UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

RESPONSE OF THE NRC STAFF TO THE EXCEPTION FILED BY INTERVENOR, CHICAGO SECTION, AMERICAN NUCLEAR SOCIETY, TO THE LICENSING BOARD'S MAY 3, 1979, AND MAY 7, 1980 ORDERS

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July 30, 1980

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I.

STATEMENT OF THE CASE

In 1967, Nuclear Engineering Company (hereinafter "NECO"), through its corporate predecessor, California Nuclear, Inc., was licensed by the Nuclear Regualtory Commission ("NRC") and its predecessor, the Atomic Energy Commission to bury low-level radioactive waste on 20.45 acres of land in Sheffield, Illinois.[1/] The land is now owned by the State of Illinois but has been leased for ninety-nine (99) years to NECO from the state. In August 1968, NECO filed a timely application seeking renewal of its license and the expansion of its burial site to the adjacent one-hundred sixty-eight (168) acres. Pursuant to the Administrative Procedure Act, 5 U.S.C. §558, and applicable Commission regulations (10 C.F.R. §§2.109 and 30.7(b)), the 1967 license has been continued in effect.

On December 27, 1978, NECO by letter to the Director, Nuclear Material, Safety and Safeguards[2/] requested suspension of further proceedings on its application for

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1/ In 1968, NECO acquired control of California Nuclear, Inc. In March of 1968, the Atomic Energy Commission approved transfer of California Nuclear's license concerning the Sheffield Low-Level Radioactive Waste Disposal Site to NECO.

2/ Letter from James N. Neel to William J. Dircks (December 27, 1978).

license renewal and expansion "until such time as the NRC has established definite criteria to govern Staff review of low-level waste disposal sites."[3] On that date, NECO also moved the Licensing Board to suspend further proceedings concerning its application.[4] On March 8, 1979, NECO filed a one-page "Notice to Atomic Safety and Licensing Board of Withdrawal of Application and Termination of License for Activities at Sheffield."[5] On that date, NECO also notified the Director, NMSS that as of that date it was (1) withdrawing its pending application to renew its license and expand the Sheffield site, and (2) was unilaterally terminating its license for all activities at the Sheffield site.[6] With regard to the second action on that date, the Director, NMSS ordered NECO to show cause why it should not resume its responsibility under its license for the Sheffield site, and ordered NECO to immediately resume its responsibilities. On March 23, 1979, NECO requested a hearing on the foregoing show cause order[7] and on June 6, 1979, the Commission found that the Director of NMSS had acted within his authority in issuing the show cause order and directed the Licensing Board, which had been convened to hear NECO's site renewal and expansion application, to consider the show cause order and request for hearing.[8]

3/ Id., p. 1.

4/ "Motion To Suspend Further Proceeding" (December 27, 1978).

5/ "Notice To Atomic Safety And Licensing Board Of Withdrawal Of Application And Termination Of License For Activities At Sheffield" (March 8, 1979).

6/ Letter from Troy B. Conner to William J. Dircks, (March 8, 1979).

7/ "Answer Of Nuclear Engineering Company, Inc. To Order To Show Cause And Demand For Hearing (March 23, 1979).

8/ Nuclear Engineering Company, Inc. (Sheffield Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673 (1979), and Id. "Notice of Hearing," p. 2 (June 6, 1979).

Chicago Section, American Nuclear Society ("CS/ANS") has attempted to invoke the review functions of this Appeal Board only with respect to the subject matter of NECO's request to withdraw its application for license renewal and site expansion. As aforementioned, on March 8, 1979, NECO filed with the presiding Licensing Board notice of its withdrawal of its license renewal and site expansion license together with a proposed order dismissing the proceeding.[9] In its Order of March 13, 1979, the Licensing Board treated the NECO filing "as a motion pursuant to §2.730 of the Commission's Rules of Practice."[10] On January 16, 1979, the Staff in filing its opposition to NECO's request to unilaterally terminate its responsibilities at the existing 20.45 acre site, also moved the Licensing Board, pursuant to 10 C.F.R. §§2.108(c) and 2.102, to deny NECO's application to expand the site, based, in part, on the failure of NECO to supply the Staff with requested geological, hydrological, and geotechnical engineering information which the Staff required to evaluate NECO's application to expand the site.[11] All of the Intervenors to this proceeding, with the exception of the CS/ANS, also moved or requested that NECO's application to expand the site be dismissed or denied.[12]

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[9] "Notice To Atomic Safety and Licensing Board Of Withdrawal Of Application And Termination Of License For Activities At Sheffield" (March 8, 1979).

