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October 27, 1989

UNITED STATES NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

DOCKETED USNRC

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In the Matter of	)	
Public Service Company of New Hampshire, et al.	)	Docket Nos. 50-443 OL 50-444 OL
(Seabrook Station, Units 1 & 2)	)	OFFSITE EMERGENCY PLANNING

NEW ENGLAND COALITION ON NUCLEAR POLLUTION'S BRIEF ON CERTIFICATION OF ALAB-922 OR, IN THE ALTERNATIVE, INTERVENORS' PETITION FOR REVIEW OF ALAB-922

Introduction

On October 11, 1989, the Appeal Board issued an opinion containing the unprecedented assertion that the Nuclear Regulatory Commission's emergency planning rule is a "second tier" safety standard, whose terms are merely discretionary rather than required for protection of the public health and safety. The Appeal Board ignores the plain language of the 1980 emergency planning rule, the preamble to the rule and the proposed rule, and the lengthy discussions between the Commissioners who promulgated the rule. Instead, it patches together an assortment of minor details, out-of-context statements, and misinterpreted statutory and regulatory provisions in an effort to downgrade the emergency planning standard. As discussed below, these distortions of the purpose and content of the emergency planning rule cannot withstand any degree of scrutiny.[1]

[1] In ALAB-922, the first portion of the Appeal Board's decision, relating to the question of whether the emergency planning rule is a first or second-tier standard, was not certified to the

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I. The Emergency Planning Rule Is a First-Tier Safety Standard.

A. The plain language of the emergency planning rule

As the Court of Appeals held in Union of Concerned Scientists v. NRC, 824 F.2d 108, 114 (D.C. Cir. 1987) ("UCS I"), the "first-tier" level of safety measures is mandated by Section 182(a) of the Atomic Energy Act [42 U.S.C. § 2232(a)], which "commands the NRC to ensure that any use or production of nuclear materials 'provide[s] adequate protection to the health or safety of the public.'"[2] The discretion to impose additional "second-tier" measures, which go beyond "adequate protection," is permitted by § 161, which contains no reference to the "adequacy" of protective measures.[3]

There is no evidence that the Commission utilized a two-tier

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Commission; however, the Appeal Board later rejected motions for reconsideration on the ground that this issue should be raised before the Commission. Memorandum and Order, dated October 24, 1989, at 2. NECNP's brief is addressed solely to this question. NECNP also adopts and incorporates by reference the briefs filed by the Seacoast Anti-Pollution League and the Massachusetts Attorney General.

To protect Intervenors' interests in the event that the Commission decides that the first portion of ALAB-922 is not properly before it, this pleading is styled in the alternative as a petition for review of that portion of ALAB-922. The petition for review is joined by SAPL and the Massachusetts Attorney General.

[2] The Commission has consistently held that cost considerations are forbidden in interpreting the "adequate protection" standard embodied in the Act and Commission regulations. See Union of Concerned Scientists v. NRC, 824 F.2d at 117, citing Maine Yankee Atomic Power Co., 6 AEC 1003 (1973).

[3] Section 161(b), which governs promulgation of safety standards, allows the Commission to impose standards that "it may deem necessary to desirable to . . protect health or to minimize danger to life or property."

approach, or had even conceptualized it, when it promulgated the 1980 emergency planning rule.[4] In any event, one need look no farther than the text of the 1980 rule to see that the emergency planning rule is a primary safety requirement, because it is directly patterned on the language of § 182. Section 50.47(a), which sets the overarching standard for emergency planning, echoes the "adequate protection" language of § 182 by requiring a reasonable assurance of "adequate protective measures" in the event of a radiological emergency. If that were not enough, in promulgating the 1980 rule, the Commissioners themselves clearly expressed their intent to adopt the "adequate protection" standard in § 182 of the Act, and explicitly changed the standard in the proposed rule from "appropriate" to "adequate" protective measures. Tr. of July 23, 1980, Commission Meeting at 30-47.

The Appeal Board completely ignores the plain language of the rule -- in fact, it suggests that for the Commission to hold to its emerging position that the emergency planning rule is an "extra-adequate protection" standard, § 50.47(a) must, for all practical purposes, be ignored.[5] With this preposterous sugges-

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[4] See brief of Massachusetts Attorney General. The Commission did not articulate the two-tiered standard until 1985, in defense of the backfit rule's use of cost considerations.

