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

In the Matter of:

NUCLEAR ENGINEERING COMPANY (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site)	)))	Docket No. 27-39

BRIEF FOR APPELLEE

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STATEMENT OF FACTS

The Sheffield, Illinois commercial low-level radioactive waste disposal facility is a shallow land burial site covering 20.45 acres in Bureau County, Illinois ("site").

The Sheffield facility was first licensed for operation in 1967, when the Atomic Energy Commission ("AEC") licensed the activities of California Nuclear, Inc., the site's original operator. Early in 1968, Nuclear Engineering Corporation, Inc. (NECO) acquired control of California Nuclear and the latter's license was transferred to NECO with the AEC's approval in March 1968. On December 29, 1976 NECO filed an application seeking renewal of its license and to expand its site to the adjacent 168 acres. On August 5, 1977 NECO filed an application to bury waste in Trench 15 on the original 20.45 acre site.

The last of the licensed trenches at the site was filled in April of 1978. From April 1978 until March 1979 NECO used the site only as a collection point for low-level radioactive waste collected from local hospitals and small generators. The collected waste has been temporarily stored while awaiting shipment to NECO burial facilities in Richmond, Washington and Beatty, Nevada, and the Allied General Nuclear Services (AGNS) site in Barnwell, South Carolina. Since March, 1979 no waste has been collected or stored in Sheffield.

On March 8, 1979, NECO notified the Nuclear Regulatory Commission (NRC) that it was withdrawing its application for license renewal and application for site expansion and was terminating its license as of 10:01 a.m. on March 8, 1979.

On March 20, 1979 the NRC issued an order to show cause why NECO should not resume its responsibilities and obligations under its license.

On May 3, 1979, the Atomic Safety and Licensing Board (Board) granted NECO's motion to withdraw its application to expand the site.

On August 24, 1979 the Chicago Section of the American Nuclear Society (CS/ANS) moved to compel the NRC to file a draft Environmental Impact Statement (EIS) and to compel study of reasonable alternatives to suspension of operations at Sheffield. On December 3, 1979, the Board ruled that it could not require the NRC Staff to prepare a draft EIS prior to the Board's ruling on the motion to withdraw its application for the 168 acre expansion, as Appellant had cited no authority which would require that action by the Board.

Appellant then moved for reconsideration or certification of the question presented for review. In the alternative, Appellant moved the Licensing Board to declare that portion of the Board's May 3, 1979 order, pertaining to withdrawal of the application to expand, as final. The Board, in its May 7, 1980 order stated that the May 3, 1979 ruling granting Applicant's motion to withdraw its application to expand the site was indeed final on the date issued, as the order disposed of a major segment of the case.

On May 21, 1980, Appellant filed an exception to the May 3, 1979 order. On May 27, 1980, the State of Illinois (Appellee) moved to strike the Appellant's exception as untimely under the Rules and Regulations of the NRC.

I

CS/ANS EXCEPTIONS TO THE MAY 3, 1979 RULING ARE UNTIMELY AND DO NOT ASSERT ANY DISCERNIBLE INJURY AND THEREFORE THIS APPEAL SHOULD BE DISMISSED.

This is an appeal from the Order of the Atomic Safety and Licensing Board of May 3, 1979, which gave permission to the Nuclear Engineering Company (NECO) to withdraw its application to expand the low level waste disposal site at Sheffield Illinois. Appellant argues that it had no notice of the finality of that order and therefore did not file exceptions. Appellant's failure to file exceptions in a timely fashion is not excused by its failure to correctly interpret the finality of the order.

The test of finality for appeal purposes in NRC proceedings is clear. Where a licensing board's action disposes of a major segment of the case, it is deemed a final decision. Toledo Edison Co. (David-Besse) and Cleveland Electric Illuminating Co. (Perry Units 1 and 2), ALAB-300, 2 NRC 752, 758 (1975).

A final order need not necessarily be the very last order in an agency proceeding so long as it meets the conditions of finality. Isbrandsten Co. v. United States, 211 F.2d, 51, 55; cert. denied, 347 U.S. 990 (1954). So long as an order imposes an obligation, denies a right or fixes some legal relationship, it is reviewable. Chicago and Southern Air Lines v. Waterman Steamship Corp. 333 U.S. 103, 113 (1948).

The Board's May 3, 1979 order clearly met the standards for a final order. The order stated:

> "Consequently, this Board hereby grants the motions to withdraw and dismiss this portion of the application pertaining to expansion of the site."

It was not necessary for the Board to also determine the issue of NECO's request to abandon the original site at that time. It is clear on the face of this order that the Board intended the ruling to fix the relationships of the parties pertaining to the expansion of the site.

Failure to file exceptions in a timely manner amounts to waiver of the exceptions. Even where only part of a decision is appealed, a party must file his exceptions without waiting for the Licensing Board's disposition of the remainder of the case. Commonwealth Edison (Zion Station)ALAB-226, 8 AEC 381 (1974); Mississippi Power and Light Company (Grand Gulf Station), ALAB-195, 7 AEC 455 (1974). Appellant cannot bootstrap its way into a timely appeal by citing the May 7, 1980 Order. The exception to the May 3, 1979 order should have been made within 10 days of that decision in accordance with the provisions of 10 CFR §2.762.