[10] "Order Setting Oral Argument" (March 13, 1979).

[11] "NRC Staff Opposition To Motion To Suspend Further Proceedings And Cross-Motion To Deny Part Of Application," pp. 1, 3 (January 16, 1979).

[12] See "Memorandum Of Illinois In Opposition To Applicant's Motion To Suspend Further Proceedings And Cross Motion To Dismiss Or Deny" (January 5, 1979); "Response To Applicant's Motion To Suspend And Response To State Of Illinois Cross Motion To Dismiss Or Deny" (by County of Bureau) (January 12, 1979); "Memorandum Of Intervenors Schedules, et. al. . . . And Cross Motion To Dismiss Or Deny" (January 16, 1979).

The CS/ANS opposed the aforementioned motions on the ground that such motions were not sanctioned by the Commission's regulations and that, in response to the Staff's motion, on the additional ground that NECO had not unreasonably refused to supply information. Moreover, CS/ANS contended:

> Since this intervenor is of the view that any interruption of operations at Sheffield, including interruption of normal and reasonable expansions in accordance with the standards prevailing in 1969, is a major federal action that should not be undertaken without appropriate consideration of the human and environmental consequences of such action, it is opposed to any request for additional data as a precondition to granting the application ("Response In Opposition To Cross-Motions To Dismiss Or Deny," p. 2 (February 2, 1979).

On May 3, 1979, the Licensing Board granted the motions to dismiss or withdraw the application with respect to the site expansion issue as follows:

> The Licensee has moved to withdraw its application to expand the site by the addition of another 168 acres. The Staff and the intervenors, except Chicago Section of the American Nuclear Society, has also moved to dismiss this part of the application seeking to expand the site. Consequently, this Board hereby grants the motions to withdraw and dismiss this portion of the application pertaining to expansion of the site ("Memorandum And Order Ruling On Motions To Withdraw Application And Dismiss Proceeding") p. 4 (May 3, 1979).

The matter of the withdrawal and dismissal of the application to expand the site lay dormant, and presumably settled, for the ensuing eight months. Then, on January 24, 1980, as an alternate course to CS/ANS' pending motions before the Licensing Board requesting reconsideration of a Board ruling which declined to order the Staff to file an Environmental Impact Statement on the "suspension

of operations at Sheffield,"[13] CS/ANS moved the Licensing Board in a one-page pleading:

> to declare as final that portion of this Board's May 3, 1979 Order terminating application for site expansion at . . . Sheffield . . . if said Order did, as a practical matter, finally dispose of that portion of the case.[14]

No supporting reason for this request was proffered; it was opposed by the Staff.[15] On May 7, 1980, the Licensing Board ruled as follows on this request:

> The May 3, 1979 ruling granting Applicant's motion to withdraw its application to expand the Sheffield site was indeed final as of that date as far as this Board was concerned, since it disposed of a major segment of the case. However, it is for the Appeal Board or the Commission to decide whether to hear an appeal. See Toledo Edison Company, et al. (Davis-Besse) and Cleveland Electric Illuminating Company, et al. (Perry Units 1 and 2), ALAB-300, 2 NRC 752, 758 (1975). ("Order Ruling On Motion By Intervenor, Chicago Section Of The American Nuclear Society For Reconsideration Of A Previous Board Ruling Or For Certification to the Commission," p. 3 (May 7, 1980).

On May 21, 1980, CS/ANS filed an exception to the May 3, 1979 Licensing Board ruling (which dismissed NECO's application for the expansion of the site) claiming that the above-quoted language in the May 7, 1980 order made the May 3, 1979 ruling final. The exception states that the ruling to permit dismissal of the application to expand,

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[13] "Intervenor, Chicago Section, American Nuclear Society Motion For Reconsideration, Or, Alternatively, For Certification To The Commission" (December 21, 1979).

[14] "Motion To Declare As Final That Portion Of This Board's May 3, 1979 Order Terminating Application For Site Expansion At . . . Sheffield . . ." (January 24, 1980).

