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October 20, 1989

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

G. Paul Bollwer, III, Chairman
Alan S. Rosenthal
Howard A. Wilber

In the Matter of	)	
	)	Docket Nos. 50-443-OL
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.	)	50-444-OL
	)	(Offsite Emergency Planning Issues)
(Seabrook Station, Units 1 and 2	)	

MOTION FOR PARTIAL RECONSIDERATION OF ALAB-922
ON BEHALF OF THE SEACOAST ANTI-POLLUTION LEAGUE

NOW COMES the Seacoast Anti-Pollution League (SAPL) and moves pursuant to 16 CFR §2.771 that this Appeal Board reconsider its holding in ALAB-922 that "emergency planning requirements are intended to be second-tier, AEA section 161 Safety Provisions rather than a first-tier, 'adequate protection' requirements under AEA section 182." (Slip Opinion, p. 18)

The sole support for the Appeal Board's decision that emergency planning is a "second-tier" safety requirement is the fact that in the string citations for authorization of the rule, the Commission, presumably through its then general counsel, cited AEA section 161 (b), (i), and (o) rather than AEA section 182.

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However, assuming that this authorization citation is indeed properly described as a "compelling indication" of Commission intent, a matter SAPL vigorously disputes (see pp. 3-6 infra), there remains no indication that an awareness of such second-tier status existed either in 1979 or 1980, when the emergency planning rules were proposed, and adopted.

Indeed, in defining the "two-tier" proposition, the Appeal Board cites to USC (I) (824 F.2d 108, 114-18). This case, however, was decided by the D.C. Circuit in 1987, seven years after the emergency planning rule was finally adopted, and contains no suggestion that prior to the briefs filed in connection with that appeal the Commission ever considered a significantly different level of safety was implied by citation to one section of the AEA rather than another.

Moreover, it seems likely that the choice of citation, in the process of adopting regulations, is left up to the Commission's general counsel, and is not presented as a matter for policy decision on the part of the Commissioners. At least, there is certainly no indication that the Commissioners thought they were making a deliberate policy decision merely because of the statutory citation used to demonstrate authorization for the promulgation of the rule.

In fact, every available indication of Commission intent at the time of the adoption of the emergency planning regulations is to the contrary: that emergency planning was intended to have

equal status and was to be considered as equally important as any other safety requirement. These indications include the following:

(1) The very language of the regulation itself, 10 CFR §50.47(a), which not only approximates, but in fact utilizes the "adequate protection" [protective] language of what is now described as the "first-tier," statute, section 182.

(2) The description in the Statement of Considerations accompanying the final rule of emergency planning as an "essential" safety feature (45 Fed. Reg. 55404) and "that the protection provided by safety and engineering design features must be bolstered by emergency planning requirements. Id. at 55403. (Emphasis added.)

(3) The statement in the Statement of Considerations that the "General Counsel advises the Commission that the NRC final rules were consistent with [the NRC Authorization] Act." 45 Fed. Reg. 55402. That Act prohibited permitting operation of nuclear plants without there being in place emergency plans (state and local or utility) that provided "reasonable assurance that public health and safety would

not be endangered by the operation of the facility concerned." (1980 Authorization Act, Pub. L. No. 96-295, §109(a)),

(4) The statement accompanying the proposed rule change on December 16, 1979 that: "The Commission recognizes that this proposal, to view emergency planning as equivalent to, rather than secondary to siting and design in public protection, departs from its prior regulatory approach to emergency planning." (Emphasis added, 44 Fed. Reg. 75167 at 169.)

(5) The decision in SAPL v. NRC, 690 F.2d 1025, at 1030, in which the Court noted that:

> "According the Commission, if it appears at the operating license review that the infeasibility of EPZ evacuation renders it impossible for PSC to provide the requisite 'reasonable assurance,' the operating license will not be granted."