[5] The Appeal Board posits that "given the 'extra-adequate protection' status of emergency planning requirements, the focus of any 'reasonable assurance' finding should be on the objective review of planning efforts and plan implementation for conformance with the requirements of section 50.47(b) and the guidance in NUREG-0654/FEMA-REP-1 (Rev 1), 'Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants,' rather than on more subjective judgments about whether a particular plant affords an 'adequate' level of protection or entails too great a

tion, which stands principles of regulatory interpretation on end, the Appeal Board all but concedes that its characterization of the emergency planning standard as "second-tier" is untenable.

B. Scope of Section 161

The Appeal Board finds "compelling" support for ascribing second-tier status to the emergency planning rule in the fact that the 1980 rule claimed authority from Section 161 of the Atomic Energy Act, but made no reference to Section 182. The Appeal Board apparently considers that Section 161 is concerned exclusively with the Commission's authority to promulgate standards that go beyond what is required for adequate protection.

Leaving aside the inappropriateness of attaching such import to this obscure citation, Section 161 cannot be read so narrowly. Section 161(b), on which the Commission explicitly relied in promulgating the 1980 rule, generally authorizes the Commission to promulgate standards governing "the possession and use" of special nuclear material. The Commission is empowered to enact a range of safety standards, from those measures that are considered "necessary" to "protect health or to minimize danger to life or property," to those measures that are considered merely "desirable" to achieve those ends. If a measure is "necessary" to "protect health" or to "minimize danger," it is logically a minimum requirement that must be met in order to achieve an adequate level of protection. On the other hand, "desirable"

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degree of risk." ALAB-922, slip op. at 23-24.

measures go beyond what is minimally required. Thus, both "tiers" of the Commission's regulatory scheme are encompassed by Section 161(b).[6] In relying on Section 161(b), the Commission was merely invoking its broad authority to establish standards for the operation of nuclear reactors.

C. Significance of the term "bolster"

The Appeal Board also relies heavily on post hoc statements by the Commission which question the degree of importance placed by the Commissioners on emergency planning in 1980. ALAB-922 at 18, note 46. In promulgating the 1987 regulatory amendments for utility-sponsored emergency plans, the Commission found that the use of the word "bolster" in the 1980 rule indicated that emergency planning was viewed as a secondary "backstop" rather than a measure equivalent to engineered safety features. Taken in the context in which it was first used, however, the word "bolster" is clearly intended to convey the concept that emergency planning would be accorded the same degree of importance as siting and

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6 Section 161(b) is not redundant to Section 182. Section 182 obliges the Commission to determine that utilization or production facilities will provide adequate protective measures to the public health and safety; Section 161(b) generally authorizes the Commission to establish standards that are either necessary to achieve that end, or desirable to provide additional levels of protection.

It should also be noted that while the U.S. Court of Appeals for the District of Columbia Circuit has found that Section 161 permits the Commission to impose safety measures over and above what is required for "adequate protection" under Section 182, it has not held, nor has it been asked to hold, that Section 161 is concerned exclusively with measures that go beyond what is required for adequate protection. See UCS I, 824 F.2d at 114, 118.

engineered safety features. As explained in the 1979 proposed rule,

> The proposed rule is predicated on the Commission's considered judgment in the aftermath of the accident at Three Mile Island that safe siting and design-engineered features alone do not optimize protection of the public health and safety. Before the accident it was thought that adequate siting in accordance with existing staff guidance coupled with the defense-in-depth approach to design would be the primary public protection. Emergency planning was conceived as secondary but additional measures to be exercised in the unlikely event that an accident would happen. The Commission's perspective was severely altered by the unexpected sequence of events that occurred at Three Mile island. The accident showed clearly that the protection provided by siting and engineered safety features must be bolstered by the ability to take protective measures during the course of an accident.
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> The Commission recognizes that this proposal, to view emergency planning as equivalent to, rather than as secondary to, siting and design in public protection, departs from its prior regulatory approach to emergency planning.

44 Fed. Reg. 75,169, Cols. 1-2 (December 19, 1979). Thus, when viewed in the full context of the rule, it is clear that the Commission's use of the word "bolster" was never intended to imply that emergency planning was less important than design and siting.[7]

D. Significance of 120-day remedial clock

In the 1987 emergency planning rule amendments for utility

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[7] In fact, there is nothing inconsistent about the use of the term "bolster" to describe the function of a necessary safety feature. The concept of "backup" or "backstop" measures with effectiveness and reliability that are equivalent to those of principal systems is a cardinal element of NRC's defense-in-depth strategy, as exemplified by the single failure criterion.

plans. The Commission also cited the 120-day remedial clock for operating plants as evidence that emergency planning is not on a par with other safety standards. The Commission reasoned that emergency planning could not be as vital as other safety standards if the 1980 Commissioners were willing to insulate licensees from shutdown for 120 days, even if a major deficieny in emergency planning were found.