[15] "NRC Response To Intervenor's Motion To Declare As Final That Portion Of This Board's May 3, 1979 Order Terminating Application For Site Expansion . . ." (February 13, 1980). The Staff opposed the request as being out of time, where two timely opportunities for such a request had previously occurred, and as an untimely request for reconsideration pursuant to 10 C.F.R. §2.771(a).

> . . . terminated disposal operations at the site and compelled transportation of waste to licensed disposal sites in other regions of the United States without consideration of the health, safety and environmental consequences of such action in violation of the Atomic Energy Act. 42 U.S.C. §2011 et seq. and the National Environmental Policy Act, 42 U.S.C. §§4332(2)(C) and (E).

On May 27, 1980, the State of Illinois, another Intervenor, moved to strike the exception as untimely.[16/] By Order dated May 30, 1980, this Appeal Board instructed both the appellant and the other parties to address in briefs the question of both the jurisdiction of the Appeal Board to entertain the appeal at this time as well as the merits of the appeal.

II.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Appeal Board should now review a ruling of the Atomic Safety and Licensing Board contained in a May 3, 1979 Order on the basis of a subsequent Licensing Board Order dated May 7, 1980 which stated that the May 3, 1979 ruling, was indeed "final as of that [1979] date . . . ."

2. a. If so, whether the May 3, 1979 Order which permitted NECO to withdraw an application to expand the existing Sheffield low-level waste disposal site was a major Federal action with significant environmental consequences within the meaning of the National Environmental Policy Act, 42 U.S.C. §4332.

16/ "Motion to Strike American Nuclear Society Exception to Decision of Atomic Safety and Licensing Board." (May 27, 1980).

b. Whether the Staff has complied with the provisions of that Act.

III.

ARGUMENT

A. CS/ANS' Attempted Invocation Of The Jurisdiction Of The Appeal Board At This Time Should Be Denied.

1. Lack of Discernible Injury To CS/ANS.

It is well-established that a party to an NRC proceeding may only appeal a ruling if that party can establish that the decision of the Licensing Board has caused a discernible injury to that party as a direct result of the ruling appealed from. Rochester Gas and Electric Company (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 393 n. 21 (October 19, 1978); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-252, 8 AEC 1175, aff. 1 NRC 1 (1975); Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-157, 6 AEC 858 (1973).[17/]

In applying this principle to the matter at hand, two key factual matters must be underscored. The first, as indicated in the foregoing recitation of facts,[18/] is that both NECO and the Staff, as well as all Intervenors but for CS/ANS, requested, moved, or cross-moved, for dismissal of the application to expand the Sheffield site.

17/ See pp. 3 to 4 infra.

18/ Neither these cases, nor the requirement that a party establish discernible injury to itself as a direct result of the ruling appealed from is discussed by CS/ANS in its Brief.

The second key factual matter which the Staff wishes to underscore is that CS/ANS' intervention petition was granted not as a matter of right, but as discretionary intervention.[19/] As the Appeal Board stated, in sending the CS/ANS intervention matter back to the Licensing Board:

> Insofar as the Chicago Section is concerned, however, we think there nevertheless to be some cause to provide it with a second chance to demonstrate, if it can, that it is both willing and able to make a valuable contribution to the full airing of the issues which the Licensing Board must consider and resolve in this proceeding. In contrast to Mid-America . . . the Chicago Section can be presumed to have within its ranks individuals with considerable training and experience in various areas of nuclear technology. It is reasonable to suppose that there may be members of the Chicago Section who are equipped to supply enlightenment on some, if not all, of the matters confronting the Board. (7 NRC at 744).

In its amended petition to intervene pursuant to ALAB-473, CS/ANS in essence, agreed to take the proceeding as it found it, merely lending its expertise to the proceeding. Indeed, the concluding paragraph of the amended petition states:

> 8. The academic and professional expertise of petitioner's members is related directly to the contentions noted in the Order Disposing of Petitions to Intervene, dated March 1, 1976. Since that date the applicant has withdrawn its application for burial in Trench 15 and the prehearing conference has been cancelled pending review and possible modification of the application and contentions of the various intervenors. Petitioner submits that its willingness and ability to contribute to informed inquiry and judgment on the issues the Board must address will not be

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19/ Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 744 (May 3, 1978); id., "Order Granting Further Request For Leave To Intervene As A Matter Of Discretion By The Chicago Section, American Nuclear Society" (June 20, 1978).

