preclude, prejudice or restrict the USR Companies'

⁷ The parties recognize that, following execution of this Agreement and its approval by the Licensing Board, the USR Companies may seek to reach a separate agreement with the NRC Solicitor's Office, whereby the USR Companies and the NRC would stipulate to the withdrawal of those Companies' Petitions for Review filed in Appeal Nos. 89-1638 and 90-1407 in the U.S. Court of Appeals (D.C. Circuit) without prejudice to the re-filing of such Petitions within 90 days after completion of the five-year license renewal period. However, the parties agree that whether or not such actions are taken does not affect the validity and finality of this Settlement Agreement.

right to challenge the NRC's jurisdiction to take enforcement actions against them as to other matters.

11. SLC and the USR Companies hereby agree to waive any and all rights or opportunity they may have to request a hearing in the event that the Respondents fail to demonstrate compliance with 10 C.F.R. § 30.35 to the satisfaction of the NRC Staff by the conclusion of the five-year renewal period, or in the event that SLC or the USR Companies fail to make monthly payments in the manner and at the times set forth herein or to otherwise comply with any of the foregoing requirements which the Director of the Office of Nuclear Material Safety and Safeguards may determine in his sole discretion to be a material breach of this Agreement, or in the event that the Staff declines to renew the -02 and -08 Licenses after the five-year renewal period due to SLC's non-compliance with 10 C.F.R. § 30.35, or in the event the Staff determines to deny any further request for exemption from the requirements of 10 C.F.R. § 30.35. In this regard, it is explicitly understood and agreed that the Staff's determination of compliance or non-compliance with 10 C.F.R. § 30.35, and its determination whether to grant or deny any further request for exemption from 10 C.F.R. § 30.35, shall be binding for all purposes, and SLC and the USR Companies hereby agree that such Staff determination shall not be the subject of any request for hearing or adjudicatory review. It is further understood and agreed, however, that if the Staff determines to deny any renewal application for reasons other than a failure to comply with the requirements of 10 C.F.R. § 30.35, the Respondents shall have the right to request a hearing with respect to such determination on grounds other than whether they have complied with 10 C.F.R. § 30.35, prior to the effective date of such Staff action, in accordance with the Commission's Rules of Practice in 10 C.F.R. Part 2.

12. It is further understood and agreed that in the event the Staff determines at the conclusion of the five-year renewal period that the Respondents have failed to demonstrate compliance with 10 C.F.R. § 30.35, as set forth in *Paragraph 4* above, and that any further request for exemption from 10 C.F.R. § 30.35 should be denied, the Respondents shall not be eligible for any further renewal of the -02 and -08 Licenses, and they shall thenceforth be obligated to satisfy the provisions in 10 C.F.R. § 30.36 ("[e]xpiration and termination of licenses"), provided, however, that the USR Companies reserve the right to contest the NRC's jurisdiction to compel the USR Companies to comply with 10 C.F.R. § 30.36.

13. In the event the Director of the Office of Nuclear Material Safety and Safeguards determines, in his sole discretion, that the Respondents have acted, or failed to act, in a manner which constitutes a material breach of this Agreement, or that the Respondents have failed to demonstrate compliance with 10 C.F.R. § 30.35 upon the conclusion of the five-year renewal period and that no further exemption from 10 C.F.R. § 30.35 should be granted, in addition to

the requirements of 10 C.F.R. § 30.36, SLC and the USR Companies hereby agree (a) not to contest any decommissioning order which the Staff may then issue (provided that any such order does not contain terms which are more restrictive or burdensome than those contained in the decommissioning order of February 7, 1992 and/or any NRC regulations which may then be in place), (b) to comply with any requirement which the Staff may then issue that they safely remove or dispose of all radioactive materials and devices which may be present at the Bloomsburg site, and (c) to maintain the existing perimeter fence and warning signs, as set forth in *Paragraphs 17 and 18* below, provided, however, that nothing contained in this Agreement shall be understood or construed to preclude, prejudice or restrict the USR Companies' right to challenge the NRC's jurisdiction with respect to those Companies in the future, as stated above in *Paragraph 10*.

14. The provisions of the Staff's Order of January 29, 1993, are expressly incorporated herein by reference and SLC hereby agrees to comply with the requirements of that Order (except as discussed in *Footnote 6* above), unless and until such time as it is relieved of such obligations, in writing, by the NRC Staff.

15. It is understood and agreed that the USR Companies reserve the right to challenge the NRC's jurisdiction as to those companies, should they so desire (except as to their obligations under this Agreement), in any appropriate forum, notwithstanding the terms of any provision in this Agreement, as stated above in *Paragraph 10*. It is further understood and agreed that the Staff does not waive or relinquish its claim of NRC jurisdiction as to those companies, notwithstanding the terms of any provision in this Agreement.

16. SLC and the USR Companies hereby agree that any and all funds required to be set aside pursuant to this Agreement shall be set aside and maintained in an interest-bearing trust fund or escrow account to be established and governed in accordance with the Staff's guidance, in the form attached hereto. It is further agreed that no money deposited in this fund, and no interest earned thereon, shall be committed or spent without prior written approval of the Staff, during and after the five-year renewal period specified herein.

17. SLC and the USR Companies further agree that any and all funds required to be set aside pursuant to this Agreement shall be used exclusively for purposes of site decontamination, cleanup, decommissioning, satisfaction of 10 C.F.R. § 30.36, maintenance of the perimeter fence and warning signs, and such other measures as are appropriate and necessary to protect the public health and safety and are approved in advance, in writing, by the Staff. In addition, such funds may be used to pay for any additional costs required for completion of the site characterization study referred to herein, in the event and to the extent that such costs may exceed the cost of the study agreed to in advance by the parties hereto pursuant to *Paragraph 6* herein. To the extent that any funds remain after

the completion of decommissioning and such other uses as specified herein, such funds shall be returned to the control of SLC and the USR Companies.

18. SLC hereby agrees to maintain the perimeter fence and warnings signs posted at the Bloomsburg site throughout the renewal period and for a period of ten (10) years thereafter, or until termination of the license with an NRC determination that the site can be released for unrestricted use, whichever occurs first.

19. SLC and the USR Companies hereby agree that they shall neither abandon nor transfer the Bloomsburg facility or any major equipment or assets located at the Bloomsburg site without prior written approval by the NRC Staff, which approval shall not be unreasonably withheld.

20. It is expressly understood and agreed that nothing contained in this Agreement shall relieve the Respondent(s) from complying with all applicable NRC regulations and the terms and conditions of the -02 and -08 Licenses during the renewal period, and, further, that nothing contained in this Agreement shall be binding on, or preclude lawful action by, any other Government agency or department.

21. SLC and the USR Companies hereby agree that any failure on their part to complete the site characterization study described above, to make the monthly payments described above when due (or within five days thereafter) or to comply with any other provision contained in this Agreement will constitute a material breach of this Agreement. Further, SLC and the USR Companies hereby agree that any such breach, or any failure to demonstrate compliance with 10 C.F.R. § 30.35 to the satisfaction of the Staff prior to expiration of the five-year renewal period specified herein, will result in the immediate expiration, revocation or suspension of the Licenses, effective immediately, without any right to or opportunity for hearing in connection therewith, provided, however, that the Staff hereby agrees that it will not revoke, suspend or declare an expiration of the Licenses in the event that any such breach involves solely a failure by the USR Companies to make monthly payments as required herein (in which case it is understood and agreed that the Staff may take such other legal actions against the USR Companies as the Staff may then deem to be appropriate including, without limitation, the right to resort immediately to a court of law in a collection action, and the USR Companies hereby waive any right they may have to seek an administrative remedy in connection therewith). In this regard, SLC and the USR Companies further consent to the entry of a Judgment providing (a) that the license expiration, revocation, suspension, or license renewal denials and any decommissioning order which the Staff may issue upon expiration, revocation or suspension of the Licenses (if such order does not contain terms which are more restrictive or burdensome than those contained in the decommissioning order of February 7, 1992, and/or any NRC regulations which may then be in place) shall be deemed to be immediately

effective in such event, with no right to or opportunity for hearing in connection therewith, subject only to the USR Companies' right to contest the NRC's jurisdiction over those Companies as set forth in *Paragraphs 10 and 15* herein, and (b) that any amounts required hereunder, whether deposited or undeposited in the trust fund or escrow account established pursuant to this Agreement, or otherwise unpaid as specified herein, shall be due and payable immediately in the event of a material breach hereof (except that amounts required to be paid by SLC shall not be due and payable immediately in the event of a breach by the USR Companies alone), and shall be treated as funds set aside to partially satisfy regulatory requirements established by the U.S. Nuclear Regulatory Commission to protect the health and safety of the public from an ongoing and continuing threat.

22. It is understood and agreed that this Agreement is contingent upon (a) notification of SLC by the Staff that it has completed its review of and is prepared to act favorably upon SLC's license renewal application, consistent with the terms of this Agreement, and (b) prior approval by the Atomic Safety and Licensing Board.

23. This Agreement shall be binding upon the heirs, legal representatives, successors and assigns of the corporate entities that are parties hereto.

IN WITNESS WHEREOF, we set our hand and seal this day of August, 1994.

For Safety Light Corporation,
and Metreal, Inc.:

C. Richter White, President

8/16/94

For USR Industries, Inc.,
USR Metals, Inc.,
USR Chemical Products, Inc.,
USR Lighting, Inc., and
U.S. Natural Resources, Inc.:

Ralph T. McElvenny, Jr., Chairman

For the NRC Staff:

Robert M. Bernero, Director
Office of Nuclear Material Safety
and Safeguards

9/14/94

Attachment: Form of Trust

**Directors'
Decisions
Under
10 CFR 2.206**

DIRECTORS' DECISIONS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Robert M. Bernero, Director

In the Matter of

Docket No. 40-8681
(License No. SUA-1358)

ENERGY FUELS NUCLEAR, INC.

