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RAS 3818

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 01/24/02

ATOMIC SAFETY AND LICENSING BOARD

SERVED 01/24/02

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Richard F. Cole
Dr. Charles N. Kelber

In the Matter of	Docket No. 50-423-LA-3
DOMINION NUCLEAR CONNECTICUT, INC.	ASLBP No. 00-771-01-LA-R
(Millstone Nuclear Power Station, Unit No. 3; Facility Operating License NPF-49)	January 24, 2002

MEMORANDUM AND ORDER
(Late-filed Contention Concerning Acts of Terrorism Affecting Spent Fuel Pool)

This proceeding concerns a proposed increase in capacity (through the addition of high-density storage racks) of the spent fuel pool (SFP) of the Millstone Nuclear Power Station, Unit No. 3 (Millstone-3), a pressurized water reactor located in New London County, Connecticut. Pending before this Licensing Board is a motion, filed November 1, 2001, by the Intervenors, the Connecticut Coalition Against Millstone (CCAM) and the Long Island Coalition Against Millstone (CAM)(collectively referenced as CCAM/CAM), to reopen the record and accept a late-filed environmental contention dealing with the likelihood and consequences of potential acts of terrorism against the Millstone-3 SFP.[1] The contention, which is supported by the declaration of Dr. Gordon Thompson, CCAM/CAM's designated expert witness, is founded in large part upon the terrorist acts of September 11, 2001, against targets in New York City and the

[1]CCAM/CAM Motion to Reopen the Record and Request for Admission of Late-filed Environmental Contention, dated November 1, 2001 (CCAM/CAM Motion).

Washington, D.C. area, and the potential for comparable strikes directed against nuclear facilities.

The Licensee, Dominion Nuclear Connecticut, Inc. (DNC) and the NRC Staff each advance a number of procedural and substantive reasons why we should reject the proposed new contention. For reasons set forth below, we are rejecting the contention solely on the basis of the bar against considering contentions of this sort set forth in 10 C.F.R. § 50.13, together with decisions applying the policy of that section to environmental contentions such as this one, e.g., 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); Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973).

These provisions reflect policy choices adopted by the Commission during an earlier time frame. Because the Commission currently has before it similar questions raised in other proceedings concerning the appropriate treatment for proposed contentions based on the recent terrorist activities, see, e.g., Private Fuel Storage, L.L.C. (Independent Fuel Storage Installation), LBP-01-37, 54 NRC __ (Dec.13, 2001)[2], we are referring this ruling to the Commission for its review and policy guidance.

I. The proposed contention and its bases. The new proposed contention, denominated sequentially as CCAM/CAM Contention 12,[3] asserts, in substance, that

> in two significant respects, circumstances have changed and new information has become available which warrant reconsideration of the NRC's previous determination that the proposed expansion of fuel storage capacity at the

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[2]But see Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC __, __, slip op. at 52-53 (December 6, 2001),

[3]See LBP-00-02, 51 NRC 25, 29-46 (2000).

> Millstone Unit 3 nuclear power plant poses no significant environmental risk and therefore does not warrant preparation of an Environmental Impact Statement (EIS).[4]

Both the existence and the significance of the two categories of changed circumstances are analyzed in the declaration of CCAM/CAM's designated expert, Dr. Gordon Thompson.

The contention goes on to specify the first of the changed circumstances, the terrorist acts of September 11, 2001, on the World Trade Center and the Pentagon, and "related information which has subsequently become public."[5] CCAM/CAM claims that these events demonstrate conclusively that the NRC's rationale for not preparing an EIS for the proposed SFP increase in capacity was incorrect and that NRC should "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."[6] CCAM/CAM emphasizes that the terrorist events and related information upon which they rely affect both the probability of and the consequences to be expected from terrorist activities of various types, not limited to airplane crashes.