> adversely affected by any likely change in the application or contentions and that the current (and probable future) unavailability of assistance from public funds will not preclude such contribution by the petitioner and its members.20/

The Staff believes that CS/ANS should be held to its averment to, in essence, take the proceeding as it finds it. Given the express nature of the intervention, i.e., to assist the Licensing Board with the expertise of its members, and by CS/ANS' express statement that its "expert comment," "will not be adversely affected by any likely change in the application," the Staff believes that CS/ANS has not demonstrated the requisite discernible injury to it as a direct consequence of the Licensing Board's Order permitting the withdrawal or dismissal of the application to expand the site. The Staff therefore does not believe that the intervention granted CS/ANS, in light of the express statements in CS/ANS' refiled petition to intervene as to the nature of its participation in this proceeding, affords it appellate rights on the matter of the withdrawal of the application by NECO to expand the site.

2. Timeliness of the Appeal.

The Commission's Rules of Practice provide that exceptions from "Initial Decisions" must be filed within ten days after service, 10 C.F.R. §2.762(a). This regulation has been interpreted to permit and govern appeals from partial initial decisions,21/

20/ "Further Request To Intervene As A Matter Of Discretion" p. 3 (May 24, 1978). This statement by CS/ANS was specifically recognized by the Licensing Board in its "Order Granting Further Request For Leave To Intervene As A Matter Of Discretion By The Chicago Section, American Nuclear Society," p. 3 (June 20, 1978).

21/ Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Units 1 & 2), ALAB-301, 2 NRC 853 (1975).

and certain other rulings by Licensing Boards.[22/] In an appeal pursuant to 10 C.F.R. §2.762, the ten day requirement for filing exceptions applies, unless the time period is extended by the Appeal Board. Therefore, the ten day requirement to file exceptions would also apply to Licensing Board orders with respect to which appellate rights are asserted. Clearly, then, the filing of an exception to a Licensing Board Order, approximately one year late as in the instant case, does not comply with the Commission's Rules of Practice. However, there are two questions which arise in considering the timeliness of the filing of the exception. The first question is whether the statement by the Licensing Board that a year-old order was "final," operates as an extension of the documented time period for filing exceptions to that order. The second question is whether the May 3, 1979 Order is a "final order," notwithstanding the May 7, 1980 ruling of the Licensing Board. The question of "finality" will be discussed in the succeeding section of this Brief.

In addressing the former question, it should be noted at the outset that a Licensing Board cannot extend the time for filing exceptions to an Initial Decision. Duquesne Light Company (Beaver Valley Power Station, Unit 1), ALAB-310, 3 NRC 33 (January 23, 1976); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-154, 6 AEC 823 (October 22, 1973). Rather, the authority to

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22/ See, e.g., Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-331, 3 NRC 771 (1976) (an order denying Applicant's authorization to construct a railroad spur to the plant prior to the issuance of an LWA); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-122, 6 AEC 322 (1973) (discovery order against a nonparty); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-76-1, 3 NRC 73 (1976) (grant of a Part 70 license to transport and store fuel assemblies, during the course of an operating license hearing).

grant such extensions as well as other appeals is that of the Appeal Board. Id. For this reason, the Staff believes that exceptions to the May 3, 1979 Order cannot be filed in May of 1980 by reason of the Licensing Board's statement in the May 7, 1980 Order. Therefore, exceptions had to be filed within ten days of service of the May 3, 1979 Order, or be waived. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752 (1975); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 392-93 (1974); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-195, 7 AEC 455, 456 n. 2 (1974); see 10 C.F.R. §2.762.

The May 7, 1980 Licensing Board Order merely stated that its May 3, 1979 Order was final in its view, at the time of issuance.[23/] Such a statement does not, and cannot, act to resurrect an opportunity to file exceptions which expired twelve months before.[24/]

3. Finality.

In order for CS/ANS to appeal, as of right, the granting of the motion to withdraw the application to expand the site, the May 3, 1979 Order of the Licensing Board must have been a "final Order." The relevant legal principles have been well-summarized as follows:

23/ May 7, 1980 Order, p. 3. The Order also stated, "However, it is for the Appeal Board or the Commission to decide whether to hear an appeal."

