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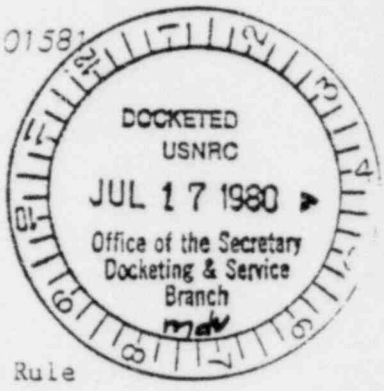

July 16, 1980

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Attention: Docketing and Service Branch

Subject: Comments on the "Immediate Effectiveness" Proposed Rule (45FR34279-5/22/80)

Dear Sir:

Yankee Atomic Electric Company appreciates the opportunity to comment on the subject proposed rule. Yankee Atomic owns and operates a nuclear power generating plant in Rowe, Massachusetts. The Nuclear Services Division also provides engineering services for other nuclear power plants in the northeast including Vermont Yankee, Maine Yankee and Seabrook 1 and 2.

Our detailed comments on the proposed rule are attached. We have concluded that the Seabrook case is no reason to change the long-standing system of "immediate effectiveness". Indeed, NRC has acknowledged that the EPA-NRC dichotomy which gave rise to the Seabrook problems has been obviated by a new memorandum of understanding. CLI-78-1, 7 NRC 1, 6 (1978). The old adage that "hard cases make bad law" is still accurate. More delay in the nuclear licensing process is intolerable. The anti-nuclear movement still views delay as its best weapon. The proper forum for the pro vs. anti-nuclear battle is not the Commission's hearing rooms; it is the Congress. Those which oppose nuclear power and our present economic system in general can be counted upon to utilize every delay device of which there seem to be an endless supply. There are plenty already available. It is inappropriate to repeal the one anti-delay device in the regulations. The "immediate effectiveness" rule should not be repealed; the suggestions set forth in Section V of our attached detailed comments should be adopted.

If you have any questions regarding our comments, please contact us.

Very truly yours,

YANKEE ATOMIC ELECTRIC COMPANY

D. E. Vandenburgh

D. E. Vandenburgh
Senior Vice President

L-4-1, Pt. 2

JHM/kaf

Attachment

Acknowledged by card 7/18/80 mdv

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

In the Matter of	)
Possible Amendments to "Immediate Effectiveness" Rule (10 CFR § 2.764)	)
10 CFR Part 2, 50	)

COMMENTS OF
YANKEE ATOMIC ELECTRIC COMPANY

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INTRODUCTION

For many years the regulations of the Atomic Energy Commission (AEC) and the Nuclear Regulatory Commission (NRC or Commission) have contained a so-called "immediate effectiveness" rule. The current version is codified as 10 CFR § 2.764.[1] The basic thrust of the rule now, and in all prior forms, was to make the licensing decision of an Atomic Safety and Licensing Board (ASLB) effective upon issuance absent some party seeking, and obtaining, a stay of the decision from some tribunal within the Commission's adjudicatory process. For many years, by virtue of adjudicatory decisions,[2]

1. In reality the rule is now suspended with respect to any licensing action involving the issuance of contested permits or licenses. 10 CFR 2, App. B.

2. E.g., Wisconsin Electric Power Co. (Point Beach Nuclear Plant Unit No. 2), ALAB-58, 4 AEC 951, 952 (1972); Northern Indiana Public Service Co.(Bailly Generating Station, Nuclear-1), ALAB-192, 7 AEC 420-21 (1974); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-199, 7 AEC 478, 480 (1974); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-221, 8 AEC 95, 96 (1974).

and now by virtue of a regulation, 10 CFR § 2.788, a party seeking a stay has had to prevail by virtue of a four-part analysis of the request under criteria first articulated over 20 years ago by the United States Court of Appeals for the District of Columbia Circuit in Virginia Petroleum Jobbers Assoc. v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). The test is comprised of four parts:

> "(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
>
> (2) Whether the party will be irreparably injured unless a stay is granted;
>
> (3) Whether the granting of a stay would harm other parties, and
>
> (4) Where the public interest lies." 10 CFR § 2.788(e).

"[N]o single one of the four Virginia Petroleum Jobbers' factors is of itself necessarily dispositive; rather, the strength or weakness of the showing by the movant on a particular factor influences principally how strong his showing on the other factors must be in order to justify the sought relief."[3].

On May 16, 1980, the Commission issued a notice of proposed rulemaking with respect to "Possible Amendments to 'Immediate Effectiveness' Rule". 45 Fed. Reg. 34279 (May 22, 1980). This issuance lists for consideration five options with respect to the rule for construction permit cases, ranging from simple repeal of the rule, to leaving it and the stay rule unchanged. Issuance of this notice was preceded by an ad hoc committee study and report which first articulated the five options. Report of the

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3. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, 4 NRC 10, 14-15 (1976). Accord, Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630, 632 (1977).

Advisory Committee on Construction During Adjudication, NUREG-0646 (Jan. 1980). This committee in turn was formed in response to a directive issued by the Commission in the course of an opinion in the Seabrook proceeding, Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 6-7 (1978).[4] The Commission's notice invited comments by the public.