December 14, 1994

The Honorable Michael O. Leavitt, Governor of the State of Utah, and the Utah Legislature requested, by a letter dated May 2, 1994, and Utah Senate concurrent Resolution No. 11, "Resolution Regarding NRC Action Regarding Disposal of Uranium By-Product 1994 General Session," that the Nuclear Regulatory Commission modify Umetco Minerals Corporation Source Material License No. SUA-1358 (now held by Energy Fuels Nuclear, Inc.), to reflect the original request of the Licensee for authority to dispose of 5000 cubic yards of 11e(2) byproduct material per in situ leach facility at the White Mesa Uranium Mill facility. Petitioners also requested that the Commission confer with the State of Utah and provide opportunity for comment prior to the issuance of license amendments involving uranium mill tailings disposal in Utah, and that the NRC obtain the concurrence of the Governor and Legislature before issuing license amendments involving disposal of uranium mill tailings in Utah. After careful consideration of Petitioners' requests, the Director of the Office of Nuclear Material Safety and Safeguards grants the request to modify Source Materials License No. SUA-1358 and the request to confer with the State of Utah insofar as the NRC shall provide direct and *Federal Register* notice of significant materials licensing actions in the State of Utah, and denies the request to obtain concurrence of Petitioners before issuing license amendments involving disposal of uranium mill tailings in Utah.

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

I. INTRODUCTION

The Honorable Michael O. Leavitt, Governor of the State of Utah, and the Utah Legislature (Petitioners) submitted a letter dated May 2, 1994, and a copy of Utah Senate Concurrent Resolution No. 11, "Resolution Regarding NRC Action Regarding Disposal of Uranium By-Product 1994 General Session" (Petition) pursuant to 10 C.F.R. § 2.206, in regard to Amendment No. 33 to Umetco Minerals Corporation (Umetco) Source Material License No. SUA-1358, which authorized disposal of up to 10,000 cubic yards (cy) of 11e(2) byproduct material per in situ leach (ISL) facility per year at the White Mesa Uranium Mill facility. Petitioners request that the "NRC reconsider the license amendment issued to Umetco and modify the amendment to reflect the original request of 5,000 cubic yards [cy] [per in situ facility]." Petitioners assert as the basis for this request that the NRC in effect created the equivalent of a commercial waste disposal facility for in situ mining waste unlicensed by Utah, while ignoring Utah's waste policy and laws. Petitioners also urge the NRC to confer with the State of Utah and provide opportunity for comment prior to the issuance of license amendments involving uranium mill tailings disposal in Utah. Finally, Petitioners request that the NRC obtain the concurrence of the Utah Governor and Legislature before issuing license amendments involving disposal of uranium mill tailings in Utah. By letter dated May 13, 1994, the State of Utah was notified that the Petition was under review and that a response would be provided in a timely manner.

The Petition has been reviewed on its merits, and as a result of this review, for the reasons stated below, Petitioners' request to modify Source Material License No. SUA-1358 is granted. Petitioners' request that the NRC confer with Petitioners before taking action on future license amendments involving disposal of uranium mill tailings in Utah is granted, insofar as the NRC shall provide notice of significant materials licensing actions in the State of Utah, such as for authorization to dispose of in situ leach facility 11e(2) byproduct material or for approval of significant changes to an approved reclamation plan, and thereby provide an opportunity to comment. Petitioners' request that the NRC obtain the concurrence of the State of Utah before issuing license amendments involving mill tailing disposal in the State of Utah is denied.

II. BACKGROUND

On February 6, 1978, Energy Fuels Nuclear, Inc. (EFN) submitted an application for a source material license for the proposed White Mesa Mill. The NRC issued an Environmental Impact Statement (EIS) for White Mesa Mill in

May 1979. In August of 1979, NRC issued Source Material License SUA-1358 to EFN. The White Mesa Mill operated on a continuous basis from August 1979 through February 1983 when operations were suspended. In January of 1984 Umetco purchased a controlling interest in the White Mesa Mill from EFN. The license was amended on December 5, 1984, to reflect the change in ownership and Umetco's status as the licensee. Production resumed in October 1985 and the White Mesa Mill has alternately operated and been on standby mode until the present time. EFN recently repurchased the controlling interest in the White Mesa Mill, and on May 25, 1994, the NRC Staff issued License Amendment No. 35, authorizing the transfer of ownership to EFN, the current licensee.

By letter dated May 20, 1993, Umetco submitted an application for a license amendment to authorize the receipt and disposal of 11e(2) byproduct material from NRC-licensed and Agreement State-licensed in situ leach facilities. Byproduct material, under Section 11e(2) of the Atomic Energy Act of 1954, as amended, is defined as "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." Specifically, Umetco requested that Source Material License No. SUA-1358 be amended to authorize:

disposal of not more than 5,000 cubic yards of 11e(2) byproduct material per generating [in situ] licensee. If Umetco received a request to dispose of more than 5,000 cubic yards of 11e(2) byproduct material, Umetco would notify URFO [NRC's Uranium Recovery Field Office¹] in writing so that the appropriate review and approval could be received from the URFO staff prior to executing a contract [contract].

The NRC Staff reviewed Umetco's license amendment application and issued License Amendment 33 on August 2, 1993.² License Amendment 33 authorized, through License Condition 55, the disposal of:

byproduct material generated at licensed in situ leach facilities, subject to the following condition that:

- A. Disposal of waste [11e(2) byproduct material] in excess of 10,000 cubic yards per year from single sources shall require specific approval from NRC.

The NRC Staff concluded that License Condition 55 would not result in significant impacts to the environment or to public health and safety. Further, the Staff concluded that License Condition 55 was consistent with 10 C.F.R. Part 40, Appendix A, Section I, Criterion 2, which is intended to avoid the

¹ The Uranium Recovery Field Office closed on August 3, 1994, and the responsibility for uranium recovery licensing was transferred to the NRC's Office of Nuclear Material Safety and Safeguards, Division of Waste Management.

² Envirocare of Utah, Inc., requested a hearing on License Amendment 33 which was denied on the grounds of timeliness. *Umetco Minerals Corp.*, Memorandum and Order, ASLBP No. 94-688-01-MLA-2 (March 4, 1994).

proliferation of small waste disposal sites, which would result if disposal in large tailings systems were not authorized.

III. DISCUSSION

A. License Condition 55

Petitioners contend that License Condition 55, which allows Umetco to dispose of up to 10,000 cy of in situ leach 11e(2) byproduct material per year at the White Mesa facility annually from any source, in effect creates the equivalent of a commercial disposal facility for in situ leach 11e(2) byproduct material in Utah. Petitioners therefore requested that License Condition 55 be modified "to reflect the original request of 5,000 cubic yards [per in situ facility]."

The NRC Staff agrees with the Petitioners that the Licensee's authorization to dispose of 11e(2) byproduct material should be limited to the 5000 cy per in situ leach facility requested by the Licensee. By way of background, however, it should be noted that License Amendment No. 33 authorized disposal of 11e(2) byproduct material consistent with NRC regulations, which require that 11e(2) byproduct material from in situ leach mines be disposed of at uranium mill tailings facilities. 10 C.F.R. Part 40, Appendix A, Section I, Criterion 2. Also, the byproduct material authorized for disposal at the White Mesa Mill represents only a subset of radioactive waste materials. Specifically, White Mesa Mill is authorized to dispose of only 11e(2) byproduct material (mill tailings), and 11e(2) byproduct material only from in situ leach facilities. Before EFN could dispose of 11e(2) byproduct material other than that from its own operations or from in situ leach facilities, EFN would be required to seek licensing authority to do so. In addition, the 10,000 cy per in situ leach facility per year authorized for disposal by License Amendment 33 at White Mesa Mill was insubstantial in comparison to the 2000 tons [1481 cy] per day for 15 years contemplated in the original licensing of White Mesa Mill. NUREG-0556, "Final Environmental Statement Related to Operation of White Mesa Uranium Project" (May 1979), at iii.

Although License Amendment No. 33 would not have resulted in the disposal of byproduct waste material in amounts approaching that contemplated at the time of the original license grant for the White Mesa Mill facility, License Condition 55 did authorize disposal of more 11e(2) byproduct material than was requested by the Licensee. The NRC practice is, generally, to grant only the disposal authority requested by the license amendment application, and no more. During an October 20, 1994 discussion with the NRC Staff, the Licensee agreed to issuance of an order to modify the license to reflect the application for authority to dispose of 5000 cy of 11e(2) byproduct material per in situ facility. Accordingly, for the reasons stated above, the license will be so modified by a

"Confirmatory Order Modifying License Condition 55" to be issued concurrently with this Decision.

B. Requests to Confer with and to Obtain Concurrence of Petitioners

Petitioners request that the NRC confer with the State of Utah and provide opportunity to comment prior to the issuance of license amendments involving uranium mill tailings disposal in Utah. The same request was made previously by Mr. William J. Sinclair, Director of the Division Radiation Control, Utah Department of Environmental Quality, in his January 27, 1994 letter. In a February 25, 1994 response to Mr. Sinclair, the Director, Office of Nuclear Material Safety and Safeguards, made several commitments designed to foster better communication with the State of Utah concerning NRC regulation of uranium tail processing mills in Utah. Specifically, the NRC committed to notify the State directly, in addition to the issuance of a *Federal Register* Notice (FRN), upon the receipt of, and also upon the final resolution of license amendment applications for significant materials licensing actions in the State of Utah, such as for authorization to dispose of in situ leach facility 11e(2) byproduct material or for approval of significant changes to an approved reclamation plan.³ An FRN issued upon receipt of a significant license amendment application serves notice, under 10 C.F.R. § 2.1205(c)(1), that interested parties have 30 days to file a petition for hearing, and thus provides interested parties, such as the State of Utah, an opportunity to comment upon the license amendment application. The FRN issued at the final resolution of the license amendment is informational. In addition, where the license amendment application raises significant or controversial issues, NRC would be willing to attend public meetings, as appropriate. Accordingly, Petitioners' request for an opportunity to confer with the NRC and to comment before issuance of license amendments involving uranium mill tailings disposal in Utah is granted, to the extent indicated above.