24/ Allowing parties to seek determinations that orders are final many months after their issuance would, in effect, nullify the time limits in the Commission's Rules of Practice to apply for reconsideration or to appeal. See 10 C.F.R. §§2.762, 2.771(a). A party would merely have to file a motion to declare that order to be final and the time to appeal would begin to run anew. If an interpretation of an order is sought, the rules do provide 10 days to seek reconsideration. 10 C.F.R. §2.771(a).

> Following the example of federal judicial practice, the Commission essentially restricts a party's right to appeal (as distinguished from seeking our discretionary review by referral or certification) to final decisions.[19] This reflects the policy judgment that piecemeal appeals create more problems than they solve.[20] The test of "finality" for appeal purposes before this agency (as in the courts[21]) is essentially a practical one. As a general matter, a licensing board's action is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate; rulings which do neither are interlocutory.[22] Under the Commission's rules (except in limited circumstances not present here), interlocutory determinations may not be brought before us for review as a matter of right until the Board below has rendered a reviewable decision.[23] (Toledo Edison Company, et al. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (November 26, 1975).

19/ Compare 10 C.F.R. §§2.730(f), 2.762 and 2.718(i) with 28 U.S.C. §§1291 and 1292.

20/ See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 169-71 (1974); Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), ALAB-269, NRCI-75/4R, 411 (1975).

21/ See Cohen v. Beneficial Ind. Loan Corporation, 377 U.S. 541, 546 (1949).

22/ See Pilgrim, supra, NRCI-75/4R at 413.

23/ Ibid.

In its May 7, 1980 Order, the Licensing Board ruled that its May 3, 1979 ruling ". . . was indeed final as of that date as far as this board was concerned, since it disposed of a major segment of the case" (Order, p. 3). No further analysis of the doctrine of "finality" was present in the Order.

Perhaps the best analogy between the approval of withdrawal of the site expansion application and federal practice in general is the principle that where the Order is one dealing with the merits, to be a final decision it must generally be dispositive of the whole merits of the cause.[25/] Indeed, CS/ANS maintains for the purpose of this appeal that the May 3, 1979 Order was indeed interlocutory,[26/] but relies upon the Licensing Board's May 7, 1980 Order as making the year-old Order appealable at this time. CS/ANS' argument is that the mere statement by the Licensing Board that the May 3, 1979 Order was final ("as far as it was concerned, since it disposed of a major segment of the case") bifurcated the action making it tantamount to two distinct claims, one of which was "certified" for appeal by the Licensing Board.[27/] However, the Licensing Board clearly fell short of such "certification," leaving as it must to the Appeal Board the decision as to whether to hear the appeal.

Thus, the heart of CS/ANS' appeal is that an otherwise interlocutory order can be made final, a year later, pursuant to a motion made to a Licensing Board under 10 C.F.R. §2.730(f) to designate an interlocutory order as "final." 10 C.F.R. §2.730 simply contains no provision to allow a Licensing Board to label an admittedly interlocutory order as final for purposes of appeal, a

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25/ 9 Moore's Federal Practice, para. 110.08[1] (1975 ed.).

26/ "Brief For Appellant Chicago Section, American Nuclear Society," p. 11 (June 20, 1979). CS/ANS cannot now assert that the May 3, 1979 Order was final. To so maintain would force the conclusion that whatever appellate rights existed from that Order have expired, 10 C.F.R. §2.762.

27/ Id., p. 13.

year after the interlocutory order was issued. Accordingly, the Staff believes that the May 3, 1979 Order is not appealable as a matter of right at this time.[28/]

For all of the reasons stated above, i.e., the lack of discernible injury to CS/ANS, the untimeliness and hence waiver of any appellate rights which may have existed. the absence of a provision in the Commission's Rules of Practice permitting a Licensing Board to designate a year-old order as "final," and the admittedly interlocutory nature of the Order appealed from, the Staff believes that CS/ANS' attempted invocation of the appellate jurisdiction of the Appeal Board should be denied.

B. The Exception (and Ensuing Legal Argument) Filed By CS/ANS is Predicated Upon a Number of Factual Assumptions Which Are Either Incorrect or Unestablished.