These comments are submitted by Yankee Atomic Electric Company (Yankee). Yankee is the owner and operator of the Yankee-Rowe nuclear unit; it also has supplied utility engineering and support services for Connecticut Yankee Atomic Power Station, Vermont Yankee Nuclear Power Station, Maine Yankee Atomic Power Station and Seabrook Station, Units 1 & 2. It is the position of Yankee, for the reasons set out below, that the present rules should remain unchanged except to make provision for a period of time for a litigant who wishes to do so to file a stay motion.

In support of this position, Yankee has summarized the complexities of the Seabrook Case in order to emphasize the continuing need for and benefit from the "immediate effectiveness" rule.

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4. Since that time one Commissioner has put himself on record that: "To assure that the Commission does not in future countenance another applicant's building its way through NEPA, I think we are going to have to modify the interpretation and perhaps the wording of 10 CFR § 2.764 which makes the decisions of our licensing boards 'effective immediately'." Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-17, 8 NRC 179, 184 (1978) (Bradford, C. concurring).

I. THE SEABROOK CASE

A. Seabrook's Relevance to the Comments

Over three years ago, the Seabrook proceeding was described by the Commission thus:

> "This case has been widely depicted as a serious failure of governmental process to resolve central issues in a timely and coordinated way - a paradigm of fragmented and uncoordinated government decisionmaking on energy matters and of a system strangling itself and the economy in red tape." Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503, 517 (1977).

As of this writing, Seabrook has been the subject of nineteen (19) officially reported Commission decisions and orders, twenty-five (25) Appeal Board officially reported decisions and orders (plus being involved in four "Radon" reported matters), nine (9) officially reported ASLB decisions and orders and two (2) Director's Denials. At EPA it was the subject of four (4) decisions of the Regional Administrator and two (2) decisions of the Administrator. It has been the subject of five (5) reported decisions of the United States Court of Appeals. Seabrook has been many things to many people and, as noted above, it was the trigger which fired off the reexamination of the immediate effectiveness rule. Because of its obvious importance not only by virtue of its role as a trigger, but also its brooding presence like an ominous cloud over the heads of the Ad hoc committee, it is worthwhile to examine the Seabrook proceeding in some detail. A lot of myths have grown up about Seabrook: some of them, hopefully will be debunked herein.

B. A Chronology of Seabrook

NRC adjudicatory proceedings in Seabrook began with a prehearing conference before an ASLB of the AEC held on October 29, 1973. This was followed by some 19 months of discovery and other legal skirmishing.[5] During this skirmishing period the Regional Administrator of the United States environmental Protection Agency (EPA) issued and revised his "draft" determinations as to the condenser cooling system.

On May 27, 1975, the evidentiary hearing commenced before the (now) NRC ASLB. On June 24, 1975, after a public hearing, the EPA Regional Administrator issued final determinations[6] as to the Seabrook condenser cooling system approving everything involved except requiring a new intake location. These determinations were appealed in the EPA appeal process by, inter alia, Seacoast Anti-Pollution League (SAPL), a major intervenor before NRC. On September 30, 1975, draft determinations were issued by the EPA Regional Administrator as to the intake location. On September 30, 1975, the EPA Regional Administrator issued draft determinations with respect to the intake. Final determinations on the intake were subsequently issued by the EPA Regional Administrator on October 24, 1975, and appealed in that Agency by SAPL.

Meanwhile, SAPL had sought, and the ASLB denied, on October 3, 1975,

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5. See LBP-74-36, 7 AEC 877 (1974); LBP-75-9, 1 NRC 242 (1975); LBP-75-28, 1 NRC 513 (1975); ALAB-271, 1 NRC 478 (1975).

6. Often these determinations are referred to along with the October 24, 1975 determinations discussed infra, as "preliminary". They were not "preliminary". Nowhere was the term "preliminary" used until after the Regional Administrator reversed himself.

a stay of consideration of cooling system matters in NRC proceedings until EPA had finally decided the cooling system case before that agency. LBP-75-61, 2 NRC 693 (1975).[7] Thirteen days later the Appeal Board refused to grant discretionary review of that ASLB decision, noting that the decision to take evidence on cooling system matters was one of discretion vested in the ASLB. ALAB-293, 2 NRC 660 (1975).

At this time, any administrative appeal of a Regional Administrator's determination within EPA commenced with an adjudicatory hearing before a hearing officer who would then certify the record and briefs to the Regional Administrator who then decided whether or not to uphold himself. The procedural regulations which the Regional Administrator applied to Seabrook flatly stated that "the burden of proof and of going forward" in the adjudicatory hearing was on the "requestor", i.e., the appellant, i.e., SAPL, 40 CFR § 125.36(i)(1) as in effect in 1976-77.

On March 23, 1976, the EPA adjudicatory hearing commenced.[8] On April 2, 1976, the hearing ended and on May 21, 1976, the record and briefs were certified to the Regional Administrator for decision, in whose care it would languish for twelve days short of six months.