As explained above, the NRC will make every effort to obtain the views and comments of the State of Utah before taking action upon license applications for authority to dispose of uranium mill tailings in Utah. Although the NRC welcomes and will closely consider the State of Utah's comments, it would be inconsistent with sections 63, 81, and 84 of the Atomic Energy Act of 1954, as amended, to grant Petitioners' request that the NRC obtain the concurrence of the Governor and the Legislature of the State of Utah before issuing license

³ Although the NRC is not legally required to provide such notice, *City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983), such notice would enhance communication with the State of Utah and material licensing decisions.

amendments authorizing disposal of uranium mill tailings in Utah.⁴ Accordingly, this request is denied.

IV. CONCLUSION

For the reasons discussed above, Petitioners' request to modify Source Material License No. SUA-1358 is granted, and will be effected by a "Confirmatory Order Modifying License Condition 55" to be issued concurrently with this Decision. Petitioners' request that the NRC confer with the State of Utah before issuing license amendments involving mill tailings disposal in Utah is granted to the extent that both direct and *Federal Register* notice of all applications for significant materials licensing actions in Utah will be given to the State of Utah, thus providing the State of Utah with an opportunity to comment. Petitioners' request that the NRC obtain the State of Utah's concurrence before issuing license amendments concerning uranium mill tailings disposal in Utah is denied for the reasons discussed above.

A copy of this Decision will be filed with the Secretary for the Commission to review as provided in 10 C.F.R. § 2.206(c). This Decision will become the final action of the Commission 25 days after issuance unless the Commission on its own motion, institutes review of the Decision in that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Robert M. Bernero, Director
Office of Nuclear Material Safety
and Safeguards

Dated at Rockville, Maryland,
this 14th day of December 1994.

⁴ Petitioners, nonetheless, may acquire authority to regulate section 11e(2) byproduct material, and thus to regulate the disposal of uranium mill tailings in Utah, through the agreement process pursuant to section 274 of the Atomic Energy Act, as amended.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Robert M. Bernero, Director

In the Matter of

Docket No. 70-08

BATTELLE MEMORIAL INSTITUTE
COLUMBUS OPERATIONS
(Columbus, Ohio)

December 14, 1994

The Director, Office of Nuclear Material Safety and Safeguards, grants a petition filed by the Battelle Permit Opposition Committee for an investigation of certain audit findings involving Battelle Memorial Institute (BMI) and for enforcement action, as appropriate. Petitioner asserted that BMI appears to be a facility out of control in its handling of radioactive material, that a potential threat exists to the surrounding neighborhood through BMI's operations, and that the level of NRC oversight of BMI activities is of concern. The Director grants the petition in that the NRC Staff has investigated the audit findings and has taken appropriate enforcement and other actions and has taken appropriate action to address the concerns regarding NRC's oversight of BMI's licensed activities.

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

I. INTRODUCTION

On December 28, 1993, the Battelle Permit Opposition Committee (BPOC) filed a petition for an investigation¹ of certain audit findings involving Battelle Memorial Institute (BMI) and for enforcement action, as appropriate. The

¹ The NRC interprets "investigation" in this context to mean a review through inspection as opposed to assessing potential wrongdoing.

referenced audit findings are the product of an independent audit commissioned by BMI and performed by ATEC Associates, Inc. The petition states that BMI appears to be a facility out of control in its handling of radioactive material, a potential threat exists to the neighborhood through BMI's operations, and the level of Nuclear Regulatory Commission (NRC) oversight of BMI activities is of concern.

By letter dated March 17, 1994, the NRC acknowledged receipt of the request for an investigation and appropriate enforcement action, and informed the requester that the letter would be treated as a petition in accordance with the provisions of 10 C.F.R. § 2.206 of the Commission's regulations and that a decision would be issued within a reasonable time.

I have now completed my evaluation of the matters raised by the Petitioner and have determined that, for the reasons stated in this Decision, the Petitioner's request for an inspection and appropriate enforcement action for the deficiencies identified by the audit is granted.

II. BACKGROUND

In July 1992, BMI hired ATEC Associates, Inc., a contractor, to conduct an independent safety inspection or safety audit of BMI's radiation protection program. This audit focused on BMI's research and development program. The audit was self-initiated and was designed to be critical in nature. The audit evaluated the radiation protection program against NRC, Department of Energy (DOE), and Occupational Safety and Health Administration (OSHA) requirements, as well as other good control practices. Approximately 240 person-hours were devoted by the contractor in performing this audit. The audit identified 201 deficiencies or weaknesses in the program. The results were provided to the BPOC.

III. DISCUSSION

In the petition, the Petitioner requests the Commission to "investigate" (*see* note 1) the findings of the audit and to take appropriate enforcement action to ensure that the BMI's facility is operated in compliance with applicable requirements. In response, during the period January 31 through March 25, 1994, a special safety team inspection was conducted at the BMI's King Avenue, Columbus, Ohio, and West Jefferson, Ohio, facilities. Included in the inspection was a review of the three concerns cited by the BPOC in the Petition, as described below.

A. Control in Handling of Radioactive Material

The Petitioner states that BMI appears to be a facility out of control in its handling of radioactive material.

NRC Special Nuclear Materials License SNM-7 allows BMI to receive, possess, use, and transfer certain radioactive materials in the conduct of research and development, radiography, and decommissioning activities.

Compliance with license-required actions to control handling of radioactive material has been confirmed by NRC inspectors during safety inspections. This confirmation was achieved through direct observation of ongoing activities, interviews with Licensee staff, and examination of Licensee records. Specific areas examined included handling and storage of radioactive materials, disposition of waste and maintenance of records in support of licensed activities. In one area of research, BMI used animals for various studies on the effects of radioactive materials. NRC reviewed the disposition of the radioactive carcasses of these animals through incineration as general waste. Research records were reviewed (typically on a random spot-check basis) and calculations performed to confirm that the radiation levels of the carcasses were below NRC limits and were, therefore, acceptable for incineration as general waste. Confirmation was achieved. With regard to the accuracy of measurements of radioactive materials handled by BMI, a review of the data recorded on the Licensee's liquid scintillation verification form (used to verify that general waste met 10 C.F.R. § 20.2005 levels for radioactive materials in unrestricted areas) indicated that the Licensee is meeting NRC requirements. (Results of these inspections were documented in Inspection Reports, including that described in special safety Inspection Report 070-00008/94001(DRSS) dated April 26, 1994.) Regarding storage, inspection tours of the King Avenue site (located in Columbus, Ohio) and West Jefferson, Ohio site, confirmed that radioactive and hazardous materials were stored adequately.

BMI is also decontaminating and decommissioning (D&D) a series of buildings at the West Jefferson, Ohio, and King Avenue sites. The D&D activities began in 1986 and are scheduled to continue through the year 2000. The facilities undergoing D&D were toured by NRC inspectors, facility workers were interviewed, procedures were reviewed, and several radiological surveys were conducted by the inspectors. The NRC has concluded that the D&D work is being conducted in accordance with BMI's NRC license and applicable NRC regulations.

The July 1992 ATEC audit of BMI's program did identify four potential violations of NRC requirements. The violations were reviewed by NRC during the special inspection, and it was determined by the inspectors that these potential violations met the criteria for noncited violations (as provided in 10 C.F.R. Part 2, Appendix C) in accordance with the Commission's Enforcement

Policy. Specifically, (1) they were corrected in a reasonable time, (2) were not repetitive violations, (3) were not willful violations, (4) were identified by the Licensee, (5) were not violations that could reasonably be expected to have been prevented by the Licensee's corrective action from a previous violation or licensing finding, and (6) were of such a nature that they would normally have been classified as Severity Level IV or V, which are the least significant severity levels. The violations were related to minor reporting, recordkeeping, and posting deficiencies that are not indicative of significant programmatic weaknesses. Consequently, NRC exercised discretion and considered these as noncited violations. During the special inspection conducted during the period of January 31 through March 24, 1994, the NRC identified an additional Severity Level IV violation which involved a failure to properly secure or maintain surveillance over a radioactive source. This violation was in addition to those identified by the auditor. As a result of this additional finding, a Severity Level IV Notice of Violation (NOV) was issued on April 26, 1994, to BMI. A Severity Level IV violation is of relatively minor significance, but a potential exists for an adverse impact on health and safety. BMI responded with appropriate corrective actions as described in correspondence dated May 24, 1994.

The Staff has concluded on the basis of the NRC's inspection and evaluation of BMI's radiological control program and ongoing D&D activities, that the Licensee has implemented and is maintaining a radioactive materials handling program and radioactive waste management program that are adequate to protect the radiological safety of employees and the public. Although the ATEC audit reported 201 deficiencies and weaknesses, the NRC found that only a few were of regulatory significance, and the NRC took appropriate action, including enforcement action for the repetitive violation for failure to secure a laboratory. In order to identify deficiencies and correct them in a timely manner in the future, the Staff supports licensees' efforts to aggressively perform self-assessments such as the ATEC audit.

B. Threat to the Neighborhoods

The Petitioner states that a potential threat exists to the neighborhoods through BMI's operations.

As stated earlier, BMI uses radioactive materials in the conduct of research and development, radiography, tracer studies, and conducts decommissioning activities. The research and development activities include the use of small amounts of radioactive materials for tracer studies and the use of gas chromatographs that contain small amounts of radioactive materials. The radiography activities include the use of two sealed radioactive sources. An additional sealed source is possessed but is kept in storage for future use.

The decommissioning activities are a result of research work conducted as far back as the 1940s. BMI was contracted to perform research activities regarding the use of nuclear fuel and other nuclear materials. During the conduct of these research activities, small amounts of nuclear materials were unintentionally deposited on floors, walls, machines, and other items involved in the research. BMI is currently in the process of performing D&D on the equipment, work areas, and other items. This extensive effort is expected to be ongoing for several years.