The exception (and ensuing legal argument) filed by CS/ANS is predicated upon a number of factual assumptions which are either incorrect or unestablished. For example, the exception states that the ruling of the Board which permitted NECO to withdraw its application to expand the site "terminated disposal operations at the site." Yet, it is an uncontested fact that the licensed original 20.45 acre Sheffield site had been filled to

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28/ The Licensing Board has declined to certify the question, and, the Appeal Board has not directed certification of it, nor has it been requested by CS/ANS to do so.

capacity since April of 1978, and, by necessity, no new waste has been added to that site. Second, by definition, no new waste could be disposed of at the "expanded site" (168 acre site) as the expanded site only existed in a paper application. Hence, the Licensing Board's Order in fact terminated no waste disposal operations. Since none of the factual predicates of the exception are factually accurate, it is difficult to conclude, as does CS/ANS, that the result of the Licensing Board Order permitting NECO to withdraw a paper application had any effect at all, let alone any "compelling" effect. Yet CS/ANS contends that the Board Order permitting withdrawal of the site expansion application "compelled transportation of waste to licensed disposal sites in other regions of the United States."[29] No citation or reference to any secondary materials is cited by CS/ANS to support either the accuracy or scope of this factual assertion. Moreover, since the Sheffield low-level radioactive waste site had already been filled to capacity, any results reasonably flowing from that fact would have proximately occurred when the original site was filled, rather than when the Licensing Board issued an order permitting the application to expand to be withdrawn by NECO. Hence, we are only left to speculate whether the "compelling" result of the Licensing Board's action, as claimed by CS/ANS is either a real, or a direct result.

These factual assumptions flaw the argument of CS/ANS that the Licensing Board's Order had any effect at all on the transport of low-level radioactive waste.

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[29] CS/ANS Brief, pp. 3-4.

The essence of CS/ANS' legal argument is also posited upon the same basic factual misinterpretation. CS/ANS claims that the Board's application "effectively terminated operations at Sheffield;"[30] that as a result of the Board Order, ". . . the Sheffield operation was converted from an active low-level waste disposal site to a collection and distribution center . . . ."[31] From this dubious factual premise CS/ANS sets forth its principle legal argument that "The board's decision therefore had a major impact and falls within the meaning of a major federal action for which an environmental impact statement ("EIS") must be prepared."[32]

In making this argument, CS/ANS has failed to confront two basic facts:

1. The presently licensed Sheffield site is filled to capacity and no further burial operations can take place, and

2. The application to permit the burial of waste in the expanded area has been withdrawn by NECO prior to the burial of any waste.

It is the Staff's position, as explained, infra; that NECO's act of withdrawing a paper application for burial of waste on land where no waste had previously been buried was not a "major federal action" within the meaning of the National Environmental Policy Act, 42 U.S.C. §4332 et seq. let alone one with significant environmental consequences.

30/ CS/ANS Brief, p. 3.

31/ Id., p. 4.

32/ Id.

It is basic, that before an EIS is required under NEPA, there must be a proposal for a major Federal action that significantly affects the quality of the human environment.[33] Thus, a withdrawn paper application for a new or expanded facility, which will not be constructed, does not constitute "a proposal" for "major federal action" affecting the environment. As stated in N.A.A.C.P. v. Wilmington Medical Center, Inc., 436 F. Supp. 1194 at 1202 (D. Delaware, 1977), affirmed, 584 F.2d 619 (3rd Cir. 1978):

> The fundamental purpose for preparing an environmental impact statement is to assure that federal decision makers consider the environmental consequences of their decisions.[34] Where the federal official has no decision to make which can be affected by environmental considerations, the principal goal of NEPA is hardly advanced by the preparation of an environmental impact statement.[35]

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[34] 115 Cong. Rec. (Part 30) 40416 (1969) (remarks of Senator Jackson); see text accompanying n. 5 supra.

[35] A similar argument was advanced, but not decided, in Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, supra, 426 U.S. at 786, 96 S.Ct. at 2437:

> "In petitioner's view, NEPA is concerned only with introducing environmental considerations into the decision making processes of agencies that have the ability to react to environmental consequences when taking action. If the agency cannot so act, its action is not 'major' and does not fall within the statutory language. Thus, petitioners urge, NEPA should not be read to impose a duty on HUD to prepare an environmental impact statement in this case since the agency, by statute, has no power to take environmental consequences into account in deciding whether to allow a disclosure statement to become effective."

