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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S BRIEF
IN REPLY TO INTERVENORS' BRIEF

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March 12, 2002

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INTRODUCTION

On February 27, 2002, Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone ("CCAM" and "CAM," collectively "Intervenors"), filed their "Brief in Response to CLI-02-05 Regarding NEPA Requirement to Admit Contention Regarding Environmental Impacts of Acts of Malice and Insanity" ("Intervenors' Brief"). Pursuant to the briefing schedule established by the Commission in CLI-02-05, the NRC Staff files its reply brief.

BACKGROUND

On February 6, 2002, the Commission issued CLI-02-05, in which it accepted the referral from the Licensing Board in the captioned proceeding of that board's determination in LBP-02-05, Memorandum and Order (Late-Filed Contention Concerning Acts of Terrorism Affecting Spent Fuel Pool), January 24, 2002, that 10 C.F.R. § 50.13 is applicable to environmental contentions and, thus, required the Board to reject proposed Contention 12. The contention at issue, filed by Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone ("CCAM" and "CAM," collectively "Intervenors") on November 1, 2001, and opposed by the licensee, Dominion Nuclear Connecticut, Inc. and the NRC Staff (Staff), alleges that, in light of the terrorist acts of

September 11, the NRC must prepare an environmental impact statement to consider the environmental impacts of the licensee's proposal to increase storage in its spent fuel pool, including its effects on the probability and consequences of accidents at the Millstone plant.

In CLI-02-05, the Commission directed the parties to file briefs addressing all issues the parties determined to be relevant to the applicability of 10 C.F.R. § 50.13 to the admissibility of Intervenor's proposed NEPA contention and to address a question posed by the Commission regarding the Commission's responsibility under NEPA to consider intentional malevolent acts.

In response to CLI-02-05, Intervenor's filed "Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Brief in Response to CLI-02-05 Regarding NEPA Requirement to Admit Contention Regarding Environmental Impacts of Acts of Malice and Insanity," February 27, 2002. On that same day, the NRC Staff filed "NRC Staff Brief in Response to CLI-02-05," in which the Staff explained the legal basis for its belief that the Commission has no responsibility under NEPA to consider intentional malevolent acts in proceedings on license and license amendment applications and that 10 C.F.R. § 50.13 is applicable to the admissibility of Intervenor's proposed NEPA contention.

In this Reply Brief, the Staff points to the mistakes in law and in fact that underlie Intervenor's argument that NEPA requires a thorough analysis of the reasonably foreseeable environmental impacts of acts of malice or insanity and that it was error for the Licensing Board to conclude that 10 C.F.R. § 50.13 barred the admission of Intervenor's proposed environmental contention.

ARGUMENT

I. NEPA Does not Require the NRC to Prepare an Environmental Impact Statement Considering the Consequences of Intentional Malevolent Acts in Evaluating Proposals to Increase Spent Fuel Pool Storage.

In this proceeding, the Commission directed the parties to submit legal briefs addressing, in particular, the following issue:

What is an agency's responsibility under NEPA to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001? The parties should cite all relevant cases, legislative history or regulatory analysis.

CLI-02-05, slip op. at 2.

Intervenors respond to the question as follows: "The unequivocal answer is that in any major action by the NRC or any other federal agency, NEPA requires a thorough analysis of the reasonably foreseeable environmental impacts of acts of malice or insanity that may have a significant effect on the environment." Intervenors' Brief at 3.

The Staff disagrees. As argued in its brief filed on February 27, 2002, although NEPA does require a thorough analysis of the reasonably foreseeable impacts of the proposed action, actions like the intentional malevolent acts of September 11 are not reasonably foreseeable impacts of the proposed action and, thus, do not need to be addressed in an environmental impact statement prepared by the Staff on the proposed action. NRC Staff's Brief at 3-19.