On June 29, 1976, the ASLB issued the Seabrook Initial Decision, LBP-76-26, 3 NRC 857 (1976), together with a decision denying a stay of

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7. The ASLB decision was 2-1 with the Chairman dissenting.

8. Meanwhile, back at the NRC hearings, the intervenors had been rebuffed in an attempt to have the "need for power" evidence put off, ALAB-295, 2 NRC 668 (1975) and to have a mistrial declared after over 50 days of hearing because the ASLB Chairman left the agency and was replaced, LBP-76-4, 3 NRC 123 (1976).

the Initial Decision until EPA had finally settled the cooling system issues before it, LBP-76-27, 3 NRC 950 (1976). The Initial Decision was not unanimous; a technical member dissented, saying an alternate site should be found. The majority granted the permits but said that, if closed-cycle cooling was required, the permits were not authorized. On July 2, 1976, SAPL filed a motion for a stay of effectiveness of the Initial Decision.[9] On July 7, 1976, the Construction Permit issued and construction commenced.[10]

On July 14, 1976, the Appeal Board denied the stay, ALAB-338, 4 NRC 10 (1976), noting that site disruption "is an ordinary consequence of any major construction project and, by itself can not be regarded as giving rise to irreparable harm in a legal sense," id. at 15.[11]

Almost three months later, on October 6, 1976, the Appeal Board issued a decision in which it held in abeyance reconsideration of the decision on the stay motion pending word from the U.S. Court of Appeals

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9. In a reply brief SAPL stated it filed its motion and initial brief before it read the Initial Decision. As seen later, much has been made of this. However, SAPL clearly had the Initial Decision before the reply brief was written. And nothing was done to shore up the motion prior to the Appeal Board's decision.

10. Counsel for the applicants told the Secretary of the Appeal Board that, unless informed of a stay, he would advise his clients to commence construction immediately and that construction would commence. The Secretary, after consulting with the Chairman of the Appeal Board, replied that the Appeal Board understood the import of what had been said.

11. This statement is noteworthy in light of the fact that one of the principal arguments for doing away with "immediate effectiveness" is because "it permits substantial environmental impact to precede review by the Commission". NUREG-0646 at p. 1-1, ¶ 1.1. However, as the Appeal Board correctly recognized there is no legally cognizable irreparable harm to an intervenor or anyone else if a utility cuts down trees or digs ditches on its own property.

to which the intervenors had by this time repaired. ALAB-350, 4 NRC 365 (1976). It is noteworthy, however, that one member of the Appeal Board did state:

> ". . . I have reservations about the continued validity of the result we reached in ALAB-338, which was in no small measure predicated upon hastily drawn papers which the movants filed before they had even seen the initial decision." Id. at 367 (Mr. Farrar concurring).

One month later, and almost four months after ALAB-338, on November 8, 1976, 12. the Appeal Board reconsidered ALAB-338, and adhered to it unanimously. ALAB-356, 4 NRC 525 (1976).[13] The big issue was possible increased turbidity in a river because of construction water runoff -- an issue in which SAPL had shown little interest during the hearing. See 4 NRC at 535.

The day after the Appeal Board decided to adhere to its decision in ALAB-338, the EPA Regional Administrator reversed himself on an adjudicatory record that contained not one matter of substance which he had not had before him when he made the original determinations. The major basis for this reversal was to shift the burden of proof and going forward back upon the applicant on the theory that the procedural regulation on burden of proof and going forward discussed above "relates only to the allocation of roles for the purpose of conducting adjudicatory hearings."

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12. In the interim the U.S. Court of Appeals for the District of Columbia Circuit had issued its decision overturning the uranium fuel cycle rule (Table S-3). As a result the Appeal Board suspended the Seabrook Construction Permit on September 30, 1976, effective October 8, 1976, ALAB-349, 4 NRC 235. The Commission stayed the Appeal Board order on October 5, 1976, CLI-76-15, 4 NRC 363 (1976) and subsequently vacated it, CLI-76-17, 4 NRC 451 (Nov. 5, 1976). Thus, no actual halt in construction took place as a result of ALAB-349.

13. One Appeal Board member reserved the right to file an "additional exposition" of his views. He never did.

EPA Region I Initial Decision in No. NH0020338 at 18 (November 9, 1976). The EPA Administrator subsequently held: "the [Regional Administrator's] . . . interpretation of these regulations to be without merit". EPA Dkt. No. 76-7, Decision of the Administrator at 17 (June 10, 1977).[14]

On November 17, 1976, the Commission declined to review the Appeal Board's decision to deny a stay, but did so without prejudice to the subsequent filing of a motion for a stay based upon the EPA Regional Administrator's action. CLI-76-24, 4 NRC 522 (1976). Almost two months later, on January 21, 1977, the Appeal Board voted 2-1 (Member Buck dissenting) to suspend the Seabrook Construction Permits in light of the EPA Regional Administrator's action. ALAB-366, 5 NRC 39 (1977). In addition, the matter was remanded to the ASLB with direction to reexamine the question of using Seabrook with cooling towers and then to recompare Seabrook in each mode with alternate sites.