With approval from the NRC and the DOE, BMI has developed and implemented procedures to safely D&D these items. The D&D activities are routinely inspected (average of once per year) by the NRC and DOE (through the DOE resident inspector) to ensure the safety of employees and the public. The inspections have shown that BMI is performing the D&D activities in accordance with its license.

Environmental monitors are located on the fence line of the BMI boundaries at the King Avenue site and the West Jefferson site. Results of BMI's air monitoring, groundwater sampling, sediment sampling, and vegetation analysis indicate that they are well within NRC regulations in 10 C.F.R. Part 20 for release of radioactive materials. As such, the NRC has determined that the effluent releases pose no threat to the neighborhoods and are within NRC requirements.

Based on NRC's evaluation of the radiological safety and environmental monitoring requirements in BMI's license and confirmation of BMI's compliance with those requirements through routine and special inspections, NRC Staff concludes that BMI's radiological program is adequate to protect the radiological safety of employees and the public and is being conducted in accordance with applicable requirements.

C. NRC Oversight

The Petitioner states that because BMI has stated that it passed NRC inspections, the audit findings raise a concern over the level of oversight that BMI is receiving from the NRC. From the Petitioner's point of view, the large number of BMI audit findings calls into question the effectiveness of the NRC inspections.

NRC inspections at BMI over the past 7 years have focused primarily on activities related to nuclear fuel-related issues and decommissioning activities, areas that were considered to be of the greatest health and safety significance. Twelve inspections were conducted at BMI from May 1986 until July 1993.

These inspections identified two violations and two areas of concern² which were of minor health and safety significance. The items identified were evaluated and corrected in a timely manner. Two recent inspections, July and November 1993, identified no violations of NRC requirements.

During this 7-year period, a limited review was performed by the NRC of the other research and development activities and the radiography program. These reviews included evaluations of data derived from records related to environmental monitoring, personnel exposures, environmental protection, waste management, the use of radioactive materials in field studies, and tracer studies. These reviews identified no additional problems.

The special inspection performed at BMI during the period January 31 through March 25, 1994, did not identify any violations of major safety significance in any of BMI's licensed activities covered by the ATEC audit. However, the special inspection made an additional finding of one potential violation due to failure to secure a laboratory that was a violation similar to one identified in the ATEC audit findings, and which was also of minimal safety significance. A Severity Level IV Notice of Violation was issued for this violation on April 26, 1994, as previously mentioned.

The special inspection identified one concern, namely, that the structure of BMI's license led to the emphasis by NRC on nuclear fuel-related and decommissioning activities. NRC has decided that more in-depth review and inspection of BMI's research and development activities and radiography program are appropriate, thus increasing the NRC oversight of this Licensee. To effectively address these issues it was determined that responsibility for BMI's license should be transferred from NRC Headquarters to the Region III Office, and the license should be divided into three separate licenses, each addressing specific license areas. This decision was made when NRC Staff concluded

² May 12 through 16, 1986. One violation, no concerns:

One violation: 10 C.F.R. § 71.5(a), 49 C.F.R. § 173.441(b)(1) — greater than 200 mR/hr on outside of flatbed hauling radwaste to Barnwell. State of South Carolina identified the readings and the readings were corrected by BMI. NRC issued an NOV on June 12, 1986, after readings were identified by South Carolina and corrected by Battelle; therefore, no response to NOV was required because it was of minor health and safety significance and was immediately corrected once identified.

January 12 through 16, 1987. One violation, no concerns:

One violation: A retired reactor facility 10 C.F.R. § 50.10(a) license expired without a timely renewal. NRC determined that this was an administrative issue and of minor health and safety concern. An NOV was issued February 10, 1987. The renewal was submitted subsequently.

October 23 through 25, 1991. No violations, two concerns:

First concern: The bioassay data reviewed by the NRC revealed that two individuals had positive uptakes of U-238. BMI showed that these levels were below the 10 C.F.R. Part 20 limits; therefore, no further action taken.

Second concern: An exit monitor was removed from a building being decontaminated. BMI replaced the monitor with friskers for personnel to use before leaving building. A portal monitor was then put in place for personnel to walk through prior to leaving the building. NRC determined that no further correspondence was necessary due to this corrective action.

that previous inspections had been too sharply focussed on the nuclear fuel-related and decommissioning activities. Moving licensing responsibility to the Region III Office increased and diversified NRC inspection activities at the site. Responsibility was transferred on March 18, 1994.

With regard to the implications of previous oversight of BMI's licensed program, the NRC evaluated all 201 of the audit findings and determined that, as of the date of the special inspection (January 31 – March 25, 1994), BMI adequately addressed all 201 of the ATEC audit findings and adequately resolved all but two of them as discussed in the following paragraphs. The BMI staff, during their review of the ATEC audit findings, found that two of the audit findings had broader implications that required further investigation. Specifically, these involved failure to secure a laboratory and accounting of radioactive sources.

NRC's review of the ATEC audit documentation determined that the description of the audit findings was vague, thus making it difficult to determine if some findings were related to NRC regulations or license conditions. As a result, the NRC took a conservative approach to these findings, and any finding that could be remotely related to NRC regulations or license conditions was considered a potential violation. These potential violations identified from the ATEC audit findings were then grouped into six categories to facilitate a determination of whether there were any violations of NRC requirements. The potential violations are as follows:

- (A) Failure to inform the NRC on a timely basis of a Radiation Safety Officer (RSO) change;
- (B) Failure to provide training to personnel;
- (C) Failure to calibrate a survey instrument at the proper frequency;
- (D) Failure to secure laboratories that contained radioactive materials;
- (E) Failure to utilize the proper radiation postings; and
- (F) Failure to account for radioactive sources.

At the time of the special inspection, which was initiated on January 31, 1994, Items D and F remained unresolved. Items A, B, C, and E are addressed below. In regards to Item D, the inspection determined that the failure to secure laboratories containing radioactive material had been corrected for those laboratories identified in the audit. However, during the special inspection another separate laboratory, not identified in the ATEC audit findings, was identified which was not properly secured in accordance with 10 C.F.R. § 20.1801 (*see* discussion above). This matter is discussed in Inspection Report 070-00008/94001(DRSS) dated April 26, 1994.

Item F, the inability to account for several sources, was reviewed in detail with the Licensee. The BMI personnel contend that the sources were either properly disposed of as radioactive waste, transferred to an authorized recipient, or remain in storage in the hot cells awaiting decommissioning. Through the

efforts of both the BMI personnel and the NRC, information was gathered demonstrating that this appears to be a recordkeeping issue. The information accumulated was based on NRC review of BMI documents and interviews with BMI personnel and other NRC licensees working in conjunction with BMI in the conduct of research activities. Based on our review, NRC is confident that the sources are not in the public domain or in an unrestricted area of the facility. The NRC will continue to monitor this issue during future inspections.

The remaining potential violations (Items A, B, C, and E) are being treated as noncited violations and are detailed in the indicated sections of Inspection Report 070-00008/94001(DRSS) dated April 26, 1994, as discussed below:

Item A Failure to inform the NRC on a timely basis of an RSO change (Section 3);

The Licensee changed the RSO without prior notification to or approval by the NRC, although an amendment request was submitted at a later date and approved. The finding was considered to be of an administrative nature, an isolated violation, was identified by BMI, was not a violation that could reasonably be expected to have been prevented by the Licensee's corrective actions by a previous violation or Licensee finding that occurred within the past 2 years of the inspection at issue, or the period within the last two inspections; was corrected in a reasonable time, and was not a willful violation. Accordingly, the NRC exercised discretion, and the finding was considered to be a noncited violation.

Item B Failure to provide training to personnel (Section 7);

The Licensee identified that training was not being provided to personnel, based upon the ATEC audit. That audit further identified that the training issue was a recordkeeping problem. For example, training was provided, but records were not kept adequately. At least thirty BMI employees interviewed indicated that they were provided initial radiation safety training but, through administrative error, the training was not properly recorded in the BMI records. The finding was considered to be of minor health and safety significance, was corrected in a reasonable time, was not a violation that could reasonably be expected to have been prevented by the Licensee's corrective action for a previous violation or Licensee finding that occurred within the past 2 years of the inspection at issue, or the period within the last two inspections; and was not a willful

violation. Accordingly, the NRC exercised discretion and the finding was considered to be a noncited violation.

Item C Failure to calibrate a survey instrument at the proper frequency (Section 9);

The BMI ATEC audit identified that one survey instrument out of approximately fifty possessed by BMI had not been calibrated for approximately one year. The Licensee inventoried all survey instruments and initiated tracking of their calibration dates. The NRC reviewed and confirmed the Licensee inventory. The finding was considered to be of an administrative nature, was not a violation that could reasonably be expected to have been prevented by the Licensee's corrective action for a previous violation or Licensee finding that occurred within the past 2 years of the inspection at issue, or the period within the last two inspections; was corrected in a reasonable time, and was not a willful violation. Accordingly, the NRC exercised discretion, and the finding was considered to be a noncited violation.

Item E Failure to utilize the proper radiation postings (Section 16).

The ATEC audit identified a number of potential NRC-related posting deficiencies. Based upon that audit finding the license took an aggressive approach to post areas where required. NRC verified that the posting deficiencies were corrected. The finding was considered to be of minor health and safety significance, was corrected in a reasonable time, was not a violation that could reasonably be expected to have been prevented by the Licensee's corrective action for a previous violation or Licensee finding within the past 2 years of the inspection at issue, or the period within the last two inspections; and was not a willful violation. Accordingly, the NRC exercised discretion, and the finding was considered to be a noncited violation.