The second of the changed circumstances to which CCAM/CAM refer is, in their view, newly developed information concerning the proper analysis of accidents in spent fuel pools: namely, the Staff's "recent concessions" that[7]

> (a) loss of water from a high-density [SFP] can lead to the onset of exothermic oxidation reactions for spent fuel of any age after discharge from a reactor; (b) the onset of exothermic oxidation reactions can be assumed if the water level in a pool declines to the level of the top of the spent fuel racks; and (c) the onset of

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[4]CCAM/CAM Motion at 1.

[5]Id. at 6.

[6]Id. at 8.

[7]Id. at 7.

> exothermic oxidation reactions in one pool is likely to lead to the onset of similar reactions in nearby pools."

Based on this information, CCAM/CAM concludes that, in the event of an act of malice or insanity which causes uncovering of the fuel, a severe pool accident involving a "significant offsite release may be assumed as inevitable, and that the consequences of such an act could be significantly greater under the proposed license amendment."[8]

II. Responses of DNC and the NRC Staff. DNC, through its response dated November 13, 2001,[9] and the NRC Staff, through its filing dated November 16, 2001,[10] each take virtually identical positions in opposition to the CCAM/CAM motion. They each claim that (1) we lack jurisdiction to entertain the CCAM/CAM motion;[11] (2) the motion was untimely filed for purposes of both reopening the record and advancing a late-filed contention;[12] (3) the motion represents an improper attempt to have us reconsider our earlier rulings rejecting CCAM/CAM Contentions 7-11;[13] (4) the proposed contention does not satisfy the procedural requirements regarding contentions set forth

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[8] Id. at 7-8. These claims are supported by the declaration of Dr. Thompson, who, in turn, relies on selected parts of the analysis appearing in Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants, NUREG-1738 (Jan. 2001) [hereinafter NUREG-1738]. See Declaration of 31 October 2001 by Dr Gordon Thompson in support of a Motion by CCAM/CAM.

[9] [DNC] Response to [CCAM/CAM] Motion to Reopen the Record and Request for Admission of Late-filed Environmental Contention and Motion for Directed Certification (Nov. 13, 2001) [hereinafter DNC Response].

[10] NRC Staff Response Opposing the Motion of [CCAM/CAM] to Reopen the Record to Admit a Late-filed Environmental Contention (Nov. 16, 2001) [hereinafter NRC Staff Response].

[11] DNC Response at 5; Staff Response at 6-7.

[12] DNC Response at 12; Staff Response at 10.

[13] DNC Response at 12-13; Staff Response at 10-11.

in 10 C.F.R. § 2.714;[14] and, (5) on the merits, the contention is not one that can be considered in licensing proceedings of the type involved here.[15] They also each ask that we certify or refer the motion to the Commission.[16]

III. Licensing Board Ruling. The Licensing Board will first treat the myriad of procedural issues raised by DNC and the Staff, and subsequently turn to the substantive merits of the CCAM/CAM motion.

A. Procedural Issues. There are essentially four categories of procedural issues raised by both DNC and the Staff that, if we agreed with their position, would preclude us from treating the substantive merits of the issue attempted to be raised by CCAM/CAM. We treat them seriatim.

1. The first of these issues is our jurisdiction to entertain the motion at all. CCAM/CAM claim that if there is any matter pending before a Licensing Board, as there clearly is here, the Board has jurisdiction to entertain a motion to reopen the record on any issue falling within the scope of a pending proceeding.[17] They cite an early Appeal Board decision, Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-86, 5 AEC 376, 377 (1972), holding that as long as some part of a licensing case remains before the Licensing Board, that Board retains jurisdiction to reopen the record on any properly-presented issue for the proceeding, including matters on which it had already ruled and that had been affirmed by the Commission. (The substantive criteria

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[14]DNC Response at 16-22; NRC Staff Response at 19-24.

[15]DNC Response0 at 16-22; NRC Staff Response at 19-24.

[16]DNC Response at 4-5, 7-10, 23; NRC Staff Response at 1, 7 (supporting DNC motion to certify issue "without decision" to the Commission).

[17]CCAM/CAM Motion at 2-3.

for reopening the record would, of course, prevent a motion for reopening from becoming instead a motion for reconsideration.)

