RAS 12034

July 21, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

July 21, 2006 (2:54pm))

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of	)	
	)	
Entergy Nuclear Operations, Inc.	)	Docket No. 50-293
	)	
(Pilgrim Nuclear Power Station)	)	
	)	

MASSACHUSETTS ATTORNEY GENERAL'S BRIEF REGARDING RELEVANCE TO THIS PROCEEDING OF REGULATORY GUIDE'S DEFINITION OF "NEW AND SIGNIFICANT INFORMATION"

I. INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's ("ASLB's") Order of July 14, 2006, the Attorney General of Massachusetts ("Attorney General") submits this brief regarding the relevance to this proceeding of the definition of "new and significant information" found in the U.S. Nuclear Regulatory Commission's ("NRC's" or "Commission's") Regulatory Guide 4.2S1, Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Operating Licenses (September 2000) ("Reg. Guide 4.2S1"). The Reg. Guide is relevant because it is consistent with the Commission's intent, as expressed in the License Renewal Rule, that the scope of new and significant information covered by 10 C.F.R. § 51.53(c)(3)(iv) includes information related to impacts designated as "Category 1" in the NRC's regulations and in NUREG-1437, the Generic Environmental Impact Statement for License Renewal of Nuclear

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Plants (1996) ("GEIS"). The Reg. Guide is also consistent with judicial precedents and the regulations of the President's Council on Environmental Quality ("CEQ").

Moreover, the information in the Attorney General's contention regarding the risk of a severe accident in the Pilgrim fuel pool meets the Reg. Guide's definition of "new and significant information" that should be addressed in an environmental report ("ER") and a supplemental environmental impact statement ("EIS"). The Attorney General was both entitled and required to challenge Entergy's ER's failure to address this new and significant information in a contention.

II. DISCUSSION

NRC regulation 10 C.F.R. § 51.53(c)(3)(iv) requires that a license renewal applicant's ER must "contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware." The Attorney General's contention challenges Entergy Nuclear Operations, Inc.'s ("Entergy's") failure to satisfy Section 51.53(c)(3)(iv) by discussing, in its ER, new and significant information demonstrating the reasonable foreseeability of a severe accident in the Pilgrim spent fuel pool. Massachusetts Attorney General's Request for a Hearing and Petition to Intervene With Respect to Entergy Nuclear Operations Inc.'s Application for Renewal of the Pilgrim Nuclear Plant Operating License, etc. at 30-37 (May 26, 2006) ("Hearing Request"). The Attorney General's contention also presents new and significant information showing that the consequences of such an accident would be severe. *Id.* at 40-41.

Entergy and the NRC Staff argue that NRC regulations preclude the Attorney General from raising a contention challenging Entergy's failure to address significant

new information with respect to Category 1 impacts, and that instead he must file a waiver petition or a rulemaking petition. Entergy's Answer to the Massachusetts Attorney General's Request for a Hearing, Petition for Leave to Intervene, and Petition for Backfit Order at 13 (June 22, 2006); NRC Staff's Answer Opposing Massachusetts Attorney General's Request for Hearing and Petition for Leave to Intervene and Petition for Backfit Order at 8-10 (June 22, 2006).

Reg. Guide 4.2S1 supports the Attorney General's position that 10 C.F.R. § 51.53(c)(3)(iv) requires Entergy to discuss new and significant information regarding the potential for and consequences of a pool fire at the Pilgrim nuclear power plant. Pursuant to 10 C.F.R. § 2.309(f)(2), the Attorney General has both the right and the obligation to challenge Entergy's failure to satisfy Section 51.53(c)(3)(iv) in a contention.

A. Reg. Guide 4.2S1 is Consistent with the Commission's Intent As Expressed in the License Renewal Rule.

Reg. Guide 4.2S1 interprets the term "new and significant information," as used in Section 51.53(c)(3)(iv), to consist of:

> (1) information that identifies a significant environmental issue that was not considered in NUREG-1437 and, consequently, not codified in Appendix B to Subpart A of 10 CFR Part 51, or (2) information that was not considered in the analyses summarized in NUREG-1437 and that leads to an impact finding different from that codified in 10 CFR Part 51.

Id. at 4.2-S-4. The Attorney General agrees with the ASLB that as a general matter, NRC Staff guidance documents like Reg. Guide 4.2S1 are not binding on the NRC or the parties to this case. *See* Order, slip op. at 3 and n.3. Nevertheless, the guidance provided by Reg. Guide 4.2S1 is relevant because it is consistent with the Commission's intent as expressed in the license renewal rule.

In relevant part, Reg. Guide 4.2S1 defines "new" information as "information that was not considered in the analyses summarized in NUREG-1437." *Id.* at 4.2.S-4. This definition is consistent with the preamble to the final rule for consideration of environmental issues in license renewal decisions, where the Commission explained that in reviewing comments on draft supplemental EISs, the Commission would "determine whether such comments introduced new and significant information *not considered in the GEIS analysis.*" Final Rule regarding Environmental Review for Environmental Review of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467 28,470 (June 5, 1996) ("Final License Renewal Rule") (emphasis added).

