

April 30, 1998

MEMORANDUM FOR: L. Joseph Callan
Executive Director for Operations

John F. Cordes, Acting Director
Office of Commission Appellate Adjudication

FROM: John C. Hoyle, Secretary /s/

SUBJECT: STAFF REQUIREMENTS - Affirmation Session, 1:45 P.M., THURSDAY, APRIL 30, 1998,
COMMISSIONERS' CONFERENCE ROOM, ONE WHITE FLINT NORTH, ROCKVILLE,
MARYLAND (OPEN TO PUBLIC ATTENDANCE)

I. SECY-98-040 - FINAL RULE: REQUIREMENTS FOR SHIPPING PACKAGES USED TO TRANSPORT VITRIFIED HIGH-LEVEL WASTE

The Commission approved a final rule, subject to the changes in attachment 1, amending 10 CFR Part 71 to add vitrified high-level waste (HLW) contained in a sealed canister designed to maintain waste containment during handling activities associated with transport to the forms of plutonium which are exempt from the double-containment packaging requirements for transportation of plutonium. This amendment responds to a petition for rulemaking submitted by the Department of Energy, Office of Civilian Radioactive Waste Management (DOE/OCRWM). The final rule grants the petition for rulemaking, with modifications, and completes NRC action on the petition.

Following incorporation of these changes, the Federal Register notice should be reviewed by the Rules Review and Directives Branch in the Office of Administration and forwarded to the Office of the Secretary for signature and publication.

(EDO)

(SECY Suspense: 5/29/98)

II. SECY-98-091 - LOUISIANA ENERGY SERVICES (CLAIBORNE ENRICHMENT CENTER): APPLICANT'S MOTION TO WITHDRAW ITS LICENSE APPLICATION AND TO TERMINATE THE PROCEEDING

The Commission voted to approve an Order granting the LES motion to withdraw its license application and terminate this proceeding. The order renders all remaining issues in this case moot. It therefore dismisses the pending petitions for review and vacates LBP-97-3, LBP-97-22, and the Atomic Safety and Licensing Board's March 3, 1995 unpublished order.

All Commissioners voted to approve the Order, as provided in attachment 2.

(Subsequently, on April 30, 1998, the Secretary signed the Order.)

III. SECY-98-002A - REVISED DRAFT OF INTERNATIONAL URANIUM ORDER

The Commission approved a Memorandum and Order (attachment 3) affirming the decisions of the Presiding Officer in LBP-97-12 and LBP-97-14 to deny the standing to the petitioners.

(Subsequently, on April 30, 1998, the Secretary signed the Memorandum and Order.)

Attachments: 1. Changes to the Final Rulemaking in SECY-98-040
2. Commission Order in the LES matter (SECY-98-091)
3. Commission Memorandum and Order in the International Uranium matter (SECY-98-002A)

cc: Chairman Jackson
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
EDO
OGC

CIO
CFO
OCAA
OCA
OIG
Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)
PDR - Advance
DCS - P1-17

ATTACHMENT 1

Changes to the Final Rulemaking in SECY-98-040

1. The background section of the Federal Register Notice and the Environmental Considerations section of the Environmental Assessment should include the Idaho National Environmental and Engineering Laboratory (INEEL) as a location from which DOE plans to ship the vitrified high-level waste.
2. The following changes should be made to the Federal Register Notice.
 - On page 13, first full paragraph, line 3, replace 'this paragraph' with 'these design requirements.'
 - On page 22, lines 3-4, replace 'this paragraph' with 'these design requirements.'
3. The following changes should be made to the Public Announcement.
 - On page 1, the last line, insert 'under certain accident conditions' after 'atmosphere.'
 - On page 2, at the end of the first full paragraph, after 'facility' insert '; however, Yucca Mountain, Nevada is currently being studied by DOE.'

ATTACHMENT 2

UNITED STATES
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.

In the matter of)
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Louisiana Energy Services, L.P.) Docket No. 70-3070-ML
(Claiborne Enrichment Center))
_____)

CLI-98-5

ORDER

Louisiana Energy Services, L.P. (LES), has filed a motion to grant its request to withdraw its application for a combined construction permit and operating license for the Claiborne Enrichment Center (CEC), near Homer, Louisiana, and to terminate the proceeding. Pending before the Commission

are three petitions for review concerning decommissioning funding and waste disposal. Two of the petitions, one filed by Citizens Against Nuclear Trash (CANT) and the other by LES, seek review of a published Partial Initial Decision issued by the Atomic Safety and Licensing Board, LBP-97-3, 45 NRC 99 (1997). CANT's petition also challenges a supplemental Board decision, LBP-97-22, 46 NRC 275 (1997). The third petition, also filed by CANT, seeks review of an unpublished Board Memorandum and Order, dated March 3, 1995, that denied CANT's petition for waiver of certain waste disposal regulations.

LES's motion to withdraw its license application and terminate the proceeding is granted. This renders moot all remaining issues in this case. The Commission therefore dismisses the pending petitions for review and vacates LBP-97-3, LBP-97-22 and the Board's March 3, 1995, unpublished order. While unreviewed Board decisions do not create binding precedent, where as here the unreviewed rulings "involve complex questions and vigorously disputed interpretations of agency provisions," the Commission chooses as a policy matter to vacate them and thereby eliminate any future confusion and dispute over their meaning or effect. Cf. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), CLI-96-2, 43 NRC 13, 15 (1996). Our decision to vacate the Board orders "does not intimate any opinion on their soundness." Id.

