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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'98 SEP 28 P 3:59

BEFORE THE COMMISSION

OFFICE OF GENERAL COUNSEL
RULEMAKING AND
ADJUDICATIONS STAFF

| | | |
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| In the Matter of |) | |
| |) | |
| NORTHEAST NUCLEAR |) | Docket No. 50-423-LA-2 |
| ENERGY COMPANY |) | |
| (Millstone Nuclear Power Station, |) | |
| Unit No. 3) |) | |

NRC STAFF'S RESPONSE TO CITIZENS
REGULATORY COMMISSION'S APPEAL OF LBP-98-22

INTRODUCTION

Pursuant to 10 C.F.R. § 2.714a, the staff of the Nuclear Regulatory Commission (Staff) hereby responds to "Citizens Regulatory Commission Brief Accompanying Notice of Appeal" (Appeal), dated September 11, 1998. As discussed below, Citizens Regulatory Commission (CRC) fails to demonstrate that the Atomic Safety and Licensing Board (Board), in its decision, LBP-98-22, either abused its discretion or committed an error of law. CRC's Appeal should, therefore, be denied.

BACKGROUND

On April 1, 1998, Northeast Nuclear Energy Company (NNECO) submitted a request for a license amendment pursuant to 10 C.F.R. § 50.90, for Millstone Nuclear Power Station, Unit No. 3.¹

¹ On March 3, 1998, NNECO submitted a separate request for a different license amendment. As described in the *Federal Register* notice, the March 3, 1998 proposed license amendment would revise the Millstone Unit 3 licensing basis to eliminate the requirement to have the recirculation spray system (RSS) directly inject into the reactor coolant system following a design basis accident. 63 Fed. Reg 14487 (March 25, 1998). CRC also sought leave to intervene in that license amendment application proceeding. "Citizens Regulatory Commission's Petition for (continued...)"

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On April 22, 1998, the NRC published a *Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing*. 63 Fed. Reg. 19964-19966, 19974-19975 (1998).

The Notice provided a description of the amendment request:

The proposed revision to the Millstone Unit 3 licensing basis would add a new sump pump subsystem to address groundwater leakage through the containment basemat.

63 Fed. Reg. at 19974. On May 21, 1998, CRC filed "Citizens Regulatory Commission Petition for Leave to Intervene." NNECO and the Staff responded to the Petition on June 5, 1998 and June 10, 1998, respectively. "Northeast Nuclear Energy Company's Answer to Request for a Hearing and Petition to Intervene: Sump Pump Subsystem Approval"; "NRC Staff's Response to Citizens Regulatory Commission's Petition to Intervene." By Order dated June 16, 1998, the Board permitted CRC to file an amendment to its Petition to address any shortcomings with respect to standing.² Order at 2-3. On July 7, 1998, CRC filed "CRC Supplement to Intervention Petition" (Supplement). The Supplement consisted of proposed contentions and the affidavit of Joseph H. Besade, which addressed standing. See "Affidavit" attached to Supplement. On July 21, 1998, NNECO and the Staff responded to CRC's Supplement as it addressed standing. "Northeast Nuclear Energy Company's Supplemental Answer Regarding Standing Issues (Sump Pump Subsystem

¹(...continued)

Leave to Intervene," April 23, 1998. On August 25, 1998, the Atomic Safety and Licensing Board ruled that CRC had standing to intervene in that proceeding. *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit No. 3), LBP-98-20, 48 NRC ____, slip op. (August 25, 1998)("RSS proceeding"). The Board's ruling on CRC's proposed contentions is currently pending.

² The Board also provided that CRC must submit its proposed contentions at the same time.

Approval)," July 21, 1998; "NRC Staff's Response to CRC Supplement to Intervention Petition Addressing Standing," July 21, 1998.³

On September 2, 1998, the Board issued a "Memorandum and Order (Resolving Standing Issue)." *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC _____, slip op. (September 2, 1998). In LBP-98-22, the Board denied CRC's Intervention Petition because it found that CRC lacked sufficient interest to intervene in this license amendment proceeding. *Id.* at 11. On September 11, 1998, CRC filed its Appeal asserting that the Board erred in denying CRC standing in this proceeding. Appeal at 3.