DNC and the Staff adopt a vastly contrary jurisdictional posture. They claim that, once exceptions to or an appeal with respect to an initial decision have been filed, a Licensing Board loses jurisdiction to entertain motions to reopen the record. They cite Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1327 (1982); CLI-00-25, 52 NRC 355, 357 n.3, a Commission ruling in this proceeding, remanding the Contention-4 issue now before us for our consideration; and Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755, 757 n.4 (1983).[18]

The precedent that at least the Staff would regard as most controlling and, indeed, the "law of the case," is the Commission's statement in this very proceeding that, with respect to the CCAM/CAM motion to reopen the record concerning Contention 4 (the matter currently pending before us), "[t]he Board lacks jurisdiction to consider a motion to reopen after a petition to review a final order has been filed." CLI-00-25, 52 NRC at 357 n.3. In context, that observation would certainly have been governing, inasmuch as, at that time, no matters in this proceeding were pending before us. As matters now stand, however, as of November 1, 2001, when the current CCAM/CAM motion was filed, that was not the case: a portion of CCAM/CAM Contention 4 was then and is currently pending before us.

The precedent that is less clear in its applicability or non-applicability is Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755 (1983). There, the Licensing Board issued a partial initial decision (PID) and,

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[18]DNC Response at 5-6; NRC Staff Response at 6-7.

on the same day, the intervenor (not having yet been served with the PID) filed a motion to reopen the record. No exceptions to the PID had been filed, and certain matters remained before the Licensing Board for decision. The Licensing Board denied the motion for lack of jurisdiction, but the Appeal Board reversed, holding that the Licensing Board should have entertained the motion to reopen the record. Id. at 757. By way of dictum, however, the Appeal Board commented that this result would follow whether or not the Licensing Board had issued a PID (with some issues remaining before it) or an Initial Decision disposing of all matters before it. Id. at 757 n.4. Beyond that, the Appeal Board sanctioned its earlier holding that, after exceptions have been filed, jurisdiction to rule on a motion to reopen the record to add a new contention rests with the Appeal Board. Id. at 757 n.3 (citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC 1324, 1327 n.6 (1982)). That proceeding, like this one last December (when CCAM/CAM sought to reopen the record on Contention 4) involved the situation in which no matters remained before the Licensing Board for decision and exceptions (or an appeal) had been filed to a Board's final initial decision. .

Here, one matter–the resolution of Contention 4–remains before this Board for decision. Further, no appeals are currently pending before the Commission. In that situation, the precedent cited by CCAM/CAM suggests we have jurisdiction to entertain CCAM/CAM's latest motion to reopen the record, and we will do so here. (Because we are electing to refer our ruling here to the Commission, albeit on policy grounds unrelated to the jurisdictional matters discussed here, that body may elect to comment further on the jurisdictional questions we have just treated.)

2. The second procedural issue raised by DNC and the Staff is whether proposed Contention CCAM/CAM 12 is no more than an untimely request for reconsideration of our rejection of several CCAM/CAM contentions early in this

proceeding. DNC equates the current proposed contention to previous CCAM/CAM contentions (which we rejected) concerning

> (a) the probability and consequences of accidents involving the 'partial or total uncovering of fuel assemblies and exothermic reaction of fuel cladding' in the spent fuel pool [CCAM/CAM Contention 8]; (b) the analysis under NEPA of alternatives to wet storage [CCAM/CAM Contention 9]; (c) the need to consider 'severe accident implications of alternative options' [CCAM/CAM Contention 10]; and (d) the need for a Full Environmental Impact Statement based upon the same considerations [CCAM/CAM Contention 11].[19]

DNC observes that all of those contentions were "supported" by the declaration of Dr. Thompson.[20] For its part, the Staff adds CCAM/CAM Contention 7, concerning an alleged "significant increase in probability and consequences of overheating accidents," leading to an accident potentially involving exothermic reaction of cladding, to those it deems the Intervenors are improperly seeking reconsideration.