After a brief stay of the Appeal Board suspension order, CLI-77-4, 5 NRC 31 (1977), the Commission affirmed the suspension order but allowed certain already commenced activities to be completed, CLI-77-5, 5 NRC 503 (1977); CLI-77-6, 5 NRC 507 (1977). On March 31, 1977, the Commission affirmed the remand portion of ALAB-366 and laid down the "obviously superior" and "sunk costs" rules for alternate site analysis. The Commission also directed that on remand the ASLB also take up the issue of southern New England alternate sites.

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14. The Administrator, having so held, then held the regulation to be "inconsistent" with the relevant statute. So he proceeded on the basis that the burden of proof was on the applicants.

On June 17, 1977, the EPA Administrator, acting as a result of an appeal taken by the applicants, reversed the EPA Regional Administrator, and reinstated the Regional Administrator's determinations.

15. The applicants immediately filed before the ASLB, the Appeal Board and NRC a motion to reinstate the permits. On June 28, 1977, the Commission elected the Appeal Board to deal with it in the first instance. CLI-77-9, 5 NRC 1357 (1977). The next day the Appeal Board denied the motion because the southern New England sites issue which the Commission had injected into the proceeding had yet to be resolved. On July 7, 1977, the ASLB issued a Supplemental Initial Decision disposing of the southern New England sites issue. LBP-77-43, 6 NRC 134 (1977).

On July 26, 1977, the Appeal Board issued two decisions. The first of these, while chastizing the ASLB as to various form and procedural matters, basically affirmed the Licensing Board down the line. ALAB-422, 6 NRC 33 (1977). The only change of substance made was to require the shortening of the Population Center Distance and concomittantly the LPZ radius. Neither change necessitated any alteration in the design of the plant. The second decision, ALAB-423, 6 NRC 115 (1977) reinstated the Construction Permits. Member Farrar dissented from both decisions. The suspension of construction had lasted 169 days.

On September 15, 1977, the Commission granted review of certain

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15. In the interim at NRC, the Appeal Board took up the so-called LPZ issue at Seabrook along with the same issue raised in a preliminary context in another case and held that the ability to give dynamic protection need not be proven beyond the LPZ. ALAB-390, 5 NRC 733, review denied, CLI-77-14, 5 NRC 1323 (1977).

aspects of ALAB-422, CLI-77-22, 6 NRC 451 (1977); on November 4, 1977, it denied a motion for a stay pending that review, CLI-77-27, 6 NRC 715 (1977); and on January 6, 1978, the Commission affirmed ALAB-422 with respect to the issues upon which it had taken review, CLI-78-1, 7 NRC 1 (1978). It was in this decision that the Commission announced its intention to review the "immediate effectiveness" rule.

Meanwhile, a little over a month earlier, on November 30, 1977, the ASLB had issued a second Supplemental Initial Decision holding the Seabrook site to be acceptable with cooling towers. LBP-77-65, 6 NRC 816 (1977).[16] Thus, as of January, 1978, Seabrook was rolling along with approvals from all necessary agencies of its preferred design plus NRC ASLB approval of an alternate condenser cooling system design. However, on February 15, 1978, the United States Court of Appeals for the First Circuit, on procedural grounds vacated the EPA Administrator's decision and remanded the matter to him for further proceedings. Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir. 1978). This did not require suspension of the permits again because there was still in place the ASLB approval of Seabrook with cooling towers. However, on April 28, 1978, the Appeal Board reversed (2-1) both of the Supplemental Initial Decisions which were on review but in a split vote, Member Farrar dissenting, left the permits

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16. In addition, the Appeal board had disposed of an issue it had raised sua sponte by approving the Seabrook steam generator tube design. ALAB-442, 6 NRC 728 (1977).

in effect.[17] ALAB-471, 7 NRC 477 (1978). On May 31, 1978, the Commission elected to review ALAB-471 and to consider the effect of the reversal of EPA on the continued validity of the permits. CLI-78-11, 7 NRC 735 (1978). A month later on June 30, 1978, the Commission delivered a split decision terminating the southern New England sites inquiry (Bradford, C. dissenting) and suspending the permits (Kennedy, C. dissenting) effective July 21, 1978. CLI-78-14, 7 NRC 952 (1978). The Commission also directed the Appeal Board itself to take evidence and resolve the closed-cycle cooling issue. On July 17, 1978, the Commission denied an applicants' motion (Kennedy, C. dissenting) to postpone the effectiveness of the permits' suspension because of the likelihood that an EPA decision in the proceeding on remand from the court was due imminently. CLI-78-15, 8 NRC 1 (1978).

On August 4, 1978, the EPA Administrator reaffirmed his prior decision approving the Seabrook condensor cooling system. On August 9, 1978, the Commission reinstated the Seabrook permits. The suspension had lasted 17 days. On August 22, 1978, the United States Court of Appeals affirmed in their entirety the decisions of the ASLB, the Appeal Board and NRC which originally authorized the issuance of the Seabrook Construction Permits. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978). On May 30, 1979, the First Circuit delivered a slashing opinion affirming the Commission's handling of the alternate site issue

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17. Member Buck, having dissented from the ASLB reversals voted to leave the permits in effect; Chairman Rosenthal decided to leave the permit issue to the Commission.

and essentially accusing the intervenors of playing games with the issue and acting in bad faith towards the administrative and judicial processes.[18] Seacoast Anti-Pollution League v. NRC, 598 F.2d 1221 (1st Cir. 1979).

