

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
DOMINION NUCLEAR CONNECTICUT, INC)	Docket No. 50-423-LA-3
)	
(Millstone Nuclear Power Station,)	
Unit No. 3))	

NRC STAFF'S REPLY TO CONNECTICUT COALITION AGAINST MILLSTONE
AND LONG ISLAND COALITION AGAINST MILLSTONE'S RESPONSE
TO ATOMIC SAFETY AND LICENSING BOARD QUESTIONS IN
MEMORANDUM AND ORDER OF DECEMBER 10, 2001

INTRODUCTION

On December 21, 2001, Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone (CCAM/CAM), filed their response to the Atomic Safety and Licensing Board's (Licensing Board or Board) Memorandum and Order (CCAM/CAM Motion for Leave to Reply to Responses of Licensee and Staff) (Order), of December 10, 2001, in which the Board granted CCAM/CAM's motion for leave to reply and requested the parties to respond to two Board questions. The NRC staff (Staff) hereby files its reply to CCAM/CAM's response to the Board's Order. As discussed below, 10 C.F.R. § 50.13 precludes admission of the contention and waiver of 10 C.F.R. § 50.13 is not appropriate.

BACKGROUND

On November 1, 2001, CCAM/CAM filed a motion to reopen the record and to admit a late-filed environmental contention.¹ On November 13, 2001, Dominion Nuclear Connecticut, Inc. (DNC or Licensee) filed a response to CCAM/CAM's Motion.² On November 16, 2001, the Staff filed its response to CCAM/CAM's Motion.³ On November 21, 2001, CCAM/CAM filed a motion for leave to reply to the DNC and Staff responses to CCAM/CAM's Motion to Reopen. On December 10, 2001, the Licensing Board issued the Order granting CCAM/CAM's November 21, 2001, motion for leave to reply and requesting the parties to answer two Board questions. The Order also established a schedule for CCAM/CAM's reply and DNC and the Staff's replies thereto. On December 21, 2001, CCAM/CAM filed its response to the Board's December 10, 2001 Order.⁴ On December 26, 2001, the Licensing Board granted the Staff's motion to extend time to file its reply.⁵

¹ Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Motion to Reopen the Record and Request for Admission of Late-Filed Environmental Contention (CCAM/CAM's Motion), November 1, 2001.

² Dominion Nuclear Connecticut, Inc.'s Response to Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Motion to Reopen the Record and Request for Admission of Late-Filed Environmental Contention and Motion for Directed Certification, November 13, 2001.

³ NRC Staff Response Opposing the Motion of Connecticut Coalition Against Millstone/Long Island Coalition Against Millstone Motion to Reopen the Record and to Admit a Late-Filed Environmental Contention (Staff's November 16th Response), November 16, 2001.

⁴ Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Reply to Oppositions to Motion to Reopen the Record and Request for Admission of Late-Filed Environmental Contention (CCAM/CAM's Reply), December 21, 2001.

⁵ DNC filed its response on January 3, 2002. See Dominion Nuclear Connecticut's Response to Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Reply to Oppositions to Motion to Reopen the Record and Request for Admission of Late-Filed Environmental Contention (DNC January 3rd Response).

In accordance with the schedule established by the Licensing Board, the Staff hereby responds to CCAM/CAM's Reply. For the reasons set forth below and in the Staff's November 16, 2001, Response, the Licensing Board should dismiss CCAM/CAM's motion to reopen the record to admit a late-filed contention.

DISCUSSION

As stated in the Staff's November 16th Response, it is the Staff's position that the Licensing Board does not have jurisdiction to address CCAM/CAM's motion to reopen. The Commission remanded a narrowly defined issue to the Board for consideration, concerning admission of Contention 4, relating to administrative controls to prevent criticality in the spent fuel pool at Millstone Unit 3. *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit No. 3), CLI-01-25, 52 NRC 355 (2000). The contention sought to be admitted via CCAM/CAM's motion to reopen, however, bears no relation to the remanded issue. As fully discussed in the Staff's November 16th Response, licensing boards may not expand the parameters of a Commission remand order to address issues outside the scope of that order. See Staff Response at 6-7. Moreover, nothing in CCAM/CAM's Reply contravenes the Staff's position and authorities, or supports a finding of jurisdiction. Therefore, the Board must dismiss the motion to reopen.