We agree that there are some common elements of CCAM/CAM's earlier contentions (particularly Contention 11) and the proposed new contention. But there is one supervening development that belies the claims of DNC and the Staff that CCAM/CAM is only seeking reconsideration of our rejection of its earlier contentions (be it four or five). That development is the actual terrorist incidents that occurred on September 11, 2001, together with the Commission's subsequent acknowledgments (relied on by CCAM/CAM) that terrorist threats to nuclear plants must be taken seriously.

None of the earlier four (or five) proposed contentions refers explicitly to terrorist activity, although Dr. Thompson, in his declaration, does peripherally mention terrorist incidents as a potential cause of a beyond-design-basis accident that could result in extensive radioactive injury. See Thompson report, dated February, 1999, attached as

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[19]DNC Response at 12; see LBP-00-02, 51 NRC at 43-46.

[20]DNC Response at 12.

Exhibit 1 to CCAM/CAM Supplemental Petition to Intervene, dated November 17, 1999, at 7-8. In contrast, CCAM/CAM's proposed Contention 12 explicitly refers to "[t]he terrorist attacks of 11 September 2001 on the World Trade Center and the Pentagon," and related information, which has subsequently become public that tends to associate terrorist activities with nuclear plants. It appears to us that, in the basis for the contention, CCAM/CAM is substituting an active event for what was previously only a hypothetical scenario. We would be ignoring reality if we were to treat CCAM/CAM's Contention 12 as merely an improper attempt to have us reconsider our rejection of its earlier contentions. Hence, we decline to do so.

3. The third procedural issue raised by DNC and the Staff is the timeliness of CCAM/CAM's filing of its proposed contention on November 1, 2001, approximately 50 days after the terrorism events of September 11, 2001. For their part, CCAM/CAM also rely, regarding the timeliness of their submission, on NRC press releases, dated September 21, 2001 (CCAM/CAM Motion, Exhibit 2) and October 18, 2001 (CCAM/CAM Motion, Exhibit 6), together with other press accounts of potential terrorist attacks on nuclear facilities, as relevant to the issue when they had sufficient information to submit a late-filed contention.

DNC and the Staff would each have us reject the admittedly late-filed contention on grounds of timeliness, claiming that CCAM/CAM has not satisfied the late-filed contention criteria set forth in 10 C.F.R. § 2.714(a)(1) and (b)(1) or the timeliness criterion for motions to reopen the record set forth in 10 C.F.R. § 2.734(a)(1) -- most specifically the criterion of good cause for failure to file on time (10 C.F.R. § 2.714(a)(1)(i)). DNC and the Staff each reference other pending licensing proceedings, namely the MOX fuel proceeding (proposed contention filed October 10, 2001) and the Private Fuel Storage ISFSI proceeding (proposed contention also filed on

October 10, 2001), in which similar terrorist-based contentions were filed, each within 30 days of the September 11, 2001 terrorist attacks.

The most significant of the late-filed contention criteria is the first–"[g]ood cause, if any, for failure to file on time." 10 C.F.R. § 2.714(a)(1)(i). See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-20, 53 NRC 565, 570 (2001). For the purpose of timeliness, we construe proposed Contention 12 as stemming from the terrorist attacks of September 11, 2001.[21] But, in the context of CCAM/CAM's proposed contention, the Commission's releases dated September 21, 2001, and October 18, 2001, are also significant. The terrorist events themselves did not involve nuclear facilities. The Commission releases emphasized the significance of the terrorist events to nuclear facilities and were instrumental in the development of the material necessary to support late-filed Contention 12. Those releases occurred 41 days and 12 days, respectively, prior to submission of CCAM/CAM Contention 12, and they may be equated to an authoritative acknowledgment of the gravity of the issues presented by that contention. Taking into account that, at least with respect to motions to reopen the record, the timeliness criterion provides that "an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented," 10 C.F.R. § 2.734(a)(1), we view proposed Contention 12 as an exceptionally grave issue and the "good cause" timeliness criterion (whether under 10 C.F.R. § 2.714(a)(1)(i) or 10 C.F.R. § 2.734(a)(1)) as having been satisfied.

