

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**RAS 5094**

**DOCKETED 12/18/02**

COMMISSIONERS

**SERVED 12/18/02**

Richard A. Meserve, Chairman  
Greta Joy Dicus  
Nils J. Diaz  
Edward McGaffigan, Jr.  
Jeffrey S. Merrifield

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In the Matter of )  
 )  
DOMINION NUCLEAR CONNECTICUT, INC. )  
 )  
(Millstone Nuclear Power Station, Unit No. 3) )  
\_\_\_\_\_ )

Docket No. 50-423-LA-3

**CLI-02-27**

**MEMORANDUM AND ORDER**

This proceeding arises from an application by Dominion Nuclear Connecticut, Inc. (“DNC” or “licensee”) for a license amendment to increase the storage capacity of Millstone Unit No. 3 spent fuel pool. On November 1, 2002, the intervenors, the Connecticut Coalition Against Millstone (“CCAM”) and the Long Island Coalition Against Millstone (“CAM”) (collectively, “CCAM/CAM”), filed a proposed new contention that maintained that, in light of the September 11, 2001 terrorist attacks, the NRC now needs to prepare an environmental impact statement discussing the risks and consequences of terrorism affecting the Millstone spent fuel pool and specifically weighing the costs of an “accident”<sup>1</sup> against the cost of alternatives such as dry cask storage. The Licensing Board found the contention procedurally valid, but found it

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<sup>1</sup> See Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone’s Motion to Reopen the Record and Request for Admission of Late-Filed Environmental Contention, dated Nov. 1, 2001, at 7.

inadmissible, pursuant to 10 C.F.R. § 50.13.<sup>2</sup> The Board referred to the Commission its ruling on the question of section 50.13's applicability.<sup>3</sup> We accepted the Board's referral, pursuant to 10 C.F.R. § 2.730(f) and established a briefing schedule.<sup>4</sup> We asked the parties to address all issues, except the procedural issue, that they determine are relevant to admissibility of the terrorism contention and specifically to answer the question, "What is an agency's responsibility under NEPA [the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*] to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001?"<sup>5</sup>

DNC and the NRC staff filed briefs which maintained that the NRC has no responsibility to consider intentional malevolent acts under NEPA, and CCAM/CAM filed a brief stating the

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<sup>2</sup> See LBP-02-05, 55 NRC 131(2002). Section 50.13 provides, in effect, that nuclear power reactor licensees need not defend against attacks by "enemies of the United States."

<sup>3</sup> *Id.* at 145.

<sup>4</sup> See CLI-02-05, 55 NRC 161 (2002).

<sup>5</sup> The Commission simultaneously agreed to review terrorism contentions and posed this same question in three other cases. See *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476 (2001) (denying admission of terrorism contention and referring issue to the Commission), *referral accepted*, CLI-02-03, 55 NRC 155 (2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), LBP-02-04, 55 NRC 49 (2002) (certifying terrorism issue to the Commission), *certification accepted*, CLI-02-06, 55 NRC 164 (2002); and *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403 (2001), *reconsideration denied*, Unpublished Memorandum and Order (Jan. 16, 2002), *petition for Commission review granted in part*, CLI-02-04, 55 NRC 158 (2002). We decide these cases today.

opposite view.<sup>6</sup> For the reasons stated below, we affirm the Board's rejection of CCAM/CAM's terrorism contention, though for reasons different from those offered by the Board.<sup>7</sup>

## I. BACKGROUND

On March 19, 1999, the licensee filed an application for a license amendment to increase the storage capacity of its spent fuel pool from 756 assemblies to 1860 assemblies.<sup>8</sup> The original design basis of the spent fuel pool at Millstone Unit 3 was 2,169 assemblies; however, the current licensing basis for the plant is 756 assemblies.

Of the contentions CCAM/CAM originally raised in this proceeding, the Board admitted three: Contention 4, relating to the risk of criticality accidents because of the licensee's alleged history of not being able to adhere to administrative controls (*i.e.*, human oversight or monitoring of physical systems); Contention 5, contesting a technical specification amendment regarding surveillance of boron concentration in the spent fuel pool; and Contention 6, relating to the legal question whether General Design Criterion 62 allows the use of administrative controls to prevent criticality in the spent fuel pool. To resolve Contention 5, the Board adopted

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<sup>6</sup> The Nuclear Energy Institute, stating that its interests were aligned with those of the applicant, filed a brief, along with a request that we consider it as an *amicus curiae*. We grant the request.

<sup>7</sup> This and several other recent Board decisions have relied on 10 C.F.R. § 50.13, to reject terrorism contentions. See LBP-02-5, 55 NRC at 142-145; *Private Fuel Storage*, LBP-01-37, 54 NRC at 486; *Tennessee Valley Auth.* (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC \_\_\_\_, \_\_\_\_, \_\_\_\_, slip op. at 20, 22 (July 2, 2002). The provision grew out of a policy judgment by the Atomic Energy Commission that it was our nation's "settled tradition" to "look[] to the military" for defense against enemy attacks, and that it was "impracticable" to expect a "civilian industry" to provide the necessary defense. See *Siegel v. AEC*, 400 F.2d 778, 782 (D.C. Cir. 1968). Since our decisions today rest on general principles regarding the scope of NEPA, we do not reach the application of section 50.13 as applied to the terrorism contentions that are raised in these cases. In our view, as we have explained, NEPA does not require a terrorism review.