Previously, on May 2, 1979, the U.S. Court of Appeals had closed out the EPA proceeding by affirming on the merits the Administrator's decision which had reversed the Regional Administrator and reinstated the favorable Seabrook determinations. Seacoast Anti-Pollution League v. Costle, 597 F.2d 306 (1st Cir. 1979).

Thus ended the major part of the Seabrook saga.[19]

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18. During this same time period the Appeal Board continued its consideration of alternate sites assuming cooling towers were used at Seabrook. See ALAB-488, 8 NRC 187 (1978); ALAB-495, 8 NRC 304 (1978); ALAB-499, 8 NRC 319 (1978); ALAB-520, 9 NRC 48 (1979). Because of the eventual resolution of the EPA proceeding in the courts, this proceeding was suspended, ALAB-548, 9 NRC 640 (1979) and finally dismissed as moot, ALAB-557, 10 NRC 153 (1979). Also during this period Seabrook was before the Appeal Panel along with numerous other plants on the so-called "Radon" issue. See ALAB-480, 7 NRC 796 (1978); ALAB-509, 8 NRC 679 (1978); ALAB-512, 8 NRC 690 (1978); ALAB-540, 9 NRC 428 (1979). Also the Appeal Board had occasion to deny, on jurisdictional grounds, a motion to reopen the proceeding based on alleged lack of financial qualifications. ALAB-513, 8 NRC 684 (1978).

19. When ALAB-422 was issued, on July 26, 1977, Member Farrar reserved the right to write a longer dissenting opinion of the seismic issue. The Commission held the decision to review that issue in abeyance pending receipt of Member Farrar's additional opinion. Mr. Farrar's opinion, together with the majority rejoinder thereto did not issue until two years later. ALAB-561, 10 NRC 410 (1979). A Commission decision as to whether to review the seismic issue has yet to be made. Finally, two major Director's Denials have issued with respect to Seabrook. DD-79-20, 10 NRC 703 (1979) (financial qualifications); DD-80-6, 11 NRC 371 (1980) (evacuation plans and consideration of Class 9 accidents).

C. The Reality of Seabrook

Introduction

To determine whether or not the Seabrook experience should be the basis of changing a long-time licensing practice and regulation of the Commission, it is necessary first to separate fact from fiction about Seabrook. There are a lot of myths about the Seabrook case which make exciting rhetoric and even better newspaper stories, but which cold-blooded analyses reveal to be myths -- exciting stories with little or no basis in reality. It is also necessary to keep in mind some important facts about Seabrook which are often overlooked in discussions of Seabrook. One Commissioner is described in NUREG-0646 as being of the view that without the momentum of construction ". . . a decision against the plant would have been clear." NUREG-0646 at G-5. This is in all too prevalent view of Seabrook, the idea being that but for bureaucratic bungling or prejudice, the plant would never have been approved. Per contra, we suggest that except for bureaucratic bungling Seabrook #1 could now be close to, if not, on-line, and properly so as seen below. It should be remembered by those who claim construction momentum allowed Seabrook to be built, that before a shovel full of earth was moved pursuant to an NRC construction permit, the New Hampshire Site Evaluation Committee, Public Utilities Commission and a host of other state agencies with more specialized authority had approved the plant; the EPA Regional Administrator, after two public hearings, had determined that the condenser cooling system was acceptable; the Staff of NRC, the ACRS, and the ASLB had approved the project. In short, not every rational man or woman who looked at Seabrook believed that turning the town dump (an open smoke-belching dump) into a nuclear power plant site

was irrational. In any event, we proceed to a discussion of certain facts and myths.

1. After all of the Reviews, Nothing of Substance in the Initial Decision was Changed

Finding No. 1 in NUREG-0646 states, in part that:

> "No construction permit has ever been refused on appeal from a Licensing Board decision. Thus, there is no instance in which an appellate reversal has shown that environmental impacts were wrongly permitted under the immediate effectiveness rule." NUREG-0646 at 1-1.

So it was at Seabrook. The only substantive finding or ruling of the Licensing Board which was ever reversed was the finding as to the Population Center Distance (PCD). And reversal of that finding, and the then necessary modification of the PCD and LPZ, required no change in the design of the plant. It became fashionable after Seabrook to criticize, sometimes in intemperate language, the job the ASLB (and particularly, its second chairman) did. However, when all is said and done, the substance of the decision stood up well.

Given this fact of Seabrook and the overall Finding No. 1 in NUREG-0646, one has the basis for disregarding one of the "General Recommendations and Conclusions" of the ad hoc committee. This is that part of Conclusion No. 4 which states that the "immediate effectiveness" rule creates the risk "of wasted resources if Initial Decisions are later reversed". NUREG-0646 at 1-1. The short answer is that such decisions never have been reversed on a basis which required stopping a project, and it is unlikely one ever will be. This is not surprising because, before any Appeal Board looks at the plant it will have passed muster with the numerous and multi-

disciplined members of the Staff and the ACRS (not to mention state agencies). No wonder one has never been found wholly unacceptable. The threat of wasted resources from reversal is no basis for changing the "immediate effectiveness" rule.