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[21]We do not construe the issuance of NUREG-1738 in October 2000, or its availability to Intervenors in January 2001, as a basis for evaluating whether the new contention was timely submitted. Rather, CCAM/CAM appears to be using NUREG-1738 as a new methodology for evaluating the results of a terrorist act, not as a basis for calculating the timeliness of its contention. The terrorist attack itself, plus the Commission's acknowledgment of its potential effect on nuclear facilities, appear to be the bases for determining whether Contention 12 was timely submitted.

As for the other timeliness criteria, we do not believe that there are other means available whereby CCAM/CAM's interest will be protected. 10 C.F.R. § 2.714(a)(1)(ii). DNC suggests the Commission's ongoing generic and policy evaluation of the spent fuel accident risk at decommissioning plants causes this factor to weigh against admission. But this study has not been the focus of any proceeding (rulemaking or otherwise) in which CCAM/CAM could express its views. No formal rulemaking has yet been announced. Nor are the other, appropriate generic approaches to addressing terrorism that, according to DNC, other petitioners have elected to follow equivalent to the hearing rights afforded here, cf. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1175-76 (1983)(Section 2.206 petition not an adequate substitute for participating in an adjudicatory proceeding concerned with the grant or denial of an operating license).[22] As a result, the second of the timeliness criteria also must be balanced in favor of CCAM/CAM.

The third criterion, the extent to which a petitioner's participation may reasonably be expected to assist in developing a sound record, clearly balances in CCAM/CAM's favor. CCAM/CAM has provided significant assistance to the Board in resolving questions earlier in this proceeding, and we have no reson to doubt that it will do so again.[23] The fourth criterion, the extent to which a petitioner's interest will be

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[22]See also Nuclear Fuel Services, Inc., CLI-75-4, 1 NRC 273, 276 (1975)(limited appearance statement not an adequate substitute for participation as a party,"with a party's attendant procedural rights"); Duke Power Co. (Amendment to Materials License SNM-1773–Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 149-50 (1979)(limited appearance statement not an adequate substitute for party participation).

[23]In that connection, we express no view at this time on the merits of the case presented by CCAM/CAM. We note, however, that the stated purpose of NUREG-1738, upon which CCAM/CAM rely to a significant extent, is "to provide a technical basis for decommissioning Rulemaking for permanently shutdown nuclear power plants ."

(continued...)

represented by existing parties, also balances in CCAM/CAM's favor, inasmuch as there are no other parties that would adequately represent CCAM/CAM's interest. The final criterion, the extent to which the contention will broaden the issues or delay the proceeding, must perforce be balanced against CCAM/CAM, inasmuch as admission of a new contention would add an entirely disparate contention to the proceeding that would cause some delay in completing the proceeding, although not in litigating or deciding the single issue presently before us.

In short, four of the five late-filed criteria, including two of the most significant (the first and third), balance in favor of accepting the contention, and only one (the fifth) cautions against doing so. We balance the factors in favor of accepting CCAM/CAM Contention 12 from a timeliness standpoint.

4. The fourth procedural objection advanced by both DNC and the Staff claims that proposed CCAM/CAM Contention 12 fails to meet the technical requirements for a contention, as set forth in 10 C.F.R. § 2.714(b). DNC claims, correctly, that a contention must have a basis in fact or law and that it must entitle a petitioner to relief. It adds that the severe consequences of the extraordinary terrorist scenario are not something that must be evaluated under NEPA.[24] The Staff adds that CCAM/CAM's designated expert

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[23](...continued)
NUREG-1738 at iii. Thus, there may be real questions as to whether NUREG-1738 sheds much light on the risk arising from the operation of spent fuel pools at operating nuclear reactors, or from terrorist attacks on such pools, or the extent to which NUREG-1738 may provide a surrogate (an earthquake well beyond the design basis) for the consequences of "destructive acts of malice." These matters are involved in the merits of the contention before us and thus will not be addressed at this time.