D. Remaining Audit Findings

The remaining audit findings were related to Battelle's research and development safety program. These findings involved questionable laboratory practices and portions of the radiation safety program where OSHA, not NRC, requirements applied. The NRC referred the findings concerning questionable labora-

tory practices and relevant radiation safety issues to OSHA for resolution. The ATEC auditor, in some cases, also did not have additional relevant information that would have mitigated some audit findings. BMI identified corrective actions for the audit findings by conducting reviews of the laboratory facilities; interviews with BMI employees; and a review of records and documents that were associated with the general health and safety of BMI employees and the public.

A copy of NRC Inspection Report 070-00008/94001(DRSS) dated April 26, 1994, was provided to the Petitioner on June 7, 1994. There will be no further action regarding this matter, since the NRC considers the concerns resolved. Future NRC inspections will be directed to specific program areas, consistent with the restructured license, to focus inspections by the type of nuclear material and activity involved, i.e., special nuclear material, byproduct material, and broad-scope license activities such as radiography and tracer studies. NRC will continue to support efforts by licensees, including BMI, to implement effective self-assessments and implement timely corrective actions when deficiencies and weaknesses are identified.

The Petitioner's concern regarding NRC oversight was substantiated. As described above, action has been taken to enhance NRC oversight of BMI's licensed program.

IV. CONCLUSION

The Staff has carefully considered the request of the Petitioner. In addition, the Staff has evaluated the bases for the Petitioner's request. For the reasons discussed above, I conclude that the Petitioner has raised valid issues related to BMI's compliance with NRC requirements and the NRC's licensing and oversight of the BMI facility. Accordingly, the Petitioner's request for an investigation and enforcement action pursuant to 10 C.F.R. § 2.206 is granted as described in this Decision, and appropriate enforcement and other actions for the ATEC audit-related deficiencies have been taken as described above. In addition, as described above, appropriate action has been taken by the NRC Staff to address the NRC's oversight of BMI's licensed activities.

As provided by 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review. The Decision will become the final action of the Commission twenty-five (25) days after

issuance unless the Commission, on its own motion, institutes review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Robert M. Bernero, Director
Office of Nuclear Material Safety
and Safeguards

Dated at Rockville, Maryland,
this 14th day of December 1994.

[The enclosure, "NRC Inspection Report 070-00008/94001(DRSS)," has been omitted from this publication but can be found in the NRC Public Document Room, 2120 L Street, NW, Washington, DC.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of

Docket No. 99900271

ROSEMOUNT NUCLEAR INSTRUMENTS,
INCORPORATED (formerly Rosemount,
Incorporated)
(Eden Prairie, Minnesota)

December 15, 1994

The Director of Nuclear Reactor Regulation grants, in part, petitions filed by Paul M. Blanch requesting immediate enforcement action against Rosemount Nuclear Instruments, Inc., for failing to notify the Commission of defects in pressure transmitters as required by 10 C.F.R. Part 21, and asking the NRC to notify all users of Rosemount transmitters and trip devices of "significant safety problems" found during an NRC inspection.

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

I. INTRODUCTION

On December 31, 1992, Mr. Paul M. Blanch (the Petitioner) filed a petition with the Executive Director for Operations, pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206), in which he requested that the U.S. Nuclear Regulatory Commission (NRC) impose immediate enforcement action against Rosemount for a knowing and intentional failure to submit, as required by 10 C.F.R. Part 21, a notice to the Commission that "basic components supplied" to its customers "contained defects," as defined by 10 C.F.R. § 21.3. On March 2, 1993, the Petitioner sent a letter to the NRC in which he stated, in part, that he "was requesting enforcement action against Rosemount for failing to report defects as required by 10 C.F.R. Part 21," and

making "a simple request that [the NRC] investigate a potential cover-up and a failure to report a defect in accordance with the requirements of 10 C.F.R. 21." On March 28, 1994, the Petitioner filed a second petition in which he requested that the NRC inform all users of Rosemount 1150-series pressure transmitters and series 510 and 710 DU trip devices of "significant safety problems" identified in NRC Inspection Report 99900271/93-01 (which addressed principally the NRC Staff inspection of Rosemount's Part 21 and Appendix B to 10 C.F.R. Part 50 established programs), and that the NRC take "prompt and vigorous" enforcement action against Rosemount for careless disregard of the reporting requirements of Part 21. In a letter dated May 2, 1994, the Petitioner reiterated his request that the NRC take action to inform all users of Rosemount 1150-series pressure transmitters and series 510 and 710 DU trip devices of the "significant safety problems" identified in NRC Inspection Report 99900271/93-01.

By letters dated February 2 and April 7, 1993, in response to the Petition of December 31, 1992, and Letter of March 2, 1993, the NRC Staff stated that the request for immediate action was denied because the actions it had already taken to address the problems with Rosemount transmitters were sufficient to ensure that the problems did not constitute an immediate safety concern for any nuclear power plant. The NRC Staff also stated in those letters that, as provided by section 2.206, action would be taken on the petition within a reasonable time. By letters dated April 25 and June 3, 1994, in response to the Petitioner's letters of March 28 and May 2, 1994, the NRC Staff stated that the NRC inspection report was included in the April 1994 publication of NUREG-0040,¹ "which is sent to all nuclear power plant licensees,"² and that none of the identified issues were considered significant enough to warrant immediate notification of the nuclear industry.

In regard to the Petitioner's second request, "to take prompt and vigorous enforcement action against Rosemount for careless disregard of 10 C.F.R. Part 21 requirements," the Petitioner was informed in the April 25, 1994 letter, that "[t]he NRC will make its determination as to enforcement action, [against Rosemount] should such enforcement action be warranted, following the enforcement conference."

The Director of the Office of Nuclear Reactor Regulation (NRR) has granted these petitions in part. Specifically, pursuant to the "General Statement of

¹NUREG-0040, "Licensee Contractor and Vendor Inspection Status Report," is distributed to NRC-licensed facilities, manufacturers, suppliers, architect-engineer firms, nuclear steam supply system suppliers and is publicly available at NRC public document rooms, National Technical Information Service (NTIS), and through the Government Printing Office (GPO) sales office.

²Subsequently, NRC Staff identified that NUREG-0040 was not distributed to "all nuclear power plant licensees" as stated to the Petitioner by letter dated April 25, 1994, because of an NRC Staff error that was made concerning the NUREG-0040 distribution process. Therefore, the NRC Staff directed in October 1994 that Inspection Report 99900271/93-01 be sent to all power reactor licensees and construction permit holders. NRC Staff has verified that the distribution of the inspection reports was completed.

Policy and Procedure for NRC Enforcement Actions" (Enforcement Policy), 10 C.F.R. Part 2, Appendix C, a Severity Level II notice of violation was issued to Rosemount on November 15, 1994. On the basis of the conclusions and findings in NRC Office of Investigations (OI) Investigation Report 4-90-009, dated November 12, 1993, in NRC Inspection Report 99900271/93-01, and NRC Staff deliberations on a Rosemount presentation of its relevant information regarding the Rosemount pressure transmitter sensor cell oil-loss problem during the enforcement conference on June 23, 1994, the NRC Staff concluded that Rosemount acted in careless disregard of Part 21 requirements and its own procedures by failing to adequately evaluate or to inform its customers of the potential for degraded transmitter operation as a result of the oil-loss problem.

Additionally, on October 11, 1994, the NRC Staff received an unsolicited letter from Rosemount, dated September 28, 1994. In this letter, Rosemount stated that it agreed with the NRC "views" expressed at the June 23, 1994 enforcement conference on the importance of Part 21. However, Rosemount stated that it could not concur in the view that Rosemount acted in careless disregard of NRC requirements by failing to adequately identify and report potential defects in its Model 1153 pressure transmitters prior to December 1988. Rosemount attached a 40-page enclosure to its letter that takes exception to a number of statements and conclusions delineated in the NRC inspection report. These exceptions included Rosemount's position that early (1984) transmitter failure mechanisms were never established as resulting from oil loss, and the oil loss problem could have resulted from other factors unrelated to transmitter design. Rosemount additionally disagreed with the position in the inspection report that early nonnuclear-grade Model 1151 transmitter failures should have made Rosemount aware of a potentially generic problem affecting its nuclear-grade transmitters.³ Further, Rosemount disagreed with the portion of the inspection report that identifies the time that Rosemount began to track field returns of failed transmitters.

The Staff reviewed the information in the Rosemount letter and determined that the letter did not provide new information or arguments that would cause any change in the Staff's position. The inspection report and the OI investigation identified numerous instances where problems with transmitters implicating the transmitter design, manufacturing, or test processes were brought to Rosemount's attention but were not properly addressed by Rosemount for their generic or common-mode failure implications. The Staff concluded that Rosemount failed to address these generic or common-mode failure implications, initially because it improperly dispositioned the failures as random rather than

³ During this particular period of time, the sensor cell for both Model 1151 nonnuclear-grade transmitters and Models 1152 and 1153 nuclear-grade transmitters were manufactured in the same production line, utilizing the same manufacturing and production-line process controls.

using available information to identify deviations that clearly, in the Staff's view, represented a common-mode failure potential. Despite having, as the OI investigation identified, multiple examples of transmitter failures and several members of the Rosemount staff convinced that the failures were a result of manufacturing problems common to all the transmitter sensor cells, Rosemount failed to inform NRC licensees of the deviation.⁴ The Staff concluded that Rosemount's knowledge of this deviation, coupled with its failure to inform licensees, constituted careless disregard for the requirements of Part 21.