Further, the Commission's regulations implementing NEPA, 10 C.F.R. Part 51, do not consider the expansion of storage in a spent fuel pool, which is the proposal at issue here, to be a major federal action requiring the preparation of an environmental impact statement. See 10 C.F.R. § 51.20, "Criteria for and Identification of licensing and regulatory actions requiring environmental impact statements." Although the Staff has prepared environmental assessments on proposals to rerack spent fuel pools, the proposal at issue is merely to add racks. The Staff prepared an environmental assessment concerning the proposal that is the subject of the captioned proceeding;

however, it could have invoked a categorical exclusion pursuant to 10 C.F.R. § 51.22(c)(9), as the proposal meets the criteria set forth there.

Intervenors argue that high-density storage of spent fuel in a pool, as at Millstone Unit 3, creates the potential for a massive release of radioactive material to the environment in the event that all water is lost from the pool as a result of an attack on the pool. Intervenors' Brief at 3. The complaint is generic and, to the extent that it may be applicable to the Millstone Unit 3 spent fuel pool, it would be equally applicable to spent fuel pools at every plant in the country. In addition, Millstone Unit 3 began operation in 1985 with high-density racks. Intervenors should not be heard now, in the context of this specific license amendment proceeding, to urge new requirements with respect to circumstances that have existed at Millstone Unit 3 for some seventeen years and that exist without regard to the proposed action.

Intervenors argue that the Commission's regulations in 10 C.F.R. § 51.71(d) require that the NRC's environmental impact statements include a discussion in qualitative terms of important considerations or factors that cannot be quantified. Intervenors' Brief at 10. As noted above, the Commission's regulations do not regard an amendment request in which expansion of spent fuel storage is proposed as a major federal action requiring the preparation of an environmental impact statement. Thus, 10 C.F.R. § 51.71(d), which concerns the contents of environmental impact statements, is not applicable here.

Intervenors cite a number of cases for the proposition that NEPA requires federal agencies to update and revisit an environmental impact statement where there is a major federal action still to occur, where the remaining action will affect the quality of the human environment in a significant manner to a significant extent not already considered, or where an environmental statement relied on stale and incomplete scientific evidence. Intervenors' Brief at 11-12. None of these cases, all of which concern impacts of the proposed action, is applicable here where the reasonably

foreseeable impacts of the proposed action do not include the impacts whose consequences Intervenor would have the NRC consider, namely, the intentional malevolent acts of September 11.

II. It Was Not Error for the Licensing Board to Find 10 C.F.R. § 50.13 Is Applicable to the Admissibility of Intervenor's Proposed NEPA Contention.

Intervenor argues that the Licensing Board was in error in concluding that § 50.13 bars consideration of their proposed NEPA contention as a matter of law. Intervenor's Brief at 12. What the Licensing Board stated was as follows:

For reasons stated 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 like 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).

LBP-02-05 at 2.

Thus, the Licensing Board based its rejection of the contention on *both* the provisions of 10 C.F.R. § 50.13 *and* decisions applying the policy of that section to environmental contentions such as Intervenor's.

Intervenor also cite as error the Licensing Board's conclusion that the policy of § 50.13 precludes consideration of their contention. See Intervenor's Brief at 16-17. However, in referring to the Board's ruling, Intervenor omit the reference to *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831,851 (1973). Intervenor discuss ALAB-156, but fail to note that the Licensing Board relies on it in concluding that it is the "policy" of § 50.13 as applied in ALAB-156 that precludes the admission of Intervenor's contention. See LBP-02-05 at 2. The Staff's Brief addresses the appropriateness of this reliance. See Staff's Brief at 21-22.

Intervenor argue that new information demonstrates that severe pool accidents caused by acts of "malice or insanity" are reasonably foreseeable and must be addressed in environmental

effectively deterred by military action (*Id.* at 15-16); and 2) NRC policy is inconsistent with the rationale for the vehicle-bomb rule (*Id.* at 27-30). As discussed below, neither argument is valid.

