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October 27, 1989

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

BRIEF OF SEACOAST ANTI-POLLUTION LEAGUE
ON CERTAIN EMERGENCY PLANNING ISSUES

INTRODUCTION

In ALAB-922 (October 11, 1989) the Appeal Board did two things in regard to several pending appeals of an ASLB decision (LPB-88-32, 28 NRC 667) which approved the New Hampshire Radiological Emergency Response Plan (NHRERP) for Seabrook.

First, it held 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)

Second, it certified to the Commission the question of whether, for this newly designated "second-tier" safety requirement, the ASLB's refusal to consider certain testimony sponsored by the Massachusetts Attorney General on the dose consequences of an accident could be disallowed as not relevant, as the ASLB had done.

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As to the first issue, the second-tier holding, both SAPL and the Mass AG filed timely motions for reconsideration. By an order dated October 23, 1989, however, the Appeal Board summarily denied the motions, stating, "they are best addressed in the first instance to the Commission in the context of the intervenors' comments on the certified question." (Memorandum and Order of 10/23/89, Slip Opinion, p. 2)

Accordingly, SAPL will now address both the issue of the status of emergency planning requirements, and the issue of the correctness vel non of the ASLB refusal to consider the dose consequence testimony at Seabrook in the event of a major accident including an off-site release of radioactivity.

I. THE APPEAL BOARD ERRED IN HOLDING EMERGENCY PLANNING IS A "SECOND-TIER" SAFETY REQUIREMENT.

In holding that emergency planning is a "second-tier, AEA section 161 safety provision" rather than a "first-tier,section 182" requirement, the Appeal Board relied solely on the fact that in the string citations for authorization of the 1980 rule, the Commission, presumably through its former general counsel, Mr. Leonard Bickwit, cited AEA section 161 (b), (i) and (o) rather than AEA section 182, describing this as a "compelling indication" of Commission intent. (Slip Opinion, p. 18)

However, assuming that this authorization citation is indeed properly described as a "compelling indication" of Commission intent, a matter SAPL vigorously disputes, 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 Union of Concerned Scientists v. NRC, ("UCS (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 brief filed by the Commission in connection with that appeal either the Commission or its general counsel 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, was left up to the Commission's general counsel, and was not presented as a matter for policy decision on the part of the Commissioners.[1] 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

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1/ The brief of the Mass AG will demonstrate that in fact the regulatory record conclusively demonstrates the opposite is true: that the Commission in 1980 knowingly and deliberately intended to hold the emergency planning requirements were not intended to be in any way "secondary" because of the string citation.

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. (No one can reasonably read "second-tier" significance into the use of the words "adequate protective" (measures) in the regulation rather than the use of the words "adequate protection." Surely "adequate protective measures" in the regulation is equivalent to "adequate protection" witnin the meaning of the AEA.

(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 the further statement "that the protection provided by safety and engineering design features must be bolstered by emergency planning requirements. Id. at 55403. (Emphasis added.)
(As to the use of the word "bolstered," see the discussion of the 1987 rule change, infra. at pp. 8-9)

(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 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)). The "no endangerment" standard is certainly equivalent to the section 182 "adequate proection" standard.

(4) The statement accompanying the proposed rule change on December 16, 1979 that: "The Commission recognizes that this proposal, to view emergency planning <u>as equivalent to, rather than secondary to siting and design</u> in public protection, departs from its prior regulatory approach to emergency planning." (Emphasis added, 44 Fed. Reg. 75167 at 169.) This is a flat, explicit rejection of the notion that emergency planning requirements were "second-tier."

(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.

These items are conclusive of the "first-tier" status of emergency planning requirements in 1979, 1980 and 1982. 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 in 1979 for the Commissioners by former general counsel Leonard Bickwit, and which is included in the appendix to the Mass AG 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 his 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)."

II. THE COMMISSION'S 1987 STATEMENTS CANNOT, AND DO NOT, ESTABLISH THE EMERGENCY PLANNING REQUIREMENTS AS "SECOND-TIER."

The Appeal Board rested its "second-tier" holding solely on the statutory citation to section 161 of the AEA, a matter discussed above.

However, by means of a footnote 46, page 19 of the Slip Opinion, the Appeal Board attempted to support its holding by reference to the Commission's "Statement of Consideration" that accompanied the 1987 rule change to accomodate consideration of utility-sponsored emergency plans. Those statements, found at 44 FR 42078 at 42081-82 (November 3, 1987) are both irrelevant to the issue, and in any event do not indicate that emergency planning was held to be "second-tier." The reason the 1987 rule change

statements are irrelevant is Obvious. The Commission's statements in 1987 cannot change the Commission's unequivocal statements made in 1979 and 1980 about the status of emergency planning, in the regulations it was adopting at that time. No amount of historical revisionism can make a rule described in 1980 as "essential," and described, in 1979, "as equivalent to," rather than as secondary to siting and design in public protection to a requirement intended, at that time, to be "second-tier."