2. The First Motion Myth

It has also become fashionable to say that Seabrook went forward simply because SAPL's original motion for a stay was not very good and this in turn was the result of SAPL not having seen the Initial Decision when it wrote the motion.[20] First of all, SAPL had read the decision by the time it filed its reply brief. Second, SAPL had four months to beef up the motion before ALAB-356 was decided, adhering to ALAB-338. The Appeal Board has never been one to prevent parties, especially intervenors, from amending motions. Certainly SAPL had good counsel as did the other intervenors. Why was the job not done? The answer: it could not be. As the First Circuit recognized in SAPL v. NRC, supra, the "big issue" of alternate sites was always nothing but a tactical maneuver. No one really thought any of the alternates were better in fact.

In short, some pretty good antinuclear lawyers took their "best shot" in these stay motions and they decided that archaeology and construction runoff was the best way to go. No one was misled or lacking information. It was litigation tactics that dictated throwing the dice the way they were thrown. Perhaps this resulted in a decision that was

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20. Mr. Farrar made something of this in his concurrence in ALAB-356. He also noted it to the ad hoc committee's investigator. See NUREG-0646 at H-11.

wrong (although we think not), but this is one of the vicissitudes of the adversary adjudicatory system. Yankee would certainly like to see this system done away with, but so long as the Commission continues to adhere, and indeed, advocate, a licensing system that emphasizes lawyers' tactics more than technical judgment, this will ever be the case.

3. The Pressure Myth

NUREG-0646 finds and concludes that ongoing construction puts pressure on some reviewers of Initial Decisions simply to let construction continue. NUREG-0646, Conclusion No. 5 at p. 1-1; Finding No. 13 at p. 1-4. The Seabrook case, during its pendency, was reviewed by three Commissioners who talked to NUREG-0646 interviewers and three Appeal Panel members all of whom talked to the NUREG-0646 interviewers. Three of these reviewers claimed that ongoing construction put pressure on them; viz. Commissioners Bradford, NUREG-0646 at 3-56, G-5, and Gilinsky, id. at 3-55, G-7, and Appeal Board Member Farrar, id. at 3-58, H-12. Two reviewers said that ongoing construction created no pressure viz. Commissioner Kennedy, id. at 3-56, G-10 and Appeal Board Chairman Rosenthal, id. at 3-57, H-1. Appeal Board Member Buck, id. at 3-58, H-8--10 apparently ventured no view on this subject. What is interesting is that the reviewers who felt pressure voted for suspensions or continued suspensions collectively eleven times:

Commissioner Bradford	3
Commissioner Gilinsky	3
Appeal Bd. Mem. Farrar	5

Commissioner Kennedy voted for a continued suspension once as did Appeal Board Member Buck. Appeal Board Chairman Rosenthal voted in favor of

suspension or continued suspension three times.[21] In short, the "pressured" members of the reviewing tribunals voted for suspension twice as much as the unpressured members. So much for the creation of pressure myth.

4. The Stop-Start Myth

The ad hoc committee study finds and concludes that a bad feature of the present system is that it creates the risks of "stops and starts" with concomitant economic and social effects. NUREG-0646, Conclusion No. 4 at p. 1-1; Finding No. 5 at p. 1-3. Balanced against this is the finding and conclusion that the present system in fact (whatever "risks" it creates) saves time and money. Id., Conclusion 1 at p. 1-1, Finding 3 at p. 1-2. In addition, the study acknowledges, as it must, that the present system has been utilized by the Appeal Boards to avoid any real problems. Id. Conclusion 2 at p. 1-1.

At Seabrook the two suspensions that actually went into effect totaled 186 days or about 6 months. At $15,000,000 a month that is a total of $90,000,000. Had the applicants awaited Appeal board affirmance of the Licensing Board on major issues (ALAB-422), the delay would have been 13 months or about $195,000,000; awaiting Commission affirmance of ALAB-422 would have meant another five months or a total of $270,000,000. If the Seabrook applicants awaited resolution of the seismic issue, the bulldozers

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21. The Commission decisions where suspension or continued suspension was at issue and received at least one favorable vote were CLI-77-5, 5 NRC 503; CLI-78-14, 7 NRC 952; and CLI-78-15, 8 NRC 1. Appeal Board decisions where at least one favorable vote for suspension or continued suspension was cast were ALAB-349, 4 NRC 235; ALAB-366, 5 NRC 39; ALAB-416, 5 NRC 1438; ALAB-423, 6 NRC 115; and ALAB-471, 7 NRC 477.

would still be rusting at the site.

Utilities can assess "stop and start risk" and this risk is no reason to change the present system.