DISCUSSION

In its Appeal, CRC claims that the Board erred in denying it standing. Appeal at 3-4. A licensing board's determination regarding standing is entitled to substantial deference absent an error of law or an abuse of discretion. *International Uranium (USA) Corp.*, (White Mesa Uranium Mill; Alternate Feed Material), CLI-98-6, 47 NRC 116, 118 (1998), *citing Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995). Since the Board did not make an error of law or abuse its discretion in LBP-98-22, its decision is entitled to substantial deference and should be affirmed. CRC's Appeal should, therefore, be denied.

As correctly held by the Board, and unchallenged by CRC, in order to establish standing, a petitioner must assert an actual or threatened, concrete and particularized injury, *i.e.*, an injury in fact that is fairly traceable to the challenged action and likely to be redressed by a favorable decision.

³ NNECO and the Staff also responded to CRC's proposed contentions, asserting that CRC failed to offer an admissible contention. "Northeast Nuclear Energy Company's Answer to Proposed Contentions Re: Sump Pump Subsystem Approval," July 28, 1998; "NRC Staff's Response to CRC Supplement to Intervention Petition Regarding Contentions," July 28, 1998.

LBP-98-22 at 7 citing *Quivira Mining Co.* (Ambrosia Lake Facility), CLI-98-11, 48 NRC ____, ____, slip op. at 5 (July 17, 1998); *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 40 NRC 111, 115 (1995); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993).

The Board initially determined that since the license amendment at issue in this proceeding did not present an obvious potential for offsite consequences, CRC's assertion that residence of one of its members in the immediate vicinity of the Millstone facility was insufficient to confer standing.⁴ *Id.* at 9, citing *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 330 (1989). The Board, therefore, concluded that CRC must allege some specific injury in fact that will result from the action taken. *Id.* The Board then went on to hold that CRC failed to establish that one of its members would suffer an injury in fact that was fairly traceable to the proposed action. LBP-98-22 at 10 citing *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75. Specifically, the Board determined that CRC failed to show that an offsite injury could plausibly result from the installation of the new sump pumps. *Id.* CRC, therefore, failed to establish standing to intervene.

In its Appeal, CRC makes three arguments, none of which establish that the Board's decision constitutes an abuse of discretion or an error of law. CRC first argues that the Board in this proceeding is bound by a decision of the Board in the RSS proceeding which found that CRC had standing in the RSS proceeding. *See* Appeal at 3. CRC claims that the issue in this proceeding is "identical" to the issue in the RSS proceeding. *Id.* Specifically, CRC asserts that the sump pump

⁴ It does not appear that CRC is appealing the Board's ruling on this issue.

subsystem is "RSS-related" and is "a different component of the RSS." *Id.* Thus, according to CRC, the legal doctrines of *res judicata* and collateral estoppel require that the Board grant CRC standing to intervene in this proceeding. *Id.*

CRC correctly states that the legal doctrines of *res judicata* and collateral estoppel generally bar relitigation of identical issues between the same parties.⁵ *See* Appeal at 3. *See also* 18 D. Coquillet, *et al.* Moore's Federal Practice, ¶¶ 131, 132 (3rd ed. 1998). The issue in this proceeding, however, is not identical to the issue in the RSS proceeding. As noted above, the issue in this proceeding involves a proposed revision to the Millstone Unit 3 licensing basis to add a new sump pump subsystem to address groundwater leakage through the containment basemat. 63 Fed. Reg. at 19974. The issue in the RSS proceeding involves a revision to the Millstone Unit 3 licensing basis to eliminate the requirement to have the RSS directly inject into the reactor coolant system following a design basis accident. 63 Fed. Reg. 14483-87. Further, the sump pump subsystem is neither a component of the RSS nor related to it.⁶ In light of the above, CRC fails to explain how the issues in these two separate proceedings are identical. Thus, CRC has not established that the legal doctrines of *res judicata* and collateral estoppel apply to the Board's ruling regarding standing.

⁵ *Res judicata* will act to bar a claim as a result of a judgment in a prior action. Moore's Federal Practice at ¶ 131.01. It requires at least three elements, 1) there must have been a final judgment on the merits; 2) the prior actions must have involved the same parties or their privies; and 3) the prior action must have involved the same claim. *Id.* The doctrine of collateral estoppel, also known as issue preclusion, acts to prevent relitigation of the same issues in a subsequent case. *Id.* at ¶ 132.01. Collateral estoppel applies only when the issues presented in each matter are identical, not merely similar. *Id.* at ¶ 132.02[2].