In its December 10, 2001, Order, the Board permitted CCAM/CAM to reply to the DNC and Staff's oppositions to its motion, but limited the reply to the "alleged factual errors in the other parties' responses." Order at 3. The Order also requested CCAM/CAM to address two issues:

(1) the applicability of 10 C.F.R. § 50.13 (together with the Appeal Board decision in Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 697-701 (1985), review declined, CLI-86-5, 23 NRC 125, aff'd sub nom. Limerick Ecology Action Inc. v. NRC, 869 F.2d 719, 744 (3d Cir.1989), applying the rule to NEPA questions; see also Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973)) to our ruling on the acceptability of the proposed environmental contention; and (2) whether, if applicable, the special circumstances raised by the proposed terrorism contention are such

that application of 10 C.F.R. § 50.13 and its environmental application would not serve the purposes for which the rule or regulation initially was adopted, within the meaning of 10 C.F.R. § 2.758.

Order at 3. The Staff and DNC were given an opportunity to respond to CCAM/CAM's answers to the questions.

A. Factual Errors

In its Reply, CCAM/CAM addresses what it categorizes as "factual errors" on the part of DNC and the Staff. Reply at 2-14. However, these so-called "errors" amount to nothing more than argument and opinion. In addition, as demonstrated by DNC in its response to CCAM/CAM's Reply, the "factual errors" alleged by CCAM/CAM are, for the most part, peripheral.⁶ DNC Response at 3. The Staff agrees with DNC's analysis of CCAM/CAM's "factual errors."⁷

⁶ The Staff notes that CCAM/CAM's Reply contains many misstatements. The Staff addresses here only the most egregious of these. CCAM/CAM states that "the assertion that a terrorist attack against any nuclear facility but Millstone is foreseeable is patently illogical." CCAM/CAM Reply at 10. But neither the Staff nor DNC made such an assertion. CCAM/CAM then belabors the obvious, that, to the extent nuclear plants are potential targets of terrorists, all plants are potential targets of terrorists. This is an argument for denying the contention, not for admitting it.

In an argument that seems to deliberately confuse information available to the national security establishment and information available to Dr. Gordon Thompson, on whose qualifications CCAM/CAM relies for their contention (Reply at 10-11), CCAM/CAM attributes to the Staff an assertion that "there is insufficient qualitative information to reasonably predict the foreseeability of an act of malice or insanity against the Millstone plant." Reply at 11. The Staff made no such assertion. The Staff's argument relied on *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 743-44 (3d Cir. 1989) (LEA) for the proposition that the risks of sabotage cannot be quantified. The Staff did not complain of insufficient information. It was the quality of the information that CCAM/CAM relied on and not the quantity of that information that was and is of concern to the Staff.

⁷ DNC does not address the qualifications of Dr. Thompson to give expert testimony concerning the proposed contention. The two decisions cited by CCAM/CAM speak for themselves regarding the value or lack of value of Dr. Thompson's contributions. See *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-00-12, 51NRC 247, 267 (2000); LBP-01-09, 53 NRC 239, 250-51 (2001). In any event, neither of those decisions concerns the subject matter regarding which Dr. Thompson is said to be qualified here, namely the qualitative assessment of the risks of terrorism to a specific spent fuel pool. Therefore, no prior findings concerning Dr. Thompson's qualifications are relevant to the matter for which his opinions are offered in the instant proceeding.

B. The Board's Questions

1. The applicability of 10 C.F.R. § 50.13 and cases cited by the Licensing Board to the admissibility of CCAM/CAM's proposed environmental contention

The Board requested the parties to address the applicability of 10 C.F.R. § 50.13 and a line of decisions concerning the proposed operating licenses for the Limerick reactors to a ruling on the acceptability of the proposed environmental contention. Order at 3.