This position, that an "infeasible" evacuation plan will preclude an operating license, is fundamentally inconsistent with the notion that emergency planning is a "second-tier" safety measure, an idea the NRC never advanced in dealing with the SAPL 10 CFR §2.206 petition, or in defending its failure to undertake a §2.206 review before the D.C. Circuit.

The only suggestion anywhere of a "two-tier" safety approach, prior to the USC 1 decision, is to be found in the conclusion of a memorandum written for the Commissioners by former general counsel Leonard Bickwit, and which is included in the appendix to the MassAG Brief on the Appeal of the New Hampshire Emergency Response Plan. (Brief Appendix, Exhibit 9, at pp. 23-24). In that memorandum, Mr. Bickwit advanced the possibility of treating safety on a two-tier basis, depending on which section of the statute was utilized, but there is no indication that suggestion was ever adopted as policy by the Commission, or advanced as a legal proposition by the Commission's general counsel, until the NRC filed its brief in UCS 1 in 1987. To the contrary, Mr. Bickwit himself, at p. 3 of his memorandum, footnote 5, states:

> "However, there is no basis in the Act or in its legislative history for distinguishing between the various statutory standards, and the Commission has construed them all as amounting to the same thing. Maine Yankee Atomic Company (Maine Yankee Atomic Station), ALAB-161, 6 AEC 1003, 1009 (1973)."

Although the Board in ALAB-922 rests its "second-tier" holding solely on the statutory citation utilized by the general counsel in 1980 to demonstrate authorization to promulgate the rule, it does cite recent, 1987, Commission statements as indicating some equivocation about the present status of emergency planning requirements in achieving the necessary level of nuclear safety.

Of course, these Commission statements in 1987 cannot in any way be indicative of the Commission's 1979 and 1980 intent, which

is abundantly clear from the rule making record, in 1979 and 1980, cited above.

Moreover, those statements have never amounted to a holding that emergency planning is in fact a "second-tier" safety requirement, much less that emergency planning was considered "second-tier" ab initio.

The Board cites two further items to support its novel holding. (Slip Opinion, p. 19, continuation of footnote 46). The first is the use of the word "bolster," which the Appeal Board suggests implies some equivocation about the status of emergency planning. However, in fact the word "bolster" does not in any way suggest a reduced safety standard, despite the Commission's attempted semantic legerdemain, particular when it is proceeded by the statement that the other protections, siting and engineered design features, "must be bolstered" by adequate emergency planning. The description of the need to improve nuclear safety by using the mandatory "must be" is not consistent with the idea that the new emergency planning requirements were "second-tier."

The second item mentioned is the fact that when the emergency planning rule was promulgated a 120-day remedial clock was provided, "a feature it noted was is in sharp contrast to the immediate shutdown that would be warranted for the correction of major engineering deficiencies."

SAPL is very doubtful that the history of the nuclear regulation will afford many examples resulting in a requirement

for immediate shutdown of nuclear reactors, even for "major engineering deficiencies." In any event, the 120-day remedial clock does not indicate that emergency planning is different from the typical implementation of other new regulatory requirements. Indeed, as the Commission noted, when it adopted the emergency planning regulations in 1980, the "final rule makes clear that for emergency planning rules, <u>like all other rules</u>, reactor shutdown is outlined in the rules is but one of a number of possible enforcement actions and many factors should be considered in determining whether it is an appropriate action in a given case." (Emphasis added, 45 Fed. Reg. at 55406)

Accordingly, SAPL moves that the Appeal Board reconsider its holding that, as initially promulgated, and at present, emergency planning is as a matter of law a "second-tier" safety requirement, and recall and amend its holding in ALAB-922 on this issue.

Respectfully submitted,
By its Attorneys,

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DATED: October 20, 1989

I hereby certify that copies of the within Seacoast Anti-Pollution League's Motion for Partial Reconsideration of ALAB-922

have been forwarded by first-class mail, postage prepaid, to the parties on the attached service list.

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