In its 1987 statements, the Commission never did state emergency planning was "second-tier," or in some way of lesser importance than other safety requirements dealing with siting and engineered safety features. However, in a discussion it conceded "does not have to be addressed in the context of the final rule announced in this notice," (Id. at 42081), it discussed two aspects of the emergency planning requirements it felt resulted in those requirements being "treated somewhat differently in terms of the corrective actions to be taken when deficiencies are identified, from the engineered safety features ('hardware') that would be relied on in an emergency." Id. at 42082. The first is the Commission's apparent belief that the use of the word "bolstered" in the 1979 and 1980 rule making "suggests the Commission of 1980 viewed emergency planning as a backstop for other means of public protection rather than as of equal importance to them." (The Commission went on to note that "the

issue cannot be resolved definitively by microscopic analysis of the particular words chosen in 1980.) Id.

However, in fact the word "bolster" does not in any way suggest a reduced safety standard, because it was preceded by the statement that the other nuclear protections, siting and engineered safety 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 plannings were "second-tier."

Moreover, in 1979, in proposing the emergency planning regulation, the Commission also utilized the same language, that other safety protections "must be bolstered by the ability to take protective measures during the course of an accident." This language was accompanied, indeed on the same page in describing the rationale for change, by the further Commission's statement,

> "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 FR 75167 at 169 (December 19, 1979).

In view of this, it is hardly a defensible proposition that the use of the word "bolstered" by the Commission in 1979 and 1980 was intended in any way to suggest that emergency planning would be anything other than primary or first-tier safety measure.

Second, the Commission in the 1987 rule change cited the fact that when the emergency planning rule was promulgated a 120-day

remedial clock was provided. (52 FR 42078 at 42082.) The history of nuclear regulation does not afford many examples resulting in a requirement for immediate shutdown of nuclear reactors, even for "major engineering deficiencies," on the basis of new regulatory requirements. Indeed, SAPL is aware of no new regulation ever being adopted that resulted in an order for immediate shutdown of reactors.

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 as 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 FR at 55406, August 19, 1980)

Accordingly, SAPL submits that for these reasons, and the reasons stated by the Mass AG and the New England Coalition on Nuclear Pollution, the Appeal Board's holding that emergency planning requirements are intended to be a "second-tier" safety measure is wholly without support, contrary to the regulatory record, and must be reversed by the Commission. As a final point, SAPL would point out that whatever may be the propriety of the Appeal Board's attempting to determine the present Commission's

attitude towards emergency planning, from statements made in the Statement of Considerations accompanying the 1987 rule change, there is absolutely no basis anywhere in the Appeal Board opinion or elsewhere which suggests that the Commissioners who proposed the emergency planning regulations in 1979, and finally adopted them in 1980, ever considered emergency planning as anything other than a first-tier, primary safety requirement.[2]

III. THE COMMISSION SHOULD REVERSE THE ASLB AND HOLD THAT THE MASS AG DOSE CONSEQUENCE TESTIMONY WAS ADMISSIBLE.

The emergency planning requirements adopted by the Commission in 1980 proceed on the assumption that a nuclear accident, beyond the so-called design basis accidents previously considered, is a credible event, and needs to be planned for. Indeed, as a matter of law, in assessing whether or not a proposed emergency plan, including the NHRERP, is "adequate" a reviewer must assume that a major accident, within the planning spectrum described in NUREG-0654 (Rev. 1) will indeed occur.

This, of course, must include a number of accidents that are fast breaking, that may result in releases within as little as one half hour after the initiating event, and a further result in plume travel to a five-mile radius within another one half hour.

The fact is, at Seabrook, there is no adequate sheltering available for the many thousands of beach goers who will be within

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2/ SAPL also notes its disagreement with the holding in ALAB-922 that a governmental emergency plan is "feasible" merely because it is a governmental plan. (ALAB-922, Slip Opinion, p. 20)

two or three miles of the reactor during many days of the summers, and particularly weekends, when weather is favorable. Furthermore, it is a fact that, as testified by the Applicants' own expert on computer modeling of evacuation, Mr. Edward Leiberman, it would take "six or more" hours merely to get the last of those beach goers from one side of Hampton Beach, to the other. (See attached excerpt of testimony of December 1, 1987, before the ASLB, attached hereto as Appendix A.) At this point, the evacuees would be in sight of, and essentially no further from the plant than when they started to leave, "six" or more hours earlier.

In these circumstances, to rule that the dose consequences of an accident at Seabrook are irrelevant to the determination of the adequacy of the emergency plan simply flies in the face of logic, sense, and any meaningful use of the words of the emergency planning requirement. Adequacy, if is to be anything other than a so-called "best efforts" approach to emergency planning, must deal in some fashion with the results of the emergency plan, and the results must in some way be related to the dose savings to be achieved at a particular site.

The only testimony ever offered on this issue was that proffered by the Massachusetts Attorney General, and rejected by the Licensing Board. The rejection of this testimony was pervasive error, and since this matter has now been moved up to

the highest level of this agency, that error must now be corrected by this Commission.

Respectfully submitted,
By its Attorneys,

BACKUS, MEYER & SOLOMON

By: 

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DATED: October 27, 1989

I hereby certify that copies of the within Seacoast Anti-Pollution League's Brief on Certain Emergency Planning Issues have been forwarded by first-class mail, postage prepaid, to the parties on the attached service list.