CCAM/CAM's proposed contention seeks to raise acts of terrorism ("acts of malice or insanity," CCAM/CAM Reply at 2), of the very type intended to be precluded by 10 C.F.R. § 50.13.

Section 50.13 provides that:

An applicant for a license to construct and operate a production or utilization facility, or for an amendment to such license, is not required to provide for design features or other measures for the specific purpose of protection against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person, or (b) use or deployment of weapons incident to U.S. defense activities.

CCAM/CAM argues that its contention is broader than the Board's understanding of it as expressed in the Board's order of December 10, 2001.⁸ CCAM/CAM Reply at 3. However, insofar as CCAM/CAM would distinguish between acts of malice, which CCAM/CAM acknowledges are encompassed by the dictionary definition of terrorism, and acts of insanity, which CCAM/CAM believes are not included within the definition, the distinction is not useful.⁹ Pursuant to

⁸ CCAM/CAM's motion is also broader in another way. CCAM/CAM would have the Staff address in an EIS all events that could cause a loss of water in the spent fuel pool at Millstone Unit 3, namely a) acts of malice or insanity by persons within or outside the plant boundary, b) aircraft impact, c) earthquake, d) drop of a fuel transfer cask or shipping cask, e) severe accident at a nearby reactor or spent fuel pool, f) an explosion inside or outside the plant buildings, and, also, leakage, evaporation, siphoning, pumping, displacement by objects falling into the pool or overturning of the pool. Motion to Reopen at 8. CCAM/CAM does not explain why it believes the probability of any of these events is increased by the proposed amendment.

⁹ Also, to the extent that CCAM/CAM seeks to raise issues other than acts of terrorism related to the September 11, 2001 attacks, they are manifestly and inexcusably out of time to a degree far greater than with respect to the terrorism issues, which are also unjustifiably late.

10 C.F.R. § 50.13, no attacks and destructive acts by enemies of the United States, whatever the mental competence of the perpetrators, need to be designed against and contentions alleging that they do are inadmissible.

The Commission recently reaffirmed the basis for 10 C.F.R. § 50.13:

Historically the NRC has drawn a distinction between requiring its licensees to defend their facilities against sabotage and requiring them to protect against attacks and destructive acts by enemies of the United States. Even NRC-licensed facilities that are required to meet the most stringent security requirements (because the potential consequences of sabotage are greatest) are not required to protect against enemies of the United States. For example, reactor licensees are required to protect against a prescriptive list of possible threats, referred to collectively as the “design basis threat.” However, our regulations stipulate that power reactors are not required to be designed or to provide other measures to counteract destructive acts by “enemies of the United States.” The basis for this distinction is that the national defense establishment and various agencies having internal security functions have the responsibility to address this contingency, and that requiring reactor design features to protect against the full range of the modern arsenal of weapons is simply not practical.

Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC_, slip op. at 3-4 (2001). The events of September 11, 2001, are precisely the kind of threats excluded from consideration by 10 C.F.R. § 50.13.

CCAM/CAM contends that the Appeal Board in its *Shoreham* decision¹⁰ did not conclude that 10 C.F.R. § 50.13 governs NEPA considerations as a matter of law. CCAM/CAM Reply at 18. That statement is incorrect. The Appeal Board in *Shoreham* cited the Federal court’s opinion in *Siegel v. AEC*, 400 F.2d 778 (1968), and the court’s finding upholding 10 C.F.R. § 50.13 and the

¹⁰ *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 9 AEC 831 (1973).

Commission's rationale¹¹ for the regulation. *Shoreham*, ALAB-156, 9 AEC at 851. The Appeal Board said:

Taking into account the "rule of reason" which we believe must govern the interpretation of NEPA, we find the rationale for 10 C.F.R. § 50.13 to be as applicable to the Commission's NEPA responsibilities as it is to its health and safety responsibilities. We so construe that regulation.