II. BACKGROUND

Since the mid-1980s, the NRC Staff had been aware of several potential problems with Rosemount Models 1152, 1153, and 1154 transmitters (1150-series transmitters). In 1987, the NRC conducted an inspection at Rosemount because of a potential generic problem concerning degraded transmitter operation associated with contaminants in sensor cell oil, a condition referred to as "latch-up" identified in the early 1980s. During the same period that Rosemount was trying to resolve the latch-up problem, another sensor-cell-related problem was identified that also caused degraded transmitter operation. The second problem involved transmitter sensor-cell oil loss, which was not readily detectable because the sensor cell was sealed inside the transmitter. Rosemount pressure transmitter sensor-cell oil-loss problems in nuclear applications occurred in a number of instances and at varying frequencies from 1984 on, indicating a potential generic problem with the transmitters. Rosemount nevertheless treated each licensee or Rosemount-identified oil-loss problem as an isolated occurrence, and handled the problems essentially on an individual basis as they arose. Although Rosemount indicated to the NRC Staff and licensees that the failures resulting from oil loss appeared to be random and unrelated to any generic problem with Rosemount 1150-series transmitters, the Staff nevertheless issued NRC Information Notice 89-42, "Failure of Rosemount Models 1153 and 1154 Transmitters," on April 21, 1989, to alert licensees to this potentially generic problem. On May 10, 1989, Rosemount issued the first of four technical bulletins in which it discussed loss of oil in its pressure transmitters. The NRC Staff continued to monitor the oil-loss problem and discuss the potentially generic problem with Rosemount and the industry.

The NRC Staff remained concerned that the transmitter oil-loss problem did not appear to be isolated, as Rosemount had been informing licensees.

⁴As defined in 10 C.F.R. § 21.3, deviation means a departure from the technical requirements included in a procurement document. The identified oil-loss problem was considered a deviation because sensor-cell oil loss caused Rosemount transmitters to depart from technical performance specifications that were delineated in Rosemount product data sheets.

Therefore, on March 9, 1990, it issued Bulletin 90-01, "Loss of Fill-Oil in Transmitters Manufactured by Rosemont," to ensure that all licensees were adequately informed about the problem and would take appropriate corrective action. After obtaining additional information, the Staff issued "Supplement 1 to Bulletin 90-01" on December 22, 1992.

In February and March 1993, NRC Staff performed an inspection at Rosemont. On March 4, 1994, the Staff issued Inspection Report 99900271/93-01, in which it identified an apparent violation of Part 21 regarding the transmitter oil-loss problem and asked Rosemont to participate in an enforcement conference on the matter. In the report, the Staff also identified several other violations of Part 21 and several nonconformances regarding Appendix B to Part 50. On June 23, 1994, an enforcement conference was held at NRC headquarters in Rockville, Maryland.

III. DISCUSSION

On the basis of the evidence developed during the investigation, OI determined that two allegations were partially substantiated. Regarding the first partially substantiated allegation, OI determined that Rosemont presented incomplete and inaccurate information to the NRC during a public meeting on April 13, 1989. However, the evidence developed during OI's investigation did not substantiate that this presentation of incomplete and inaccurate information was deliberate. Although the NRC Staff recognized that the inaccurate and incomplete statements made to the NRC during the public meeting on April 13, 1989, were not deliberate, it had substantial concerns about this matter and emphasized to Rosemont in the letter of November 15, 1994, that the submittal of inaccurate and incomplete information to the NRC is unacceptable and that the NRC expects all licensee and vendor communications to be complete and accurate and to properly reflect situations that could have implications for public health and safety.

Regarding the second partially substantiated allegation, OI determined that Rosemont acted with careless disregard when, in violation of Part 21, it failed to adequately identify and report a deviation regarding sensor-cell oil loss that was known to Rosemont staff and to inform its customers of the problem.

This violation was of concern because Rosemont did not fulfill its basic 10 C.F.R. § 21.21 responsibility of "informing the licensee or purchaser of the [transmitter oil-loss] deviation in order that the licensee or purchaser may cause the deviation to be evaluated unless the deviation has been corrected." Rosemont was aware that its manufacturing processes and testing were causing and allowing slow-leaking sensor cells to be used in nuclear transmitters, but Rosemont did not apprise NRC licensees of those circumstances. Although the

different causes of the oil-loss problem were known to the Rosemont staff, that information was not accurately or completely transmitted to individual licensees for their use in performing an evaluation pursuant to Part 21. As a result, the licensee Part 21 evaluations that were performed with the information that was provided to them by Rosemont did not encompass all of the known circumstances surrounding the oil-loss problem. The objective evidence indicated that Rosemont field service staff became concerned after the discovery of several transmitters with degraded operation that exhibited oil loss at one NRC-licensed facility in 1984. Additional instances of oil loss in the nuclear transmitters continued to be documented by Rosemont between 1984 and 1988. It appeared to the NRC Staff that Rosemont's emphasis was on correcting the manufacturing and testing weaknesses that allowed degraded transmitter operation due to oil loss without much consideration of candidly informing NRC licensees of the potential for degraded operation of Rosemont transmitters installed in safety-related applications at NRC-licensed operating nuclear power plants. Between 1984 and 1988, Rosemont received many of the failed units from its nuclear customers, performed failure analyses, and determined that the degraded operation of these units was caused from sensor-cell oil loss. Despite these numerous indications of potential problems with the Rosemont Model 1152, 1153, and 1154 transmitters, Rosemont failed to comply with Part 21 requirements and its own internal policy and procedure and inform its customers of the potential problem in a timely fashion. The NRC inspectors concluded, partly on the basis of Rosemont internal memoranda, discussions with past and present Rosemont staff, and correspondence between Rosemont and licensees, that weaknesses in Rosemont's Part 50, Appendix B quality assurance (QA) program and the reluctance of Rosemont managers to be candid in their communications with customers contributed to Rosemont's failure to promptly inform customers of the oil-loss problem. If Rosemont had established effective measures to ensure that conditions adverse to quality, such as failures, malfunctions, deficiencies, deviations, and nonconformances, were promptly identified and corrected, Rosemont management could have seen the developing trend of degraded transmitter response caused by inadequate or inconsistent controls over the sensor-cell manufacturing process. Rosemont did not begin to inform its nuclear power plant customers, as required by Part 21 and its own procedures, of the deviation regarding the oil-loss problem until December 1988. The NRC Staff believes that Rosemont's failure to take action between 1984 and 1988 — as a result of its failure to avail itself of the multiple opportunities to recognize the generic implications of sensor-cell oil loss in its 1150-series transmitters, repeated failure to recognize the problems identified by experienced Rosemont personnel, and the reluctance of Rosemont personnel to allow candid communications with customers of the circumstances surrounding the deviations — reflects careless disregard of the requirements of Part 21.

In summary, the NRC Staff concluded that the failure of Rosemount to provide timely and complete notification of NRC licensees in the more than 4 years that the company was aware, or should have been aware, of the problem indicates a careless disregard of the reporting requirements of Part 21. In accordance with the Enforcement Policy, Supplement VII, section C.5, the failure either to perform an adequate Part 21 review or to inform Rosemount customers about the problem would be classified as a Severity Level III violation. However, in accordance with section IV.C of the Enforcement Policy, the severity level was increased to Severity Level II because of the careless disregard of Part 21 by the Rosemount nuclear department management between 1984 and 1988. No civil penalty was proposed because the Staff had not found that the requirements of 10 C.F.R. § 21.61 for issuance of a civil penalty — that a director or other responsible officer knowingly and consciously failed to provide the notice required by 10 C.F.R. § 21.21 — have been met in this case.

IV. CONCLUSIONS

The Petitioner's requests were granted, in part, and denied, in part, as discussed herein. As provided in 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review.

FOR THE NUCLEAR
REGULATORY COMMISSION

William T. Russell, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 15th day of December 1994.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of

Docket Nos. 50-498
50-499

HOUSTON LIGHTING AND
POWER COMPANY
(South Texas Project, Units 1 and 2)

December 20, 1994

The Director of the Office of Nuclear Reactor Regulation grants in part and denies in part a petition submitted pursuant to 10 C.F.R. § 2.206 by Mr. Thomas J. Saporito (Petitioner) requesting action with regard to the South Texas Project (STP), Units 1 and 2, of the Houston Power and Lighting Company (HL&P or the Licensee).

Petitioner requested the NRC to issue civil penalties against the Licensee and/or Licensee management personnel at STP for discrimination. This request has been granted insofar as the NRC on October 26, 1994, issued HL&P a Notice of Violation and Proposed Imposition of Civil Penalty in the amount of \$100,000 for a violation of 10 C.F.R. § 50.7.

With regard to the Petitioner's request for the NRC to institute a show-cause action pursuant to 10 C.F.R. § 2.202 to modify, suspend, or revoke HL&P's NRC operating licenses authorizing the operation of STP, Units 1 and 2, and that the NRC take appropriate actions to cause the immediate shutdown of the two reactor cores at STP, the Director finds that the Petitioner has not raised substantial health or safety issues in the petition and denies those portions of the petition.

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

I. INTRODUCTION

On May 5, 1993, Mr. Thomas J. Saporito, Jr. (the Petitioner) filed a petition with the U.S. Nuclear Regulatory Commission (NRC) pursuant to 10 C.F.R. § 2.206. The Petitioner requested that the NRC institute a show-cause proceeding pursuant to 10 C.F.R. § 2.202 to modify, suspend, or revoke the Houston Lighting & Power Company's (HL&P's or the Licensee's) NRC operating licenses authorizing operation of South Texas Project (STP), Units 1 and 2; that the NRC initiate appropriate actions to cause the immediate shutdown of the two reactor cores at STP; and that the NRC issue civil penalties against the Licensee and/or Licensee management personnel at HL&P's STP. The specific requests were based on fourteen alleged managerial, security, and human performance problems at STP.

On July 8, 1993, Thomas E. Murley, then Director of the Office of Nuclear Reactor Regulation, informed the Petitioner that the petition had been referred to this Office for action pursuant to section 2.206 of the Commission's regulations and that the Petitioner's request for the immediate shutdown of the STP units was denied. He also informed the Petitioner that the NRC would take appropriate action within a reasonable time regarding the Petitioner's request.

My Decision in this matter follows.