[24]DNC Response at 17.

lacks qualifications to address the questions that proposed Contention 12 would engender.[25]

Whether the potential consequences of a terrorist act need be evaluated under NEPA is a question going to the merits of the proposed contention and hence will be discussed below. Suffice it to say that CCAM/CAM has provided at least one factual basis for Contention 12 and it has demonstrated meaningful relief that it could achieve–i.e., reevaluation of the Staff's decision (made in its Environmental Assessment) not to prepare an Environmental Impact Statement for this facility modification. Further, Dr. Thompson, CCAM/CAM's expert, seems to possess sufficient threshold qualifications to address at least some (if not all) of the questions raised by CCAM/CAM, although the weight to be accorded his testimony (vis-a-vis that of other experts) would be determined in the context of resolving the merits, should it be admitted. See CCAM/CAM Reply at 12-13, citing Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-09, 53 NRC 239, 250-51 (2001). Accordingly, we believe that CCAM/CAM has satisfactorily met the contention requirement with respect to proposed Contention 12.

B. Admissibility of Proposed Contention 12 .

Having rejected the numerous procedural objections to our admitting, as a new contention, proposed CCAM/CAM Contention 12, we must now turn to deciding whether it is an admissible contention. And, as we pointed out in permitting CCAM/CAM to reply to DNC and the Staff's oppositions to their contention, and requesting all parties

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[25]NRC Staff Response at 15-16; NRC Staff's Reply to [CCAM/CAM] Response to [ASLB] Questions in Memorandum and Order of December 10, 2001 (Jan. 10, 2002) at 4 n.7; DNC does not challenge the qualifications of CCAM/CAM's expert. See [DNC] Response to [CCAM/CAM] Reply to Oppositions to [CCAM/CAM Motion] (Jan. 3, 2002) at 5 [hereinafter DNC Reply].

to address certain questions posed in that Order,[26] there is currently a provision in NRC regulations that provides:

> 10 C.F.R. § 50.13. Attacks and destructive acts by enemies of the United States; and defense activities. 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.

This provision is part of the safety regulations of the NRC, but its substantive terms appear to have been applied as well to environmental issues, such as is presented by CCAM/CAM Contention 12. See, e.g., 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); Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973).

Because of the apparent applicability of this provision to our acceptance of CCAM/CAM Contention 12, we asked all parties to address its significance in view of the two cases cited above. Memorandum and Order (CCAM/CAM Motion for Leave to Reply to Responses of Licensee and Staff), dated December 10, 2001, at 3-4. CCAM/CAM observes that at the time Section 50.13 was first issued (1967), NEPA had not yet been passed. CCAM/CAM correctly characterizes Section 50.13 as a safety requirement and adds that satisfying safety requirements "is not necessarily equivalent to compliance with the requirements of NEPA."[27]

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[26] See Memorandum and Order (CCAM/CAM Motion for Leave to Reply to Responses of Licensee and Staff), dated December 10, 2001, at 3.

[27] [CCAM/CAM] Reply to Oppositions to Motion to Reopen the Record and

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As for the carryover of Section 50.13 to environmental contentions, CCAM/CAM cites Limerick Ecology Action v. NRC, 869 F. 2d 719, 729 (3rd Cir. 1989) [LEA], for the proposition that issues excluded from consideration as safety issues need not necessarily also be excluded under NEPA. CCAM/CAM recognizes that LEA upheld NRC's exclusion of a sabotage issue from NEPA consideration but interprets LEA as holding in this respect that: (a) regulations of the CEQ [Council on Environmental Quality] did not bind the NRC to consider worst-case accidents; (b) the NRC's refusal to consider the impacts of sabotage was not based solely on policy statements, but on scientific judgment that then-current risk assessment techniques "could not provide a meaningful basis upon which to measure such risks;"[28] and (c) that the petitioner in LEA had failed to undermine or rebut the NRC's conclusion.[29] CCAM/CAM observes that none of the grounds relied on by the LEA court relates to the question of whether the exclusion of safety issues required by Section 50.13 also extends to environmental issues.