Id. CCAM/CAM's point regarding *Shoreham* is not clear. The Appeal Board construed the regulation to be applicable to the Commission's NEPA responsibilities. Although it took the "rule of reason" into account, the holding does not rest on that rule, but instead upon the Commission's rationale for 10 C.F.R. § 50.13. CCAM/CAM has pointed to no Commission issuance or regulation that calls the holding in *Shoreham* into question; in fact, it has recently been relied upon by a licensing board in denying the admission of a contention seeking to litigate safety and environmental concerns relating to the September 11th attacks. See *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC __, slip op. at 11-13; *but see Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC __, slip op. at 51-55 (2001)(finding *Shoreham* inapposite because 10 C.F.R. § 50.13 is inapplicable to Part 70 facilities). Moreover, as noted above, the rationale for 10 C.F.R. § 50.13 was reaffirmed, in pertinent part, in the Commission's decision in *PFS*. *PFS*, *supra*, CLI-01-26, 54 NRC __, slip op. at 3-4.

CCAM/CAM correctly states that *LEA* does not address § 50.13. CCAM/CAM Reply at 17. However, in the holding in *LEA* regarding sabotage risks that the Board asked the parties to address, the Court of Appeals for the Third Circuit specifically found that NEPA did not require the

¹¹ "(1) the impracticality, particularly in the case of civilian industry, of anticipating accurately the nature of enemy attack and of designing defenses against it, (2) the settled tradition of looking to the military to deal with this problem and the consequent sharing of its burdens by all citizens, and (3) the unavailability, through security classification and otherwise, of relevant information and the undesirability of ventilating what is available in public proceedings." *Shoreham*, ALAB-156, 9 AEC at 851, *citing Siegel*, 400 F. 2d at 782.

NRC to admit a contention concerning the need to address sabotage risks in the environmental impact statement prepared on an application for a license to operate a reactor.¹² See *LEA*, *supra*, 869 F.2d 719, 743-44. The court in *LEA* upheld an NRC appeal board finding that there was no known basis on which the NRC could make a “reasonable prediction of . . . the kind of stochastic human behavior displayed by an act of sabotage,” and that sabotage, therefore, need not be considered in an environmental impact statement. See *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 698-701 (1985), *review declined*, CLI-86-5, 23 NRC 125 (1986) *aff’d sub nom Limerick Ecology Inc. v. NRC*, 869 F.2d 719, 743-44 (3d Cir. 1989).

2. Whether a waiver of 10 C.F.R. § 50.13 pursuant to 10 C.F.R. § 2.758 would be appropriate given the special circumstances raised by the proposed terrorism contention

The second question the Board asked the parties to address is whether, if 10 C.F.R. § 50.13 was found to be applicable, the special circumstances raised by the proposed terrorism contention would not be such that the application of § 50.13 both as a safety matter and as an

¹² In the instant proceeding, the proposed action is the issuance of an amendment to increase the storage capacity of the spent fuel pool at Millstone Unit 3. As discussed in the Staff’s response to the Supplemental Petition to Intervene and in the Staff’s response to the instant motion to reopen, the Commission’s regulations do not require an EIS on such an action. Also, as discussed, the Commission’s regulations provide that for actions that are categorically excluded from the requirement to prepare an EIS or for actions that require an environmental assessment, the Commission will, where there are special circumstances raised by the proposed action, prepare an EIS. CCAM/CAM’s contention is:

The Staff must prepare an EIS that fully considers the environmental impacts of the proposed license amendment, including its effects on the probability and consequences of *accidents* at the Millstone plant.

Motion to Reopen at 8 (emphasis added). CCAM/CAM does not reveal why it believes the proposed amendment will increase the probability of a terrorist attack on the Millstone Unit 3 spent fuel pool, much less why it would regard such an attack as an accident.

environmental matter should be waived pursuant to 10 C.F.R. § 2.758 for failure of § 50.13 to serve the purposes for which it was adopted.