<sup>8</sup> The licensee at the time of filing the application was Northeast Nuclear Energy Company. On March 31, 2001, DNC became the licensee and party in interest in this matter, due to a license transfer.

an agreed-upon license condition. The Board denied an evidentiary hearing as to Contentions 4 and 6,<sup>9</sup> and CCAM/CAM petitioned the Commission for review of the decision. On the original record, we denied review of the factual issues surrounding Contention 4, accepted review of the legal question involved in Contention 6,<sup>10</sup> and ultimately denied CCAM/CAM the relief they requested.<sup>11</sup>

During the pendency of the appeal, CCAM/CAM filed a motion for reconsideration of the Board's decision regarding Contention 4. We remanded the motion to the Board, which, on reconsideration, granted the motion and reopened the proceeding for the limited purpose of considering the effect, if any, the loss of two fuel rods at Millstone Unit 1 might have on the issues raised in Contention 4.<sup>12</sup> The Board ultimately denied CCAM/CAM's request for an evidentiary hearing and terminated the proceeding.<sup>13</sup>

CCAM/CAM raised the terrorism contention in the reopened proceeding. CCAM/CAM asserted that changed circumstances -- *i.e.*, the terrorist attacks on the World Trade Center and the Pentagon -- demonstrate that severe fuel pool "accidents" caused by acts of malevolence or insanity are reasonably foreseeable and must be addressed in an EIS. The

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<sup>9</sup> See *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-00-26, 52 NRC 181 (2000).

<sup>10</sup> See CLI-01-03, 53 NRC 22 (2001). The Commission recognized that the GDC 62 issue also affected the spent fuel pool expansion license amendment proceeding for the Shearon Harris nuclear power plant; therefore, we invited the Shearon Harris parties, Carolina Power & Light Co. and the Orange County Board of Commissioners, to file *amicus curiae* briefs.

<sup>11</sup> See CLI-01-10, 53 NRC 353 (2001).

<sup>12</sup> See CLI-00-25, 52 NRC 355 (2000).

<sup>13</sup> See LBP-02-16, 56 NRC \_\_\_\_ (Aug. 8, 2002). The Commission upheld LBP-02-16 on November 21, 2002. See CLI-02-22, 56 NRC \_\_\_\_.

Board rejected the contention on the authority of 10 C.F.R. § 50.13 and referred its ruling to the Commission.<sup>14</sup>

## II. DISCUSSION AND CONCLUSION

For the reasons we stated today in *Private Fuel Storage*, we find that NEPA imposes no legal duty on the NRC to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001, in conjunction with the license amendment to expand spent fuel pool storage capacity at Millstone Unit 3.<sup>15</sup> As we said in *Private Fuel Storage*, “the possibility of a terrorist attack ... is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA.”<sup>16</sup> Moreover, the NRC cannot make publicly available the kind of information necessary for a more than superficial NEPA review.<sup>17</sup>

Our conclusion comports with the practical realities of spent fuel storage, which has been occurring at Millstone for nearly two decades and will continue, regardless of our decision today.<sup>18</sup> Congress has recognized the need for and encouraged high-density spent fuel storage at reactor sites.<sup>19</sup> Further, all that we decide today is that *NEPA* is not the right vehicle for considering the impact of terrorism. Our post-September 11<sup>th</sup> generic analysis of safeguards

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<sup>14</sup> See note 2, *supra*, and accompanying text.

<sup>15</sup> See *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-02-\_\_\_, 56 NRC \_\_ (Dec. 18, 2002); accord *Duke Power Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-\_\_\_, 56 NRC \_\_ (Dec. 18, 2002); and *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-\_\_\_, 56 NRC \_\_ (Dec. 18, 2002).

<sup>16</sup> *Private Fuel Storage*, CLI-02-\_\_\_, 56 NRC at \_\_, slip op. at 11.

<sup>17</sup> See *id.* at \_\_, slip op. at 20-24.

<sup>18</sup> Cf. *Duke Power Corp.*, CLI-02-\_\_\_, 56 NRC at \_\_, slip op. at 7.

<sup>19</sup> See Nuclear Waste Policy Act, 42 U.S.C. §§ 10,131 *et seq.*

and security issues<sup>20</sup> already includes reevaluation of interim spent fuel storage at power reactor sites. The Millstone 3 license amendment does not entail any technological challenges which warrant immediate site-specific treatment before our staff concludes its assessment of security at all nuclear facilities we license or completes any generic rulemaking proceeding precipitated by the recent terrorist attacks.

Accordingly, we *affirm* the Board's decision to reject the terrorism contention proposed by CCAM/CAM.

IT IS SO ORDERED.

For the Commission<sup>21</sup>

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 18<sup>th</sup> day of December, 2002.

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<sup>20</sup> See *Private Fuel Storage*, CLI-02-\_\_\_, 56 NRC at \_\_\_, slip op. at 2-4.

<sup>21</sup> Commissioner Dicus was not present for the affirmation of this Order. If she had been present, she would have approved it.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-02-27) have been served upon the following persons by Electronic mail. Each party will also receive a paper copy of the Commission Memorandum and Order by U.S. mail, first class.

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(CLI-02-27)

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[Original signed by Evangeline S. Ngbea]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 18<sup>th</sup> day of December 2002