II. BACKGROUND

The Petitioner asserts as grounds for the request that there is no "reasonable assurance" of safe operation of STP, because the NRC has referred four cases of discrimination against whistleblowers to the U.S. Department of Justice (DOJ) and DOJ is seeking indictments against Licensee officials for retaliation against the whistleblowers; the Licensee's actions against workers have instilled a "chilling effect" at STP; the Licensee's physical plant nuclear security program is of questionable effectiveness; the NRC Inspector General found that the process used to justify the terminations of three former STP employees was prejudicial to them; and NRC investigators found that management was aware that these workers had made allegations to "Speakout" and/or to NRC officials; Licensee officials may be held liable for allegedly misleading the NRC about certain security-related matters; the Licensee's failure to reduce a huge maintenance backlog has led to repeated human errors and equipment failures; the Licensee maintains an autocratic, vindictive management team at STP, which has further instilled a chilling effect; the Licensee has twelve U.S. Department of Labor (DOL) discrimination cases pending regarding alleged retaliatory actions taken

at STP; the Director, NRC Office of Investigations (OI), stated that if the NRC cannot rely on the Licensee to be truthful or candid then there is a major safety issue; a former security supervisor at STP has stated that "nobody wanted to hear that there were any problems"; the NRC Chairman has stated that the NRC has become much more aggressive in pursuit of utilities that retaliate against whistleblowers; the Director, OI, has said that he has no qualms about referring a case of alleged utility wrongdoing to the Department of Justice; the NRC is investigating allegations that the Licensee has used surveillance devices to spy on employees, and possibly NRC resident inspectors, at STP; and on March 30, 1993, a Licensee executive was involved in an incident that appears to be a form of intimidation.

III. DISCUSSION

A. Enforcement Action Based on Discrimination

The Petitioner asserts that HL&P's employment actions against himself and three other individuals are violations of 10 C.F.R. § 50.7. The Petitioner, and the three other individuals were employed at South Texas Project when they raised safety concerns and were subsequently terminated.

OI began an investigation to review the circumstances surrounding the termination of plant access to the Petitioner after he had made allegations to the NRC. OI concluded that the Licensee was inconsistent in adjudicating access authorization decisions. Furthermore, OI concluded that the managers involved in the decision to revoke the Petitioner's unescorted access to STP were prompted by his having made allegations to the NRC. DOL is reviewing the Petitioner's case. On June 30, 1992, the District Director of the Wage and Hour Division of the DOL found that the Petitioner had engaged in a protected activity and that the action against him constituted a violation of section 210 (now section 211) of the Energy Reorganization Act of 1974, as amended. HL&P has appealed this decision and a hearing will be held before a DOL Administrative Law Judge. The NRC had not taken enforcement action on the Petitioner's case earlier because it was waiting for a decision by DOL. NRC understands that the DOL hearing has been postponed. Therefore, NRC proceeded with enforcement action based on the conclusions of the OI investigation. On October 26, 1994, the NRC issued HL&P a Notice of Violation and Proposed Imposition of Civil Penalty in the amount of \$100,000 for a violation of section 50.7 (Enforcement Action 93-056 (EA 93-056)). NRC took this action in accordance with the "General Statement of Policy and Procedure for NRC Enforcement Action," Appendix C to 10 C.F.R. Part 2. The NRC has allowed HL&P to defer payment of the civil penalty and response to the Notice of Violation until 30 days after the decision of the DOL's Administrative Law Judge. NRC also asked HL&P

to submit (1) a description of the current duties of the managers involved; (2) an explanation of why the NRC can have confidence that HL&P will ensure an environment that is free from harassment, intimidation, and discrimination; and (3) an explanation of why the NRC can have confidence that the managers involved will comply with NRC requirements if they are involved in NRC-licensed activities in the future. The Licensee is required to respond to this request by December 25, 1994. The NRC considered the violation to be a Severity Level II violation, because the discrimination involved managers whose positions were above first-line supervisors. NRC issued EA 93-056 to send a strong message to the Licensee that discrimination by HL&P management will not be tolerated.

The NRC also issued Demands for Information to the managers involved. These managers are no longer affiliated with STP and are not involved in NRC-licensed activities. Therefore, no immediate action by the NRC is necessary to ensure continued safety at STP. NRC will take appropriate action against the managers, if necessary, after reviewing their responses to the Demands for Information.

The NRC is reviewing the cases of the three other individuals and these cases are also pending with DOL. NRC will consider further enforcement action against HL&P or individual employees of HL&P after doing a thorough review of these cases.

B. Intimidation and Chilling Effect

The Petitioner asserts that the actions against the three other individuals instilled a pervasive "chilling effect" at STP, dissuading other workers from voicing safety concerns.

The NRC is committed to ensuring that the programs through which employees can voice safety concerns are responsive and nondiscriminatory. The program at South Texas, in particular, has been thoroughly inspected. In April 1993, the NRC conducted a diagnostic evaluation team (DET) inspection at South Texas while the units were shut down for various problems found by NRC and the Licensee. A DET is a broadly structured evaluation to assess overall plant operations and the adequacy of the Licensee's programs for supporting safe plant operation. The DET for South Texas was the result of an apparent decline in performance and a need for NRC managers to have more information to make an informed decision on performance. One of the issues that the team investigated was the effectiveness of the employee concerns program. The team found that employees perceived that the program did not always protect the allegor's identity and that management was not always interested in employee concerns, as demonstrated by the lack of results. However, the team did not detect any reluctance by employees to report issues perceived as immediate safety

concerns. The NRC required the Licensee to address the effectiveness of its employee concerns program as a condition of NRC approval for restart of either unit. After the DET inspection, the Licensee replaced the South Texas program, which was formerly called "Speakout," with a new employee concerns program, the Nuclear Safety and Quality Concerns Program (NSQCP). The Licensee has taken several steps to make employees feel more comfortable using the new program including: increasing confidentiality, hiring an employee advocate, and holding meetings between employees and management to encourage employees to raise concerns. NRC inspected the facility again in December 1993 (Inspection Report 93-52, January 24, 1994). This inspection began on the day that Speakout was replaced with the new program. The inspectors found that employees still expressed some reservation about the confidentiality of the program. However, most employees who expressed fear of harassment and intimidation based their opinions on rumors, or newspaper articles, rather than on direct evidence. The inspectors found that senior managers were taking strong measures to improve employee comfort in bringing forth concerns. In May 1994, NRC did a followup inspection and found that the revised program addressed the deficiencies described in previous inspections and that Licensee managers were promoting the new program and were committed to its success (Inspection Report 94-21, June 6, 1994). The inspectors interviewed approximately thirty STP employees, with emphasis on employees who had previously submitted nuclear safety concerns to the Speakout program. They found that virtually all of the employees would submit nuclear safety concerns either to their supervisor or to the NSQCP. Overall, the inspections showed that the new managers and revised program have made progress in resolving any "chilling effect" that may have been present at STP.

The Petitioner also asserts that the management team at STP is "autocratic and vindictive," instilling a "chilling effect" at STP. The DET reviewed management and organizational issues at STP during its inspection in April 1993 and found the management and organization weak, with ineffective management direction and oversight, poor use of support and resources, weak communications and teamwork, ineffective corrective action processes, ineffective use of self-assessment and quality oversight, and inadequate information systems. While the team did not specifically find a "chilled" work force, it found the weaknesses discussed above to be in themselves significant. The NRC has determined that the Licensee may not have always wanted to hear bad news and that managers ineffectively addressed problems and issues found by plant personnel through quality assurance self-assessment. In May 1994, the NRC did a followup inspection to evaluate improvements by the Licensee managers in finding, pursuing, and correcting plant problems. The inspectors found that several initiatives by plant management to improve plant performance were effective. These included: the addition of a second supervisor for each maintenance crew,

a revised station problem report process, an operations work control group, and the implementation of the technical support engineering group. The inspectors also reviewed management self-assessments and assessments performed by the independent assessment organization and found these to be adequate. The inspection report states that

a significant change in plant culture was clearly underway throughout the organization. The attitude expressed by virtually all interviewees was that senior management encouraged ownership of problems and expected plant personnel to identify and correct problems in a quality manner. There did not appear to be a reluctance on the part of operators and maintenance personnel to raise concerns to management as had apparently existed in the past.

Inspection Report 94-20, at 13.

Although the NRC has not reviewed the management style at STP, the findings of the DET gave the NRC sufficient information to address the problems in STP management that had reduced the effectiveness of programs designed to implement the findings and recommendations of plant staff. Inspections since the DET indicate that plant management has taken steps to ensure that an atmosphere exists in which employees can raise concerns. Therefore, the NRC does not have a reason to suspect that the current management style instills a pervasive "chilling effect" at the facility. The information provided by the Petitioner gives the NRC no new information and does not provide an adequate basis for the request.

The Petitioner asserts that the work force was intimidated by an incident that occurred on March 30, 1993, involving a Licensee executive. The Licensee's executive encountered several labor union protesters distributing leaflets on HL&P's property. According to a newspaper article, he became enraged, drove into the plant, summoned several armed guards and returned to the gate area where he ordered the guards to photograph the protesters and/or employees who took leaflets. The NRC Region IV office reviewed the incident in question. These leaflets were designed to inform labor union members that HL&P employed non-union labor from out of state during the current outage. Security guards were dispatched to the scene to ask the protesters to leave HL&P's property. NRC determined that the executive's actions were not a violation of Title 10 of the *Code of Federal Regulations* and do not raise a significant health and safety issue. The newspaper article referenced by the Petitioner does not reveal any health and safety issues.

The Petitioner asserts that there have been allegations that the Licensee has used surveillance devices to spy on employees and NRC resident inspectors at the STP nuclear station. The NRC investigated the various allegations. In April 1993, OI performed a sweep of the resident inspectors' offices and found no surveillance devices. This allegation was found to be groundless. The NRC

Inspector General investigated the allegation of spying on HL&P employees and has found no evidence to support this allegation. Therefore, this issue is considered closed for the NRC.