In its reply, CCAM/CAM states that, assuming the applicability of § 50.13, considerations it addressed in response to the first question would operate to justify a waiver. CCAM/CAM's Reply at 21. However, these considerations, discussed at 19-20 of CCAM/CAM's Reply, appear to go to its opinion that § 50.13 is too dated to be of use in light of subsequent events such as the destruction of a Federal building in Oklahoma and other terrorist events. If CCAM/CAM believes 10 C.F.R. § 50.13 is too dated to be of use, it should petition for rulemaking pursuant to 10 C.F.R. § 2.802; CCAM/CAM has failed to address or demonstrate that the situation warrants waiver of the rule in the specific and narrowly defined circumstances presented here. The Staff notes that no party has made a request for a waiver and the procedural requirements of 10 C.F.R. § 2.758 (petition and supporting affidavit) have not been met. The affidavit submitted in support of the motion to reopen does not address the requirements of 10 C.F.R. § 2.758 and, thus, the *prima facie* case that the regulation requires has not been made out.

The substantive requirements of 10 C.F.R. § 2.758 are clear. The sole ground for a waiver is "special circumstances with regard to the subject matter of the particular proceeding . . . such that the application of the rule or regulation . . . would not serve the purposes for which the rule or regulation was adopted." The Board's question addresses the "special circumstances raised by the contention." In the Staff's view, the Board's emphasis is misplaced. The language of the regulation clearly refers to special circumstances *relating to the subject matter of the proceeding*, not the contention. Here, the subject matter of the proceeding is increasing storage in the spent fuel pool at Millstone, Unit 3. CCAM/CAM has not explained how the events of September 11 relate to the proposed action.

The Commission has defined “special circumstances” as “one or more facts, not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the rulemaking proceeding leading to the rule sought to be waived.” *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573 (1988). See also *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-80-16, 11 NRC 674, 675 (1980) (no special circumstances present because the issue not peculiar to specific plant, but was “common to all light water power reactors”). CCAM/CAM has raised a generic concern regarding terrorism. No facts specific to Millstone or the increased spent fuel pool storage under consideration have been shown. The “special circumstances” CCAM/CAM urges here are no different for Millstone than for the other reactors in the United States. Therefore, no special circumstances have been shown.

Beyond the complete lack of special circumstances, there is another and more important reason to deny a waiver. The purpose of 10 C.F.R. § 50.13 is to clarify that “power reactors are not required to be designed or to provide other measures to counteract destructive acts by ‘enemies of the United States.’” See, e.g., *PFS*, CLI-01-26, 54 NRC __, slip op. at 4. Therefore, to deny admission of the contention based upon § 50.13 would be to apply the regulation in exactly the way it was intended to be applied. The events of September 11 are precisely the kind of threats excluded from consideration by 10 C.F.R. § 50.13. Thus, it cannot be said that “special

circumstances” undercut the rationale of 10 C.F.R. § 50.13.¹³ Therefore, waiver of 10 C.F.R. § 50.13 is not appropriate in this case.

CONCLUSION

Based on the foregoing, CCAM/CAM’s motion to reopen the closed record should be denied.

Respectfully submitted,

/RA/

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/RA/

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¹³ In addition, a waiver will only be granted in “unusual and *compelling* circumstances”. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231, 235 (1989), *citing*, *Seabrook*, CLI-89-3, 29 NRC 234, 239 (1989). Within the context of 10 C.F.R. § 2.758, as discussed above, no such circumstances have been demonstrated.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S REPLY TO CONNECTICUT COALITION AGAINST MILLSTONE AND LONG ISLAND COALITION AGAINST MILLSTONE'S RESPONSE TO ATOMIC SAFETY AND LICENSING BOARD QUESTIONS IN MEMORANDUM AND ORDER OF DECEMBER 10, 2001" in the above-captioned proceeding have been served on the following through deposit in the NRC's internal mail system, or by deposit in the NRC's internal mail system with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service as indicated by a double asterisk, with copies by electronic mail as indicated, this 10th day of January, 2002:

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