5. The "Cause of Seabrook" Myth

By merely proposing a change in the Commission's "immediate effectiveness" rule because of Seabrook, the Commission is giving solace to those who claim it was NRC's procedures, rules, biases or other attributes that created the Seabrook mess. Wrong. The fact is that the Seabrook problems were created by the inconsistent actions of EPA Region I. As noted earlier, one will look in vain to find any substantive difference between the evidence presented to Regional EPA when it made its determinations and when it reversed itself. Indeed, virtually the same witnesses showed up and the same studies were received at the non-adjudicatory public hearings as were received at the adjudicatory hearings after which Regional EPA reversed itself. This means either that the record was never read the first time around or Regional EPA simply "changed its mind" the second time around. The critical burden of proof ruling was summarily, and properly, rejected by the agency head.

II. OTHER MYTHS RELIED UPON THE STUDY

A. The Public Perception Myth

NUREG-0646 finds and concludes that the present system undermines public confidence because the public perception is that once construction starts, it will not be stopped. NUREG-0646, Conclusion No. 3 at p.1-1; Finding No. 2 at 1-2. We urge the Commission to review the portions of

the study cited on Page 1-2 of the study as the basis for these findings and conclusions. One will find that the only basis for them is the subjective views of staff members and some Licensing Panel members. That's a pretty slender hook on which to hang a psychological analysis and conclusion with respect to the American public.

It can just as easily be said that the public perceives administrative agencies as having adopted and altered the slogan of one of the reactor manufacturers to read "delay is our most important product". The Commission continues to equate the public with those relatively few citizens who intervene or support intervention in licensing proceedings and even occasionally show up at a hearing. There is a large body of public which either approves the NRC's activities or does not even think about it. In any event, the primary concern for government officials including the NRC, who presumably are in office, inter alia, to lead this nation, should be whether something is right not how it is perceived. If it is right it can be explained, perhaps not to the satisfaction of everyone with an axe to grind but at least to sufficient numbers so that political acceptance is forthcoming.

B. The Utilities Can Plan for Delay Myth

Perhaps the most amusing finding in NUREG-0646 is No. 4 which states, inter alia, "Applicants will respond to a postponement of effectiveness by applying earlier by a period of time equal to the postponement". Construction time is already outside the planning window of most utilities. Aside from that the following questions arise: What is the time equal to the postponement; who will say how long a given stay will remain in effect?

More to the point, how does management decide say one year before it files an application that if there is a stay of effectiveness in its particular case, it will be for "X days". The proposition is absurd; it provides no basis for changing the rule.

C. The Substantial Harm Before Review Myth

Conclusion No. 7 (in part) and Finding No. 6 of NUREG-0646 are to the effect that one of the bad features of the present system is that "substantial environmental impacts will occur before the administrative process is complete". NUREG-0646 at 1-3. At Bailly it was demonstrated that where a unique environmental setting may be irrevocably harmed, the present system gives the agency and its tribunals all the ammunition needed to protect the situation. It is true that in any case, such as Seabrook, trees will be cut down and excavation will be made prior to completion of the administrative process. Is this "tree cutting and dirt digging" substantial environmental harm? The Appeal Board correctly perceived it as not being legally cognizable irreparable harm by someone who does not own the site. See note 11, supra and accompanying text. Aside from that, it is just plain not substantial. The Seabrook Project Manager put it best:

> "It is true only God can make a tree, but He keeps doing it. With a little help, Nature will recover an area in a short time." NUREG-0646 at D-7.

The environmental impact of early construction simply is not that great when viewed in proper perspective and is no different than the effects any big construction project has. See NUREG-0646 at H-19 (Interview of Appeal Panel Member Salzman). This line of reasoning provides little basis for a change in the rule.

III. OTHER IRRELEVANCIES

A. The "Immediate Effectiveness" Rule is Promotional and Unique

The ad hoc committee finds that the "immediate effectiveness" rule is unique to the NRC among federal agencies; it also found that the rule's history shows it to have been a "promotional" type of regulation to make nuclear plants competitive, a goal which is no longer an objective of the Commission. NUREG-0646, Findings Nos. 14 and 15 at p. 1-5.

We fail to see why being unique necessarily means something is bad. NRC and its predecessor AEC are also unique in that the industry they regulate has never once caused injury or death to any member of the public the agency is charged with protecting.

It is difficult to see why, because NRC has a rule or practice different from say the FAA, which brought us the DC-10, or the FDA, which gave us thalidomide, or the FCC which brings us the "vast wasteland", it should jump to change it for that reason. Is sameness to be a goal of the government in and of itself?

As to the rule's history: accepting the fact that the rule was Congressionally imposed to make nuclear energy more competitive and thus is promotional in nature, this does not mean repeal is in order. First, it might be useful to see if Congress wants it repealed if, as the study claims, Congress created it. Second, nuclear power is the only electric energy source which must carry the diseconomy of NRC regulation; that being the case, what is wrong with minimizing its effect. It is true that NRC

was not created to promote nuclear energy. But it was not created to kill the technology either. It was created to regulate it, and the "immediate effectiveness" rule, given the delays already in the system, is a good regulation.

The rule's history and uniqueness is irrelevant to the issue at hand.

B. The Effects of Sunk Costs

The ad hoc committee finds and concludes that a bad effect of the present system is to make alternate site cases different on appeal than at trial because of "sunk costs". NUREG-0646, Conclusion No. 7 at p. 1-1; Finding No. 13 at p. 1-4.