CCAM/CAM recognizes also that NRC did address the applicability of Section 50.13 to NEPA questions in Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973). CCAM/CAM claims that ALAB-156 did not conclude that 10 C.F.R. § 50.13 governs NEPA considerations as a matter of law. Rather, according to CCAM/CAM, the Appeal Board in ALAB-156 examined the applicability of the rule's rationale under NEPA's "Rule of Reason." Quoting from ALAB-

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[27](...continued)
Request for Admission of Late-filed Environmental Contention (Dec. 21, 2001) at 16.

[28]Id. at 17 (quoting LEA, 869 F.2d at 742).

[29]Id.

156, CCAM/CAM claims that the rule's underlying considerations regarding the feasibility and reasonableness of protection against "wartime sabotage" included:

> (1) the impracticability, 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.[30]

According to CCAM/CAM, the Appeal Board then concluded that this rationale was as applicable to the Commission's NEPA responsibilities as to its health and safety responsibilities. But further, CCAM/CAM asserts that, twenty eight years after ALAB-156, after such events as the destruction of the federal building in Oklahoma, the near destruction of a U.S. destroyer by a boat bomb, and the destruction of the World Trade Center by a commercial airliner bomb, these considerations no longer govern the NEPA "rule of reason."[31]

Relying on the declaration of their designated expert, CCAM/CAM discounts the impracticability of reasonably anticipating the nature of a serious attack on a nuclear power plant as well as the claimed lack of information concerning such attacks. "Enough is known about the methods typically used by terrorists, and the vulnerabilities in the designs of nuclear facilities, to evaluate measures that could increase the effectiveness of protection against such an attack."[32] CCAM/CAM also claims that the military is generally ineffective in preventing such attacks "because [it] does not stand in

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[30]CCAM/CAM Reply at 18, citing ALAB-156, 6 AEC at 851, which in turn cites Siegel v. AEC, 400 F.2d 778 (1978).

[31]Id. at 19.

[32]Id.

constant readiness to counter serious domestic threats."[33] CCAM/CAM concludes that the exclusion of issues in Section 50.13 thus cannot be applied as a matter of law and that consideration of the consequences of "acts of malice or insanity" may only be excluded ab initio if it would be inconsistent with NEPA's "rule of reason" (which, according to CCAM/CAM, is not the case here).[34]

DNC and the Staff each take a directly contrary view of the applicability of 10 C.F.R. § 50.13 and its environmental progeny to CCAM/CAM proposed Contention 12.. According to DNC, "there can be no doubt that acts of terrorists fall into this provision, at least to the extent that those acts exceed the design basis security threat defined in 10 C.F.R. § 73.1(a)(1)."[35] Although acknowledging that Section 50.13 may be a safety regulation not technically applicable to proposed Contention 12, DNC asserts that there is no principled or logical basis to ignore the regulation in the context of NEPA. It adds that the Appeal Board in ALAB-156, 6 AEC at 851, and more recently a Licensing Board in Private Fuel Storage (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC ___ (slip op. at 13) (Dec.13, 2001) have explicitly found the regulation applicable to assessing NRC's NEPA responsibilities and accordingly have rejected proposed environmental contentions similar to proposed Contention 12.

For its part, the Staff cites a recent Commission decision in Private Fuel Storage L.L.C., CLI-01-26, 54 NRC __ (slip op. at 3-4) (Dec. 28, 2001), to the effect that the Commission recently reaffirmed the basis for 10 C.F.R. § 50.13, concluding that the events of September 11, 2001 are precisely the kind of threats excluded from

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[33] Id.

[34] Id. at 20.

[35] DNC Reply at 7.

consideration in licensing decisions by 10 C.F.R. § 50.13. The Staff notes that this rationale was recently relied on by the Licensing Board in LBP-01-37, supra, rejecting the admission of a contention to litigate both safety and environmental concerns related to the September 11, 2001 attacks. The Staff also notes that CCAM/CAM's argument concerning Shoreham is not clear, inasmuch as, although the Commission took the rule of reason into account, the holding does not rest on that rule (as claimed by CCAM/CAM) but instead on the rationale for Section 50.13.