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[33] 42 U.S.C. §4332(2)(E); 10 C.F.R. §51.1(a); Kleppe v. Sierra Club, 427 U.S. 390, 406 (1976); Gage v. A.E.C., 479 F.2d 1214, 1220 n. 19, (7th Cir. 1973).

In its Brief, CS/ANS argues that "(I)n a factual setting analagous to Sheffield, at least one court has concluded that suspension or abandonment of a project can have affirmative consequences necessitating an EIS."[34/] The sole authority relied upon for that proposition is City of New York v. U.S., 337 F. Supp. 150, supp. opinion, 344 F. Supp. 429 (E.D.N.Y. 1972). CS/ANS' reliance on this case underscores its basic misunderstanding of the facts at issue in this proceeding, for the "analogous" factual setting in City of New York was an Interstate Commerce proceeding concerning the abandonment of an existing railroad line. Under section 1(18) of the Interstate Commerce Act, 49 U.S.C. §1(18), one cannot abandon rail service without approval of that Commission. Thus, in that case a three-judge federal district court (convened pursuant to 28 U.S.C. §§2321, 2325) held that the I.C.C. had a duty to consider NEPA in determining whether to permit abandonment of an existing railroad line. Abandonment of the existing railroad line would have necessitated increased use of alternate modes of surface transportation. But the Staff cannot agree with the "analogy" of that decision to the instant proceeding. As aforementioned, the existing Sheffield site was full and Applicant withdrew its application to expand the site. While the action of the ICC permitting abandonment may be a major Federal action, an Applicant's withdrawal of its application to provide services it has no obligation to provide is certainly not such a Federal action. Thus, there was no "abandonment" of a service provided under

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[34/] CS/ANS Brief, p. 7.

a certificate of public convenience and necessity as in City of New York, supra, but only withdrawal of a paper application.

One case which was not relied upon by CS/ANS, but which merits discussion is Scottsdale Mall v. State of Indiana, 549 F.2d 484 (7th Cir. 1977). In that case, the Indiana State Highway Commission withdrew a highway project from a a federal-aid highway program (23 U.S.C. §101, et seq.) and sought to proceed with state funds and thus avoid compliance with NEPA, contending that there was no "major federal action." The Court of Appeals concluded:

> Under the facts and circumstances of this case, Indiana's seeking and receiving federal approval at various stages of the project and receiving preliminary financial benefits so imbued the highway project with a federal character that, notwithstanding the state's withdrawal of the project from federal funding consideration, compliance with federal environmental statutes was necessary. Were we to hold otherwise, we would give little, if any, effect to the Congressional directive so cogently expressed by the phrase "to the fullest extent possible." (549 F.2d at 489).

The distinguishing point of Scottsdale Mall is that a highway construction project of a federal character was to be continued, albeit without federal funding. In the instant matter, construction was not under way, the application to expand the site was totally withdrawn, thus the project to expand the site was abandoned, and the withdrawn proposal to expand the site was strictly a private undertaking which was not affected by other federal actions. Moreover, without actual or proposed Federal action, there is no major Federal action and an EIS is not required. Kleppe v. Sierra Club, supra; Gage v. A.E.C., supra.

D. The Staff Has Complied With NEPA.

CS/ANS contends that even if the Appeal Board should rule that an EIS is not necessary, NEPA §§102(2)(E), 42 U.S.C. §4332(2)(E) also mandates that an agency "study appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." Thus, CS/ANS contends that the above section requires an evaluation of alternatives to the suspension of operations at Sheffield before action is taken to close the latter facility.[35/] CS/ANS thus asserts that the Staff has not complied with 42 U.S.C. §4332(2)(E).[36/]

NEPA requires every EIS to include a detailed statement of the adverse environmental effects of and alternatives to the proposed action. Kleppe v. Sierra Club, 427 U.S. 390, 394 (1976); Mid-Shiawassee County Concerned Citizens v. Train, 408 F. Supp. 650, 653 (E.D. Mich. 1976); 42 U.S.C. §4332(2)(C); 10 C.F.R. §51.1(a). The purposes of an EIS are to detail the environmental and economic effects of the proposed major Federal action so that those who did not participate in preparing an EIS may know of and meaningfully consider the factors involved. Furthermore, the EIS should compel a decisionmaker, with discretionary choice-making capabilities, to seriously consider all environmental choices to a major federal action. Sierra Club v. Morton, 510 F.2d 813, 819 (5th Cir. 1975).