It must be remembered that "costs" are a two-way street. It may be true that increasing sunk costs at the primary site prejudices an alternate site somewhat on appeal. But cost of delay can prejudice both the primary site and the technology in the alternate energy sources analysis.

C. The Failure of Intervenors to Meet the Virginia Petroleum Jobbers Criteria

Part of Finding No. 9 of the ad hoc committee is as follows:

> "The stay criteria of Virginia Petroleum Jobbers have never been met in NRC proceedings." NUREG-0646 at p. 1-3.

The study reveals that the difficulty of meeting the criteria was emphasized by at least one Commissioner, id. at G-5, and the ELD, id. at I-16.

To begin with the rest of Finding No. 9 is also noteworthy: "However, no proponent of a stay has ever prevailed ultimately on the

merits." More importantly, the fact that no intervenor has yet "won" a stay motion is no reason to change the rules. Any change of the rule on such a basis would be the equivalent of major league baseball reducing the strike zone or the NFL forbidding "bump and run" to get more spectator-pleasing offense in the game. NRC presumably exists for some purpose other than increasing spectator interest in its contests. While the fact that intervenors have never won under it is not a reason to keep the rule; similarly, it is no reason for changing it either.

IV. THE OPTIONS PRESENTED, AND AN ANALYSIS OF THE AMOUNT OF DELAY EACH WOULD CAUSE, IF ANY

A. Effectiveness as an Additional Issue in Licensing

The minimum delay here in a contested case is 60 days, plus a "suitable period" for Commission review. In addition, innumerable days will be consumed at the hearing while an anti-nuclear intervenor quizzes the construction schedule ad infinitum.

B. A Final Decision on LWA Issues Prior to Construction

The minimum delay here is impossible to determine as no fixed deadlines are set. If Seabrook had had to wait for a final (i.e., Commission) decision on seismology, there would still be nothing at the site.

C. Repeal the Immediate Effectiveness Rule

Again, no fixed deadlines are involved. In a hotly contested case it would not be unreasonable to predict a 6-12 month delay to have a Commission sigh off on the case.

D. Retain the Present System but With Significantly Loosened Standards for Obtaining a Stay

If the standard articulated in the Notice of Proposed Rulemaking is used, there will be a stay in every case. A "non-frivolous" argument is perhaps easier to conjure up than a frivolous one. In any event, the minimum delay will be 30 days.

E. Retain the Present System Unchanged

Yankee advocates this option but would modify it as seen below.

V. THE PRESENT SYSTEM WITH TIME TO FILE A STAY MOTION AND INCREASED INTERLOCUTORY REVIEW IS THE BEST CHOICE

The one perhaps legitimate criticism of the "immediate effectiveness" rule is that it does not give an opponent adequate time to prepare and file a motion and brief before the permit issues. Indeed, the Staff is required to issue the permit within 10 days after the ASLB decision authorizing issuance issues. 10 CFR § 2.764(b). The simplest way to avoid this problem is to amend 10 CFR § 2.764(b) to say the permit shall not issue until "X" days after the initial decision is served (i.e., mailed out). The "X" can be anything from 10-20 days.

In addition, the regulations should be changed to encourage interlocutory review by the Appeal Board and the Commission. It is extremely costly to try out almost any issue in a nuclear case and if summary

disposition is wrongfully denied on an issue, that error should be corrected at once.[22]

There is no unfairness in the real world by virtue of the immediate effectiveness rule. The opponent has had a chance to make his case with the Staff (perhaps the ACRS), usually the state and the ASLB before the Initial Decision issues. To place a heavy burden on him if he wishes to hold things up for a longer time is perfectly legitimate. Especially is this so when one considers that no stay proponent has ever ultimately prevailed on the merits. Finally, to remove the immediate effectiveness rule is to diminish the status of the ASLB.

VI. A MISCELLANEOUS POINT

The notice of proposed rulemaking states that the proposal deals only with construction permit cases. But in the various drafts no attempt has been made to provide separately for operating license cases. This should be done.

CONCLUSION

The Seabrook case is no reason to change the long-standing system of "immediate effectiveness". Indeed, NRC has acknowledged that the EPA-NRC dichotomy which gave rise to the Seabrook problems has been obviated by a new memorandum of understanding. CLI-78-1, 7 NRC 1, 6 (1978). The

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22. At Seabrook a number of days were devoted to evacuation beyond the LPZ because the ASLB wrongfully denied summary judgment on that issue. The Appeal Board denied Directed Certification. The ASLB reversed itself on the issue in the Initial Decision; this view then prevailed on review.

old adage that "hard cases make bad law" is still accurate. More delay in the nuclear licensing process is intolerable. The anti-nuclear movement still views delay as its best weapon. The proper forum for the pro vs. antinuclear battle is not the Commission's hearing rooms; it is the Congress. Those which oppose nuclear power in general can be counted upon to utilize every delay device available. There are plenty already available. It seems inappropriate to repeal the one anti-delay device in the regulations. The "immediate effectiveness" rule should not be repealed; the suggestions of Yankee set forth in § V above should be adopted.