As demonstrated in the discussion immediately preceding the vote on the 1980 rule, however, the Commissioners approved the 120-day clock with the explicit understanding that it did not prevent them from shutting down a reactor in the interim if a serious safety problem arose.[8] Tr. of July 23 Commission meeting at 68-81. Rather than signifying the secondary role of emergency planning, the four-month clock was intended to impress state and local governments, over whom it had no direct control, that the Commission's tolerance for delayed compliance with this important rule was limited.[9]

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8 The language was adopted with the understanding that the Commission had "preserved the full range of possible Commission actions during the four months ..." Statement of Commissioner Bradford, Tr. at 81.

9 As Commissioner Ahearne explained:

> Let me try to remind you of one of the reasons why there is a month [sic] period in there. These aren't reactors to be licensed. They are reactors that are licensed. This process concludes that the emergency plan at one stage either had been or in this review we have now filed is not adequate. We have now put them on notice. Now, if it is a very severe problem the potential is there that they are on notice that they could be shut down. Remember, we are in many cases trying to reach beyond the licensee and trying to reach to the state and local governments. That is the

Moreover, it is standard NRC practice to establish timetables for compliance with major safety requirements. During the same year that it promulgated the emergency planning rule, the NRC gave licensees two years to correct widespread noncompliance with its "fundamental" environmental qualification requirements. Petition for Emergency and Remedial Action, CLI-80-21, 11 NRC 707, (1980). When licensees failed to meet that deadline, it was extended again and a new timetable was codified in 10 C.F.R. § 50.49. Similarly, the NRC built lead times and provision for extensions into its emergency core cooling system regulations in 10 C.F.R. § 50.46. As with its other safety regulations, the NRC retained the authority to shut down any reactor whose noncompliance was deemed to pose a serious safety threat, despite the pendency of these grace periods.

II. The Mass AG's Testimony Was Admissible.

The focus of ALAB-922 is the admissibility of the Massachusetts Attorney General's testimony regarding the potential consequences of a radiological emergency at Seabrook. In rejecting this evidence, the Appeal Board never directly reaches the ques-

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> inherent problem in a lot of this.
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> The point was that in doing that reaching we wanted to show we are really serious. The seriousness is that they have got four months to correct that deficiency. It is a fixed period of time. It is not the Commission saying the deficiency must be corrected, which is sort of indefinite, it is that here is a fixed period of time to correct the deficiency. That was the sense of the reason there was a fixed period.

Tr. at 70.

tion of whether the evidence would have been admissible under a first-tier emergency planning standard. However, at note 47, the Appeal Board questions whether such testimony need be considered under such a standard, given the D.C.Circuit's decision in Union of Concerned Scientists v. NRC, 880 F.2d 552, 558 (D.C.Cir. 1989) ("UCS II"), that "the 'adequate protection' standard may be given content through case-by-case applications of [the Commission's] technical judgment rather than by a mechanical verbal formula or set of objective standards."

The Appeal Board misses the point. In UCS II, the petitioner unsuccessfully challenged the backfit rule's lack of general guidelines for distinguishing between the category of safety measures considered to be necessary under the adequate protection standard, and the category of safety measures deemed "extra-adequate." Here, Intervenors have never sought a generic standard for evaluating what constitute "adequate" protective measures. Instead, they sought to introduce evidence that would assist the Licensing Board in giving content to the concept of what constitutes adequate (or inadequate) protective measures at Seabrook.

In fact, the specific circumstances of Seabrook made this evidence particularly relevant, because "adequate protective measures" could not be found by mere reference to a "range of protective actions." Such a range is nonexistent. Sheltering on the beaches is so minimal and ineffective that it is not even

included in the New Hampshire plans, thus leaving the beach population with a single option of lengthy evacuation. Evidence regarding the effectiveness of this protective measure should have been admitted.

CONCLUSION

Ten years ago, the chaotic aftermath of the Three Mile Island accident jolted the Commission into recognition of the importance of emergency planning in saving lives during a nuclear disaster. As a result, the Commission elevated emergency planning to the status of a primary safety standard. The Appeal Board's effort to recast the history of the rule as a secondary or discretionary standard fails utterly. The Seabrook emergency plans must be judged against an objective standard of adequacy, informed by relevant evidence regarding the degree of protection afforded by the plans.

Respectfully submitted,

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October 27, 1989

CERTIFICATE OF SERVICE

I certify that on October 27, 1989, copies of the foregoing pleading were served by first-class mail or as otherwise indicated on the parties to the attached service list.

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