DNC also advances a slightly different argument, to the extent that the Appeal Board decision in Limerick, together with the Third Circuit's subsequent decision in LEA, held that the NEPA review is limited by a "rule of reason" and that the NRC was not required by NEPA to entertain a contention on sabotage risk. DNC adds that the petitioner there, like CCAM/CAM here, had offered no meaningful method by which the NRC could either assess or predict sabotage risk. According to DNC, the Third Circuit cited (and relied on) the NRC's conclusion that "sabotage risk analysis is beyond current probabilistic risk assessment methods."[36]

Although calculating the risk of sabotage or terrorism may, as CCAM/CAM claim, fall within the purview of current analytical methodologies, a matter that would be litigated in resolving proposed Contention 12 if it were admitted, we conclude that the Commission's current policy is to apply 10 C.F.R. § 50.13 to environmental contentions. That being so, we perforce must reject proposed CCAM/CAM Contention 12.[37]

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[36]DNC Reply at 8 (citing LEA, 869 F.2d at 743-44).

[37]As DNC points out, a Licensing Board recently accepted an environmental-terrorist contention comparable to that proffered by CCAM/CAM here, but that was in a proceeding that did not involve a Part 50 facility, so that 10 C.F.R. § 50.13 did not apply.

C. Referral to Commission.

DNC and the Staff urge that we certify, pursuant to 10 C.F.R. 2.718(i), the question of the applicability of 10 C.F.R. § 50.13 to CCAM/CAM proposed Contention 12 to the Commission for its decision, without deciding the question ourselves. Such course is not preferred, however, in the absence of emergency or similar circumstances. See Toledo Edison Co., (Davis-Besse Nuclear Power Station, Unit 1), ALAB -297, 2 NRC 727, 729 (1975); Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2, and Catawba Nuclear Station, Units 1 & 2), CLI-01-27, 54 NRC __ (Dec. 28, 2001) (slip. op. at 7), because a ruling by the Presiding Officer puts the Commission in a better position to evaluate a question, based on the views not only of the parties but of the proposed reconciliation of those views by the Board itself. For that reason, we will refer our ruling to the Commission pursuant to 10 C.F.R. § 2.730(f). Certainly, prompt referral to the Commission here is desirable given the number of other proceedings in which terrorism contentions have been raised.

D. Order.

For the reasons set forth above, it is, this twenty-fourth day of January, 2002,

ORDERED:

1. CCAM/CAM's November 1, 2001 Motion to Reopen the Record to Admit Late-filed CCAM/CAM Contention 12 is hereby denied.

2. This ruling is referred to the Commission pursuant to 10 C.F.R. § 2.730(f).

The Atomic Safety and Licensing Board

/RA/

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

/RA/

Dr. Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 24, 2002

[Copies of this Memorandum and Order have been e-mailed today to counsel for each of the parties.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (LATE-FILED CONTENTION CONCERNING ACTS OF TERRORISM AFFECTING SPENT FUEL POOL) (LBP-02-05) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Charles Bechhoefer, Chairman
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Richard F. Cole
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Charles N. Kelber
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Ann P. Hodgdon, Esq.
Robert M. Weisman, Esq.
Susan L. Uttal, Esq.
Antonio Fernández, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Lillian M. Cuoco, Esq.
Dominion Nuclear Connecticut, Inc.
Millstone Nuclear Power Station
Building 475/5
Rope Ferry Road (Route 156)
Waterford, CT 06385

Docket No. 50-423-LA-3
LB MEMORANDUM AND ORDER (LATE-FILED
CONTENTION CONCERNING ACTS OF
TERRORISM AFFECTING SPENT FUEL POOL)
(LBP-02-05)

David A. Repka, Esq.
Donald P. Ferraro, Esq.
Winston & Strawn
1400 L Street, NW
Washington, DC 20005

Nancy Burton, Esq.
147 Cross Highway
Redding Ridge, CT 06876

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 24th day of January 2002