Robert A. Backus, Esquire

UNITED STATES NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)
) Docket Nos.
PUBLIC SERVICE COMPANY OF) 50-443-OL
NEW HAMPSHIRE, et al.,) 50-444-OL
) OFF-SITE EMERGENCY
(SEABROOK STATION, UNITS 1 AND 2)) PLANNING

EVIDENTIARY HEARING

Monday,
December 1, 1987

Hall of Representatives
New Hampshire Statehouse
Concord, NH

The above-entitled matter came on for hearing, pursuant to notice, at 9:15 a.m.

BEFORE: JUDGE IVAN W. SMITH, CHAIRMAN
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

JUDGE JERRY HARBOUR, MEMBER
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

JUDGE GUSTAVE A. LINENBERGER, JR., MEMBER
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

December 1, 1987

hearing and again today, you talked about the saturated condition of the roadways being the critical factor. Do I understand your testimony correctly that on the beaches, and I'm focusing particularly on Seabrook and Hampton Beaches, so long as the roadways -- the means of egress out of those beaches are saturated, that the trip generation times are actually irrelevant?

A (Lieberman) They are irrelevant so long as they don't extend beyond the evacuation times associated with the saturated traffic movement. In other words, if it takes six hours, to cite a figure, to evacuate say Hampton Beach, so long as a trip generation time does not approach that figure, anything less than that would have no effect on evacuation time.

Q Is that your figure, six hours?

A (Lieberman) No, I just picked it out. It's not far from the truth, but I used a round number.

Q I was going to suggest that it was five and a half hours; that that was my recollection of your testimony.

A (Lieberman) Yes, that's right. I used that as an example.

Q Okay, but I'm not asking you to accept my estimate. I'm asking you what your estimate is.

A (Lieberman) Five and a half hours my recollection says is about right. We also looked into the study conducted

by HMM wherein they took ATR counts throughout the summer, and compared the number of vehicles which exited the beach areas over a six-hour period under normal times when you have substantial inflowing volume and found that it was comparable to the number of vehicles that would exit over that period of time during evacuation.

So effectively what I'm saying is the available data demonstrates that the existing highway system can in fact service the number of estimated cars on the beach at a peak point within the time frame estimated by the I-DYNEV model.

(Continued on next page.)

Q So the number is five and a half hours in --

A (Lieberman) To my recollection, that sounds right.

Q And that assumes a vehicle population -- I think that the number was about 26,000?

A (Lieberman) Well, the five and a half hour figure, and it may be higher with the new Avis figures, may be closer to six hours.

We use the projected figure shown on Page 38 of the direct testimony of 29,300 roughly.

Q Okay, so the five and a half hour figure, which you have just given us, relates to a vehicle population of 29,300?

A (Lieberman) No.

Let me call your attention to Page 10-11, which is Table 10-9, shows the estimated time to evacuate the beach areas, and it shows five hours and 40 minutes for Hampton. And that is based on our previous estimate, of vehicles at the beach, which in turn, relied upon our projection of reasonable upperbound, or peak population on the beach, based on the August 11th, 1985 films.

We have since updated that information, using the Avis photos. We now have a higher count of vehicles on Hampton Beach, and I am sure that translates into a longer time to evacuate the beach area.

If you give me a few minutes, I can look that up if you like. But I would say that is probably in the neighborhood

of six or over six hours, at this point.

Q No, it is not necessary for my purposes that you give me an exact number. It is enough that you would agree the more vehicles there are, beyond the number you assumed, the longer the evacuation time.

A (Lieberman) The more vehicles there are on Hampton Beach, yes.

Q Now, I want to clarify what, where the vehicles are, at the end of that period of time.

In your direct testimony, in the previous weeks of the hearing, you talked about the time it takes for the vehicles to get off the beach and you identify being off the beach, with being, as I remember it, at the point where the marshes start.

Have I remembered your testimony correctly?

A (Lieberman) That is close enough.

Q Okay, you are looking at the photograph behind you, and I was going to suggest exactly that. In the upper right-hand corner of the photo on the right, let's use the water tower as a point of reference.

Do you see that?

A (Lieberman) Yes.

Q And is that the point that you were referring to, when you talked about being off the beach?

Or was it that U-shaped intersection, a little bit to

the west?

A (Lieberman) Well, to be precise, what we do is we gather data on a link and we ask, when does that link empty out?

And I would say the water tower is probably a good landmark for the point where, which we used as a reference to gather these figures.

Q So the five and a half hour figure refers to the point in time, when all of the vehicles on Hampton Beach have passed the water tower?

A (Lieberman) That is right.

It includes the assumption that every vehicle that is actually there, is, in fact, used to evacuate.

Q And let me go back, for a moment, to one of my earlier questions.

We were talking about the relationship between trip generation time and evacuation time, under saturated conditions.

I used some complicated structures in my sentences, and I wanted to make it simpler, so that it is easier to understand it when we go through the record later.

What you are saying, as I understand it, is if it takes five and a half hours to get off the beach, then it doesn't much matter, whether it takes people 10 minutes or three hours to get into their cars.