Appellant's argument that no order can be considered final except as defined in 10 CFR §2.764 is not based on law. If that argument were to be accepted, once could never appeal any segment of a case prior to issuance of the initial decision. This is obviously not the practice of the NRC. It is common for intervenors who have

been denied admission to cases to bring appeals of the Board's determinations of standing and contentions during the litigation of the issues brought by other parties. Although this is an "interlocutory" appeal, certification by the Board is not required. 10 CFR, §714(a). Florida Power and Light Co. (St. Lucie Plant, Unit 2) CLI-78-12, 7 NRC 939 (1978). See also In the Matter of Commonwealth Edison (Carroll County, Early Site Review) Docket Nos. 50-599, 50-600 NOTICE OF APPEAL from the LICENSING BOARD's "Memorandum and Order Re: Contentions" filed on June 12, 1980, Appeal pending before the Atomic Safety and Licensing Appeal Board.

Other orders from which immediate appeal may be brought prior to the issuance of an initial decision have included an order granting discovery against a third party which was deemed "final" and appealable as of right. Kansas Gas & Electric Co. et al. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311, 3 NRC 85, 87 (1976); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973). Similarly, a Licensing Board order on the issue of whether offsite activity can be engaged in prior to issuance of an LWA or a CP has been found appealable, Kansas Gas & Electric Co. et al. (Wolf Creek Nuclear Generating Station, Unit 1) ALAB-331, 3 NRC 771, 774 (1976), as was the grant of a Part 70 license to transport and store fuel assemblies during the course of an OL hearing. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-76-1, 3 NRC 73, 74 (1976). Similarly, a Licensing Board's decision authorizing issuance of an LWA and rejecting the applicant's claim that it is entitled to issuance of a construction permit was considered final

for the purposes of appellate review. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 318 (1978). Even a protracted withholding of action on a request for relief may be treated as tantamount to a denial of the request and final agency action. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-417, 5 NRC 1442 (1977); Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426, 428 (1977). Thus there is no reason, given the case law, for Appellant to have postponed filing an appeal within the time limits specified by the regulations.

Additionally, this appeal should be dismissed because the Appellant has not established that any discernible injury to it has been sustained as a consequence of the Board's ruling. Rochester Gas & Electric Corporation et al (Sterling Power Project, Nuclear No. 1) ALAB-502, 8 NRC 383, 393 (1978); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-252, 8 AEC 1175, Aff'd CLI-75-1, 1 NRC 1 (1975). The ruling did not effect closing of the Sheffield site. An opposite ruling could not have caused NECO to operate the expanded site. Even if NECO could have been compelled to continue with its application the site cannot ultimately be operated under NRC regulations unless the State or Federal government owns the land upon which the disposal operation is sited. As the Board has no power to order either sovreign to buy land and to lease it to NECO for use as a radioactive dump, the Board's order cannot alter the status quo. Therefore Appellant cannot claim that the order of May 3, 1979 has caused injury and this appeal must be dismissed.

II

THE ORDER OF THE LICENSING BOARD WAS NOT A "MAJOR" FEDERAL ACTION NOR DOES IT SIGNIFICANTLY AFFECT THE QUALITY OF THE HUMAN ENVIRONMENT, THEREFORE NO EIS IS REQUIRED

Appellant's claims are based on its interpretation of that part of the National Environmental Policy Act (NEPA) 42 U.S.C. 4332 (2)(c), which requires that an Environmental Impact Statement (EIS) be prepared for major federal actions that significantly affect the quality of the human environment.

Illinois does not quarrel with the notion that an NRC Board Order may constitute "federal action". Neither does Illinois maintain that a licensing Board does not have jurisdiction to order an EIS where appropriate. However Illinois does contend that NEPA was not intended to be applied in situations where government action was de minimus or had a minimal effect on the environment. To avoid the expenditure ofunnecessary agency funds and manpower, the Statute deliberately has built in "restrictions" in regard to where an EIS must be written. The first threshhold to be crossed is that the federal action in question must be one of "major" importance.

A "major" federal action is one that requires substantial time, resources, planning or monetary expenditure. National Resources Defense Council v. Grant, 341 F. Supp. 356, 366, (DC 1972) Southwest Neighborhood Assembly v. Eckard, 445 F. Supp. 1195, 1199 (DC 1978).

The legislative history of the Act is also instructive. According to the Senate Report,"major actions" covered by §4332(2)(c)of NEPA include "project proposals, proposals for new legislation, regulations, policy statements or expansion or revision of enjoining programs..." The Board's order in the instant proceeding clearly is not of the magnitude envisioned by the framers of the Act or those who have interpreted the legislation. See Virginians for Dulles v. Volpe , 541 F.2d 442, 446 (C.A.4th, 1976). See also Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, 1331 (4th Cir.1972) and Greene County Planning Board v. Federal Power Commission, 455 F.2d 412, 424 (2d Cir., 1972). The Board's order did not set in motion events which would correspond to the definition of the elements of a major federal action, nor did it work any vast changes affecting the area. The Board's action was merely a formality based on necessity to conform to regulations.* Thus the Board's order does not constitute a mandate for an EIS because it does not fall within the first NEPA requirement of "major federal action".