Not all Federal actions require preparation of an EIS, however, First National Bank v. Richardson, 484 F.2d 1369, 1370 (7th Cir. 1973). An EIS is not required where the impact of the Federal action is minor or unimportant. Hanly v. Kleindienst, 471 F.2d 823, 831 (2d Cir. 1972), cert. denied 412 U.S. 908 (1973). The responsible Federal agency has the authority to determine whether the contemplated Federal action

35/ CS/ANS Brief, p. 8.

36/ Id.

falls within the "minor" category or whether it has a potentially significant adverse effect. First National Bank v. Richardson, supra at 1370.

As to the consideration of alternatives to an anticipated course of action under NEPA, not every conceivable alternative to an action needs to be considered. An agency need only consider those alternatives necessary to permit a reasoned choice. Louisiana Environmental Society Inc. v. Brinegar, 407 F. Supp. 1309, 1322 (W.D. La. 1976). Thus, only reasonable alternatives need be considered under NEPA. Moot or farfetched alternatives need not be considered. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978); Natural Resources Defense Council v. Morton, 458 F.2d 827, 837-838 (D.C. Cir. 1972); Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974). The alternative which CS/ANS wishes to have considered, of expanding the Sheffield site, is such a moot or farfetched alternative. First, NECO does not now seek to expand its site at Sheffield, and, as pointed out previously, NECO's decision in this regard is strictly a private decision which is not controlled by Federal actions. Second, under 10 C.F.R. §20.302(b) waste disposal sites may only be licensed on land owned by the Federal or a state government. However, neither the Federal government nor the State of Illinois owns this land. Therefore, the alternative of the expansion of the NECO's Sheffield operations to non-governmentally owned land, is not a reasonable alternative that need be considered in this proceeding.

The Licensing Board's May 3, 1979 Order which permitted NECO to withdraw its application to expand the site, was based, in part, on NECO's private decision

to voluntarily withdraw its application to expand the site. That decision, as opposed to NECO's decision to abandon its existing site, does not require NRC approval for it merely involved the withdrawal of a paper application. As no Federal approval was required, there is no "major Federal Action" and thus there is no basis under NE.. to impose a duty to consider alternatives to expanding the site.[37/] Thus, NEPA cannot be used to compel an Applicant to expand its private, non-public utility service,[38/] if it does not so desire.

CONCLUSION

For reasons discussed above, the Staff believes that the Appeal Board should not grant the attempted invocation of its appellate jurisdiction, as requested by CS/ANS. If, however, the Appeal Board determines to review the exception filed by CS/ANS to the May 3, 1979 Order, the Staff believes that the exception should be dismissed as wholly unmeritorious.

Respectfully submitted,

R P Lessy

Roy P. Lessy
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 30th day of July, 1980

37/ See Public Service Company of New Hampshire, et al. (Seabrook Station Units 1 and 2), CLI-77-8, 5 NRC 503 at 541.

38/ These services should be contrasted with the public rail services discussed in City of New York v. U.S., discussed at p. 18 supra.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with §2.713, 10 C.F.R. Part 2, the following information is provided:

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Name of Party	- NRC Staff U.S. Nuclear Regulatory Commission Washington, D.C. 20555

R P Lessy

Roy P. Lessy
Counsel for NRC Staff

Dated at Bethesda, Maryland
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CERTIFICATE OF SERVICE

I hereby certify that copies of "RESPONSE OF THE NRC STAFF TO THE EXCEPTION FILED BY INTERVENOR, CHICAGO SECTION, AMERICAN NUCLEAR SOCIETY, TO THE LICENSING BOARD'S MAY 3, 1979, AND MAY 7, 1980 ORDERS" and "NOTICE OF APPEARANCE" of Roy P. Lessy in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 30th day of July, 1980:

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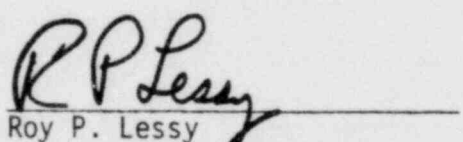

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