CANT's response to LES's motion calls for vacating several of the Commission and Board rulings in LES's favor, and giving res judicata effect to rulings in CANT's favor. These requests, except for vacating the unreviewed decommissioning rulings described above, are denied. CANT seeks a sweeping vacatur order because LES's withdrawal has stripped CANT of any immediate opportunity to seek judicial review of the rulings in LES's favor. CANT in this instance is no different from a party that finds itself at the end of the proceeding with exactly what it asked for, in this case no license. CANT will have an opportunity to seek judicial review when and if rulings issued in this proceeding are used against it in a future case. Similarly, the res judicata or other preclusive effect of a previously decided issue is appropriately decided at the time the issue is raised anew.⁽¹⁾

In addition to the motion filed here, LES filed an identical motion with the Board to withdraw its license application and to terminate the proceeding. Our order terminating the proceeding renders unnecessary any further Board proceedings, either on the motion to withdraw and terminate or on the issues we recently remanded to the Board in CLI-98-3, 47 NRC ____ (1998).

The proceeding is hereby terminated.⁽²⁾

IT IS SO ORDERED.

For the Commission

John C. Hoyle
Secretary of the Commission

Dated at Rockville, Maryland, this 30th day of April, 1998.

ATTACHMENT 3

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.

In the matter of)
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INTERNATIONAL URANIUM (USA)) Docket No. 40-8681-MLA
CORPORATION)
(White Mesa Uranium Mill;)
Alternate Feed Material))
_____))
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MEMORANDUM AND ORDER

In LBP-97-12, 46 NRC 1 (1997), and LBP-97-14, 46 NRC 55 (1997), the Presiding Officer concluded that three petitioners (the Native American Peoples Historical Foundation Inc.'s Great Avikan House Project, Ms. Lula Katso and the late Mr. Norman Begay) had failed to demonstrate standing in this source materials license amendment proceeding. On appeal, petitioners challenge the Presiding Officer's conclusions. We affirm LBP-97-12 and LBP-97-14.

Petitioners were provided clear and extensive guidance by the Presiding Officer (and also by the NRC staff) on what additional showings were necessary to demonstrate standing. See Energy Fuels Nuclear, LBP-97-10, 45 NRC 429, 430-32 (1997). See also NRC Staff's Response to the Request for Hearing (May 21, 1997). Petitioners repeatedly ignored almost all of this guidance -- not only at the hearing stage but also on appeal.⁽³⁾ In particular, they failed to show that their asserted injuries from the action that would be approved by the license amendment are distinct and palpable, particular and concrete, as opposed to being conjectural or hypothetical. See, e.g., *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1016 (1998); *Warth v. Seldin*, 422 U.S. 490, 501, 508, 509 (1975); *Sequoyah Fuels Corp. (Gore, Oklahoma Site)*, CLI-94-12, 40 N.R.C. 64, 72 (1994).

As we recently indicated in *Atlas Corp.*, CLI-97-8, 46 NRC 21, 22 (1997), if a petitioner fails to respond to a "Presiding Officer's reasonable and clearly articulated requests for more specific information," the Presiding Officer is fully justified in rejecting the petition for intervention. Moreover, the Commission generally defers to the Presiding Officer's determinations regarding standing, absent an error of law or an abuse of discretion. See *Georgia Tech*, supra, 42 NRC at 116. We see no such error or abuse here.

IT IS SO ORDERED.

Chairman Jackson did not approve this memorandum and order. She would have reversed LBP-97-12 and LBP-97-14 and remanded the proceeding to the Presiding Officer to determine whether petitioners have raised any areas of concern that are germane to the license amendment. In her view, petitioners (Avikan, Ms. Katso, and the late Mr. Begay) have claimed some risk of injury from the Cotter material, albeit not in precise or detailed terms, that would be avoided if the amendment were rejected. Thus, in her view, petitioners have demonstrated enough for standing.

For the Commission

John C. Hoyle
Secretary of the Commission

Dated at Rockville, Maryland, this 30th day of April, 1998.

1. We deny CANT's request for a Commission order requiring service of future documents exchanged between the Staff and LES after the proceeding is terminated. This seems to us unnecessary and would run counter to NRC practice. See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 152 n.46 (1993). We also deny CANT's request for special notice if LES were to refile its application. The Commission's existing notice requirements are adequate to ensure that CANT has an opportunity to seek participation in any future licensing proceeding.

2. In its capacity as amicus curiae, the Nuclear Energy Institute (NEI) has filed a letter asking that the Commission "clarify that Executive Order 12898 does not, as a matter of law, apply to NRC licensing proceedings." No clarification is necessary, as the Commission has already held that the executive order "by its own terms, established no new rights or remedies. See E.O. 12898, 6-609. Its purpose was merely to 'underscore certain provision[s] of existing law that can help ensure that all communities and persons across this Nation live in a safe and healthful environment' (emphasis added)." CLI-98-3, 47 NRC ____ (April 2, 1998) [slip op. at 29]. NEI cannot, in any event, advance arguments or bring motions not pursued by any party to the proceeding.

3. However, contrary to the Presiding Officer's finding (LBP-97-12, 46 NRC at 6), petitioners did provide him with the distance between their homes or headquarters and the White Mesa Mill property. But proximity alone does not suffice for standing in materials licensing cases. See, e.g., Final Rule, "Informal Hearing Procedures for Materials Licensing Cases," 54 Fed. Reg. 8269, 8272 (Feb. 28, 1989); see generally Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115-17 (1995).