Even were the Board's order to be considered a major action under NEPA an EIS still would not be required because the order does

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* S. Rep. No. 296, 91st Cong., 1st Sess. 1969 at 20

** 10 CRF §2.107 (a) appears to require an act of the Commission to allow withdrawal of an application after a notice of hearing has been issued.

not "significantly affect the quality of the human environment". This threshold test is met when a plaintiff alleges facts which, if true, would show that the proposed project would materially degrade any aspect of environmental quality. 42 U.S.C. §4332(2)(c); 10 CFR Part 51. The Second Circuit of Appeals, summarized the meaning of "significant impact" thus:

> "In the absence of any Congressional or administrative interpretation of the term, we are persuaded that in deciding whether a major federal action will significantly affect the quality of the human environment the Agency in charge, although vested with broad discretion, should normally be required to review the proposed action in the light of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitive adverse environmental effects in excess of those created by existing uses in the area affected of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area. Where conduct conforms to existing uses, its adverse consequences will usually be less significant than when it represents a radical change. . ."

Hanly v. Kleindienst, 471 F.2d 823, 830-831, (2d Cir. 1972). Applying this test to the Board order, it is clear that the order does not meet the test of action which creates a significant affect on the quality of the human environment.

The NRC has issued its own regulations implementing NEPA as 10 CFR Part 51. Subpart A of that Rule "General Requirements for Environmental Impact Statements, Negative Declarations and Impact Appraisals" includes as §51.5 a section which defines "Actions requiring preparation of environmental impact statements...(and) actions excluded.

An EIS is mandatory for construction permits or operating licenses for nuclear reactors, test facilities, reprocessing plants, milling production of uranium hexafluoride and similar "issuance of a license authorizing commercial radioactive waste disposal by land burial pursuant to parts 30, 40 and/or 70..." 10 CFR §51.5(a)(b) (emphasis added). Preparation of an EIS is discretionary in various situations proposing major changes including:

> "(4) Issuance of an amendment which would authorize a significant change in types or significant increase in the amounts or effluents or a significant increase in the potential for accidental releases of a license for:...
>
> (iii) authorizing commercial radioactive waste disposal by land burial... 10 CFR §51.5 (b)(4)(iii)(emphasis added).

Finally §51.5(d) exempts from EIS preparation issuances of orders pursuant to 10 CFR Part 2, Subpart B, which orders would include orders to show cause and revocations of existing licenses.

The order of this Board allowing withdrawal of the application to expand, though not issued under Subpart B, clearly stands in closest alignment with such exempted orders. The order resulted in the following:

(1) The status quo at the site was maintained. There were no adverse environmental effects in excess of the current existing usage of the site.

(2) The conduct conformed to the existing usage of the area. Usage of the site for low level waste disposal ceased over two years ago. The cumulative harm to the area resulting from the withdrawal of the expansion application therefore is nonexistent.

Appelant has not alleged any facts which would show that the action of withdrawing the application to expand the site resulted in any significant changes in the environment. The order put Appellant in the position it would have been in had NECO never applied to expand the site. As the original site has not been used since 1978, the order did nothing more than give official sanction to the status quo.

The Board's order does not violate NEPA's second mandate. The order does not have a significant effect. In fact, the order falls within the general category of agency actions found to be exempted from NEPA.

Appellant erroneously cites City of New York v. U.S. 337 F. Supp. 150, supp. opin. 344 F.Supp. 929 (E.D.N.Y., 1972) as precedent for the preparation of an EIS where an action is abandoned. City of New York involved the impending abandonment of a railroad line which action was thought to lead to changed conditions - specifically, increased usage of trucks on the highway to transport goods previously shipped via the railway. The consequences that resulted from suspending operations in City of New York are not analogous to those resulting from

withdrawal of the application to expand a site that had never been used and which will have no significant environmental effect.

CONCLUSION

Appellant's appeal should be dismissed for lack of timeliness and for failure to state an injury resulting from the Board's order. Even if the appeal were to be heard on the merits the legislative history of NEPA, the NRC regulations, the CEQ guidelines and the case law all support a denial of Appellant's request as it cannot be shown that the Board fits the definitions required to necessitate an EIS.

Respectfully submitted,

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with §2. 713, 10 C.F.R. Part 2, the following information is provided:

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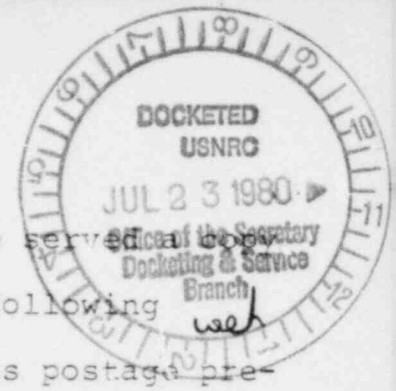

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