In the rulemaking, which concerned the amendment of a safety regulation, the Commission reaffirmed its long held position that sabotage cannot be quantified:

The NRC examined the use of PRA to predict sabotage as an initiating event and concluded that to do so would not be credible or valid because terrorist attacks, by their very nature, may not be quantified. Past attempts to apply PRA techniques to acts of sabotage have resulted in similar findings. . . . The Commission continues to believe that arbitrary selection of numbers to “quantify” threat probability without demonstrable, actual, supporting event data would yield misleading results at best. Knowledgeable terrorism analysts recognize the danger and are unwilling to quantify the risk. . . . The NRC continues to believe that, although in many cases considerations of probabilities can provide insights into the relative risk of an event, in some cases it is not possible, with current knowledge and methods, to usefully quantify the probability of a specific vulnerability threat.

59 Fed. Reg. at 38890. That finding is entirely consistent with the Commission’s position regarding the analysis of acts of terrorism. The Commission found that, for the purposes of amending the rule changing the design basis threat, quantification of the probability of an actual attack was not necessary to a determination concerning an increase in protection of the public health and safety. *Id.* at 38891. The Commission stated that “[i]nherent in the NRC’s current regulations is a policy decision that the threat [of the malevolent use of a land vehicle], although not quantified, is likely in a range that warrants protection against a violent external assault as a matter of prudence.” *Id.*⁴

⁴ In a later Part 73 rulemaking regarding the requirements for protection of spent nuclear fuel storage facilities pursuant to Part 73, the Commission observed that “protection from this type of threat [the malevolent use of an airborne vehicle] has not yet been determined appropriate. . . .” Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste; Final Rule, 63 Fed. Reg. 26,955, 26,956 (1998).

Nowhere in this rulemaking does the Commission conclude that such an assault is reasonably foreseeable within the meaning of NEPA.⁵

In sum, Intervenors confuse amendment of a safety regulation with requirements under NEPA. There is nothing in the vehicle bomb rulemaking that contradicts the Commission's policy regarding the inability to quantitatively evaluate the risk of terrorist acts. NEPA concerns reasonably foreseeable impacts. The risk of terrorist acts of concern here are not reasonably foreseeable, in that no basis has been shown to support a reliable estimate of the probability of their occurrence, their magnitude, or the likely success of those acts in the face of NRC safety and physical protection requirements and protection by the defense establishment. See Staff Response at 3-19. The Commission has reiterated that the likelihood of terrorist acts cannot be predicted and cannot be quantified.⁶ Nothing in the rulemaking cited by Intervenors vitiates the Commission's position or renders the risk of such acts at a particular facility or type of facility reasonably foreseeable under NEPA.

⁵ In discussing these events, the Staff notes there is no basis to conclude that the events of September 11 are in any way comparable to those that gave rise to the 1994 rulemaking.

⁶ The Staff does not assert that a best estimate of the consequences of a postulated attack could not be hypothesized -- based, for example, upon an analytical model of the attack. However, any such "consequence" analysis would not meaningfully contribute to the agency's consideration of its licensing action under NEPA without some rational means to estimate the probability that the postulated event will occur at a specific facility, in that a probability estimate is needed to allow an agency to determine whether that attack (or its likely consequences) are "reasonably foreseeable." This view was stated as well in the Staff's Brief of February 27. See Staff Brief at 4, 9-12, and 14-19. To the extent that any statement therein may not have expressed this position clearly, it should be read in this context. See Staff Br. at 4 ("in the absence of any means to reasonably predict or evaluate the occurrence, magnitude, or *consequences* of such intentional, malevolent acts. . . .") (emphasis added).

CONCLUSION

For the reasons discussed, NEPA does not require the NRC to prepare an environmental impact statement considering the consequences of intentional malevolent acts in proposals to increase spent fuel pool storage. Further, 10 C.F.R. § 50.13 is applicable to contentions like the one at issue in the captioned proceeding. The Licensing Board's ruling denying admission of the contention should be affirmed.

Respectfully submitted,

/RA/

Ann P. Hodgdon
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Dated at Rockville, Maryland
this 12th day of March, 2002

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN REPLY TO INTERVENORS' BRIEF" 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 12th day of March, 2002:

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