⁶ If the sumps are not pumped out, however, the groundwater could eventually affect the RSS. *See* LBP-98-22 at 3. As discussed below, the Board properly ruled that CRC must demonstrate how the installation of the sump pump subsystem could lead to offsite consequences in order to establish standing in this proceeding. *Id.* at 11.

CRC, therefore, fails to demonstrate that the Board's ruling on standing constituted an abuse of discretion or an error of law. The Board's decision should, therefore, be upheld.

CRC next argues that because CRC had been granted standing in the RSS proceeding, its denial of standing here was also arbitrary and capricious. Appeal at 3. To support its assertion, CRC claims that this proceeding involves a component of the RSS system and thus the Board acted arbitrarily and capriciously by ruling that CRC did not have standing to intervene in this proceeding when it was granted standing in the RSS proceeding. *Id.* As discussed above, the sump pump subsystem is not a component of the RSS system. Further, the Board properly considered CRC's concerns regarding the RSS system as they related to standing in this proceeding and determined that:

CRC has made no showing of an offsite injury that plausibly results from the installation of new safety-related sump pumps in the ESF [Engineered Safety Features] building sumps. Rather, the instant CRC petition, because it merely repeats the content of CRC's earlier petition, is aimed primarily at the Millstone recirculation spray system, the subject of the license amendment in LBP-98-20, 48 NRC at ____ (slip op. at 45)(Aug. 25, 1998). The CRC petition is not focused, as it should be, on the sump pump subsystem that is the subject of the license amendment in this proceeding.

LBP-98-22 at 10. The Board went on to hold that CRC failed to demonstrate how an accident with offsite consequences could result from the installation of the sump pump subsystem. *Id.* at 11. CRC fails, here, to explain how the Board's holding regarding CRC's concerns was incorrect. CRC does not even attempt to explain how an offsite injury could plausibly result from the installation of the sump pump subsystem. *See* Appeal at 3. Thus, CRC fails to demonstrate that the Board's decision was arbitrary and capricious. CRC's Appeal should, therefore, be denied.

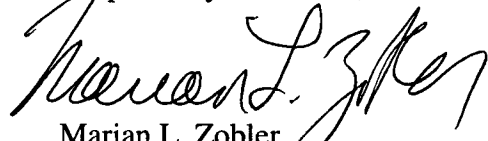
CRC's third basis for appeal is that "[t]he license amendment proposed a band-aid approach to a serious safety issue; CRC is rightly concerned and possesses a legal right to participate." Appeal

at 4. CRC goes on to raise concerns regarding the degradation of the waterproof membrane that was to prevent groundwater inleakage in the containment basemat. *Id.* CRC's concern regarding the membrane was not raised below and thus, cannot, now, form a basis for standing. *See Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 348 (1978)(ordinarily an issue raised for the first time on appeal will not be entertained). Even if CRC had raised this concern below, CRC fails to explain how its concern regarding the waterproof membrane could lead to an injury in fact that is fairly traceable to the proposed action. In fact, the addition of the sump pump subsystem is intended to address the degradation of the waterproof membrane. *See Letter to U.S. Nuclear Regulatory Commission from M.L. Bowling, Jr., Northeast Nuclear Energy Company, April 1, 1998, Re: Millstone Nuclear Power Station, Unit No. 3, Proposed License Amendment Request ESF Building Sump Pumping Subsystem (PLAR 3-98-2).* As the Board correctly held, CRC's petition for leave to intervene must focus on the installation of the sump pump subsystem, the subject of the license amendment. LBP-98-22 at 10. Thus, even if CRC had raised this concern below, since the concern does not relate to the installation of the sump pumps, CRC would still not have established standing to intervene in this proceeding. CRC's Appeal should, therefore, be denied.

CONCLUSION

For the reasons set forth above, CRC's Appeal should be denied and LBP-98-22 should be affirmed.

Respectfully submitted,



Marian L. Zobler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 28th day of September 1998

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO CITIZENS REGULATORY COMMISSION'S APPEAL OF LBP-98-22" in the above-captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk this 28th day of September, 1998:

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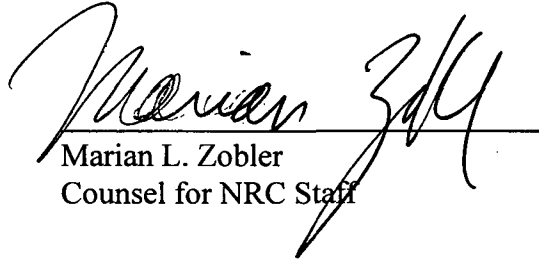
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