Similarly, with respect to the meaning of the term "significant," Reg. Guide 4.2S1 is consistent with the preamble to the Final License Renewal Rule. Reg. Guide 4.2S1 suggests that information is "significant" if it leads to an impact finding different from that codified in 10 CFR Part 51. *Id.* at 4.2.S-4. Likewise, the preamble to the Final License Renewal Rule states that new information will be considered "significant" if it "indicate[s] that the analysis of an impact codified in the rule is incorrect in significant

respects . . ." *Id.* at 28,470.[1]

Reg. Guide 4.2S1's definition of "new and significant information" also is consistent with the Supreme Court's decision in *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 374 (1989) which defined "new and significant information" as information showing that a proposed action will affect the quality of the human environment "in a significant manner or to a significant extent not already considered." *See also Essex County Preservation Association v. Campbell,* 536 F.2d 956, (1st Cir. 1976) (affirming lower court decision that supplemental EIS is required when there is a "new or changed environmental effect of significance to the quality of the environment.") Moreover, the Reg. Guide is consistent with the CEQ's regulations for implementing the National Environmental Policy Act ("NEPA"), which are entitled to "substantial

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[1] The complete text is as follows:

> a. NRC's response to a comment regarding the applicability of the analysis of an impact codified in the rule to the plant in question may be a statement and explanation of its view that the analysis is adequate including, if applicable, consideration of the significance of new information. A commenter dissatisfied with such a response may file a petition for rulemaking under 10 CFR 2.802. If the commenter is successful in persuading the Commission that the new information does indicate that the analysis of an impact codified in the rule is incorrect in significant respects (either in general or with respect to the particular plant), a rulemaking proceeding will be initiated.
>
> b. If a commenter provides new information which is relevant to the plant and is also relevant to other plants (i.e., generic information) and that information demonstrates that the analysis of an impact codified in the final rule is incorrect, the NRC staff will seek Commission approval to either suspend the application of the rule on a generic basis with respect to the analysis or delay granting the renewal application (and possibly other renewal applications) until the analysis in the GEIS is updated and the rule amended. If the rule is suspended for the analysis, each supplemental EIS would reflect the corrected analysis until such time as the rule is amended.

61 Fed. Reg. at 28,470.

deference." *Andrus v. Sierra Club,* 442 U.S. 347, 359 (1979). CEQ regulations require the supplementation of an EIS when there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1509(a)(2)(ii). Thus, Reg. Guide 4.2S1 has no inconsistency with judicial precedents or applicable regulations that would preclude its application in this proceeding.

B. The Information Submitted by the Attorney General in his Contention Meets Reg. Guide 4.2S1's Definition of "New and Significant."

In his contention, the Attorney General has demonstrated, with specificity and basis sufficient to satisfy the admissibility standard of 10 C.F.R. § 2.309(f), that his concerns meet the second prong of the definition of "new and significant information," *i.e.,* "information that was not considered in the analyses summarized in NUREG-1437 and that leads to an impact finding different from that codified in 10 CFR Part 51."

First, the Attorney General has demonstrated that the information he submitted is "new" as defined in Reg. Guide 4.2S-1 because it was not considered in the analyses summarized in the GEIS. Hearing Request at 24-30, 40-41. Second, the Attorney General has demonstrated that the information in his contention is "significant" because it would lead to "impact findings" that are different than the impact findings in the GEIS, *i.e.,* contradicts the finding of the GEIS at page 6-85 that the accident risks posed by high-density pool storage of spent fuel are "not significant." Hearing Request at 30-37, 40-41. Accordingly, the Attorney General has submitted an admissible contention challenging Entergy's failure to comply with 10 C.F.R. § 51.53(c)(3)(iv)'s requirement that its ER must address new and significant information regarding the environmental

impacts of continued high-density pool storage of spent fuel at the Pilgrim nuclear power plant.

C. The Attorney General Has Both the Right and the Obligation to Challenge Entergy's Failure to Satisfy 10 C.F.R. § 51.53(c)(3)(iv) in a Contention.

Reg. Guide 4.2S1 makes clear the NRC Staff's expectation that license renewal applicants will address new and significant information regarding Category 1 environmental impacts in their ERs pursuant to 10 C.F.R. § 51.53(c)(3)(iv). Therefore Entergy's failure to do so may be challenged in a contention pursuant to 10 C.F.R. § 2.309(f)(2), which provides that a petitioner "shall file" NEPA contentions "based on the applicant's environmental report." Indeed, the NRC's use of the word "shall" in the regulation establishes that the filing of contentions challenging the adequacy of an ER constitutes the *only* way that a petitioner may seek to litigate NEPA issues in a licensing proceeding. Had the Attorney General failed to file his contention, he would risk being completely denied an opportunity to litigate his concern regarding Entergy's and the NRC's failure to address the risks of spent fuel pool accidents in their NEPA analyses. Accordingly, the Attorney General's contention should be admitted.[2]

III. CONCLUSION

Because the Attorney General's contention shows, with specificity and basis, that Entergy failed to satisfy 10 C.F.R. § 51.53(c)(3)(iv) by discussing new and significant information regarding the environmental impacts of continued high-density pool storage of spent fuel, the contention should be admitted.

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[2] As discussed in the oral argument on July 6, 2006, out of an abundance of caution the Attorney General plans to file a rulemaking petition with the Commission.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS

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Tr. at 89. The Attorney General does not believe, however, that the filing of a rulemaking petition should preclude the admission of his contention.

CERTIFICATE OF SERVICE

I certify that on July 21, 2006, copies of the foregoing Massachusetts Attorney General's Brief Regarding Relevance to This Proceeding of Regulatory Guide's Definition of "New and Significant Information" were served on the following by first-class mail and/or electronic mail, as indicated below:

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