In summary, the Staff has reviewed the Petitioner's concerns regarding intimidation of plant employees and has determined that the Petitioner does not raise a significant health or safety issue.

C. Referrals to Other Government Agencies

The Petitioner asserts that the Licensee can no longer provide reasonable assurance to the NRC that STP will be safely operated because the NRC has referred four cases of whistleblower discrimination to DOJ. The Petitioner also asserts that the Licensee has twelve DOL discrimination cases pending as a result of alleged retaliatory actions taken at STP.

Referrals to DOJ do not necessarily indicate challenges to the public health and safety. Consistent with the Memorandum of Understanding Between the Nuclear Regulatory Commission and the Department of Justice (53 Fed. Reg. 50,317 (Dec. 14, 1988), hereafter "MOU"), the NRC will refer cases to DOJ when the Staff suspects criminal wrongdoing. Such referral to the DOJ does not prevent the NRC Staff from taking action to safeguard the public health and safety. If the NRC concludes that immediate action is required to protect the public health and safety, it will proceed with such action as is necessary to abate the immediate problem and then notify the DOJ. Upon learning of the alleged discrimination in the four cases mentioned above, the NRC investigated and found that, although the alleged chilling effect did not present an immediate threat to public health and safety, these cases indicated that the Licensee's employee concerns program (Speakout program) was ineffective. The NRC required HL&P to address the effectiveness of the Speakout program before restarting either unit from the extended outage in 1993. This decision is documented in Supplement 2 to the Confirmatory Action Letter of October 15, 1993.

The Petitioner does not give an adequate basis for maintaining that the "Licensee can no longer provide reasonable assurance for the safe operation" of the facility as a result of a referral to DOJ. The Petitioner cited a newspaper article (*Houston Chronicle*, March 28, 1993) as the reference for this allegation. The article gives NRC no additional facts and does not provide an adequate basis for the request.

In accordance with the MOU between the Department of Labor and the NRC (47 Fed. Reg. 54,585 (Dec. 3, 1982)), DOL advises the NRC of the status of pending cases. The NRC reviews DOL filings and decisions and may take enforcement action based on DOL decisions if the NRC has not conducted its own investigation. DOL discrimination cases as a result of alleged

retaliatory actions are not, in themselves, evidence of improper conduct sufficient to jeopardize nuclear safety. The fact that a discrimination case is pending before the DOL does not prohibit the NRC from taking any immediate enforcement action that it believes is necessary.

The NRC takes alleged retaliatory action and discrimination by licensees seriously and has taken enforcement action against the Licensee for one of these cases. (See Section III.A, above) NRC may take further enforcement action as it completes its own investigation of the remaining cases. The Staff has concluded that the DOL filings and DOJ referrals do not raise a significant health or safety issue.

D. Submission of Misleading Information to the NRC

The Petitioner asserts that there has been an allegation that the Licensee misled the NRC concerning security-related matters. The Petitioner alleges that STP officials may have misled the NRC about power failures that disabled parts of a security intrusion detection field. The NRC received allegations about this event and reviewed this issue as part of a safeguards inspection at South Texas Project in August 1991. The inspectors determined that the Unit 2 perimeter and vital area alarms were inoperable, because both primary and backup power sources were rendered inoperable on March 9, 15, and 21, 1991. The inspectors found that the power failures lasted from a minimum of 20 minutes to a maximum of 2 hours and 50 minutes. However, contrary to allegations, compensatory measures were taken within 10 minutes. The Licensee did operational tests of the alarms at the time of power restart, but did not do functional tests, as required by the Physical Security Plan. The NRC issued a Severity Level IV violation for failure to conduct functional testing. OI reviewed the case to determine if the Licensee had misled the NRC regarding these power failures. In September 1991, OI closed its investigation after determining that the Licensee committed no wrongdoing. The Petitioner gives no additional facts other than those already known by the NRC and does not present a substantial health or safety issue that would call into question the continued safe operation of STP.

E. Maintenance Backlog

The Petitioner asserts that the Licensee failed to reduce a "huge maintenance backlog" of corrective work that has led to repeated human errors and equipment failures. In its April 1993 inspection, the DET reviewed the maintenance backlog in detail and found that the work control process at STP was inefficient and manpower-intensive, which contributed to the poor material condition of the

plant. However, the inspectors found no instances of equipment failure that could be attributed to delayed maintenance. The DET's findings are documented in a report of June 10, 1993.

NRC discussed the maintenance backlog in a supplement to the Confirmatory Action Letter of May 7, 1993, as an issue that had to be addressed before restarting either unit. Since the DET inspection, the Licensee has developed a management plan to reduce the backlog. The Licensee developed a new classification system for service requests to improve productivity. The Licensee also developed the Maintenance Rover Work Program to improve the timely resolution of low-priority service requests that did not require detailed work planning. The NRC reviewed these corrective actions and considers them good initiatives. The Licensee significantly reduced the Unit 1 and common service request backlog from approximately 3000 at the beginning of 1993 to 961 service requests prior to restart in February 1994. Unit 2 had a backlog of 615 service requests prior to its restart in May 1994. In January 1994, NRC did an inspection to determine the effectiveness of the Licensee's efforts to reduce and maintain an acceptable maintenance backlog. The inspectors found that the Licensee was quickly addressing high-priority work. The inspectors concluded that, with the current maintenance programs in place, the Licensee should be able to keep the service request backlog manageable. The backlog as of October 31, 1994, was 717 service requests for Unit 1 and common, and 433 for Unit 2. The inspectors also reviewed the service request backlog to ensure that maintenance activities that were deferred did not compromise the reliability of safety-related equipment. They concluded that the maintenance actions that are deferred have adequate technical basis for such deferral. Therefore, the Licensee has sufficient control of its maintenance program to ensure that safety-significant repairs are completed in a timely manner. Inspection Report 94-20, June 10, 1994, includes a discussion of the NRC's evaluation of the service request backlog. The inspectors concluded that the Licensee was maintaining control of service request backlog levels and had taken sufficient actions to control the backlogs in the foreseeable future.

The Petitioner refers to a newspaper article (*Houston Chronicle*, March 28, 1993) which gives no additional facts other than those already known by the NRC and does not provide an adequate basis for the request. In summary, the Petitioner does not present a substantial health or safety issue that would call into question the safe operation of STP.

F. Effectiveness of the Physical Security Plan

The Petitioner asserts that the Licensee's physical plant nuclear security program is of questionable effectiveness because a simulated terrorist team was able to penetrate the vital area of STP during a training exercise in 1992 as cited

in a newspaper article (*Houston Chronicle*, March 28, 1993). The Licensee had an NRC-approved training and qualification plan in effect and was conducting training in compliance with that plan when the incident occurred. One purpose of training is to find weaknesses in personnel, tactics, and procedures. The training revealed one security exercise weakness for which the Licensee took corrective actions. During an operational safeguards response evaluation (OSRE) conducted in January 1993, the Licensee successfully demonstrated its capability to protect against a design-basis threat. The OSRE team documented its conclusions in an OSRE report of March 17, 1993.

The NRC conducts OSREs to evaluate a licensee's ability to protect against the design-basis threat of radiological sabotage and to ensure that the safeguards measures do not adversely affect the safe operation of the plant. The OSRE team was established to do reviews to help resolve generic safeguards issues and to evaluate the twenty-eight sites where the regulatory effectiveness review team had not observed contingency drills. STP was one of these sites. The OSRE team consists of a nuclear engineer, safeguards specialists from the Office of Nuclear Reactor Regulation and NRC's regional office, the resident inspector, and active-duty U.S. Army Special Forces personnel acting in a support and advisory role under an interagency agreement.

The OSRE team at STP noted in the March 17, 1993 report the overall soundness and use of response capabilities and the rapid, intense, and generally effective execution of the security strategy by the total response force. These findings were based on discussions with security force members and observations of response force drills and critiques. The OSRE team found no significant deficiencies and found a high level of safeguards effectiveness at STP. The newspaper article referred to above by the Petitioner gives no additional facts other than those already known by the NRC and does not provide an adequate basis for the request. The Staff has concluded that the issues raised concerning the security program have been satisfactorily addressed by the Licensee and are not significant to health and safety.

G. Request for Institution of Proceedings Under Section 2.206

The Petitioner requests that the NRC initiate a show-cause proceeding to revoke, modify and/or suspend South Texas Project's operating licenses. The institution of proceedings in response to a request for action under 10 C.F.R. § 2.206 is appropriate only when substantial health and safety issues have been raised *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975), and *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), DD-92-1, 35 NRC 133, 143-44 (1992). The allegations contained in the instant petition do not raise substantial health and safety issues that would justify revoking, suspending, or

modifying the South Texas licenses. Accordingly, I have concluded that no adequate basis exists for initiating a proceeding as requested by the Petitioner.

IV. CONCLUSION

The NRC Staff has reviewed the basis and justification stated to support the Petitioner's request that the NRC institute a show-cause proceeding pursuant to 10 C.F.R. § 2.202 to modify, suspend, or revoke HL&P's NRC operating licenses authorizing the operation of South Texas Project, Units 1 and 2, and that the NRC take appropriate actions to cause the immediate shutdown of the two reactor cores at South Texas Project. The Staff finds that no adequate basis exists for granting the Petitioner's request for immediate shutdown of South Texas Project, Units 1 and 2, or for a proceeding to show cause why the operating licenses should not be modified, suspended, or revoked, as no substantial health or safety issues have been raised by the petition. The Petitioner also requested that the NRC issue civil penalties against the Licensee and/or Licensee management personnel at HL&P's South Texas Project. This request has been granted insofar as the NRC has issued a proposed civil penalty to HL&P for a violation of section 50.7.

A copy of this Decision will be filed with the Secretary of the Commission for review in accordance with 10 C.F.R. § 2.206(c). The Decision will become final action of the Commission twenty-five (25) days after issuance unless the Commission, on its own motion, institutes review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

William T. Russell, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 20th day of December 1994.