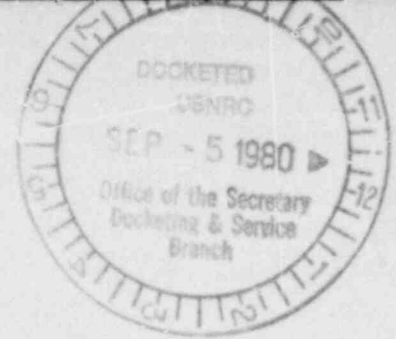


UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION



In the Matter of )  
NUCLEAR ENGINEERING COMPANY, INC. )  
(Sheffield, Illinois Low-Level )  
Radioactive Waste Disposal Site) )

Docket No. 27-39

*2 Sept '80*

PETITION FOR REVIEW

1. Summary of Atomic Safety and Licensing Appeal Board Decision, August 12, 1980 (ALAB-606).

The August 12, 1980 decision of the Atomic Safety and Licensing Appeal Board affirmed the May 3, 1979 order of the Atomic Safety and Licensing Board dismissing the application of the Nuclear Engineering Company ("NECO") for expansion of the Sheffield, Illinois low-level radioactive waste disposal site.

Although the ASLAB acknowledged that the Licensing Board decision probably foreclosed future storage of radioactive waste at Sheffield (ALAB - 606 at 10), that transportation of the waste elsewhere is hazardous and that "both licensing and not licensing Sheffield's expansion have consequences for the public health and safety" (ALAB - 606 at 15, Johnson, concurring opinion with general agreement of Rosenthal and Salzman), it concluded that these consequences are not "attributable to Federal action within the contemplation of NEPA." (ALAB - 606 at 10). The basis for the conclusion was the premise that the Nuclear Regulatory Commission lacks statutory authority to compel NECO to expand its burial site and then to receive and store additional waste materials. (ALAB - 606 at 11).

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Finally, the Appeal Board characterized the Licensing Board's action as involving only the allowance of NECO's voluntary decision to withdraw the portion of its application relating to site expansion, even though "there is room to conclude that this step [NECO's withdrawal] was at least indirectly a result of NRC Staff actions."<sup>/1</sup> (ALAB - 606 at 15, Johnson, concurring opinion with general agreement of Rosenthal and Salzman).

2. Record Notations Where the Issues were Previously Raised.

On August 24, 1979, deeming the May 3, 1979 order as interlocutory, Chicago Section, American Nuclear Society ("Chicago Section") moved the Licensing Board to compel the staff to file a draft Environmental Impact Statement ("EIS") and to study reasonable alternatives to continued burial operations at Sheffield as required by 42 U.S.C. §4332(2)(C)(E). It was intervenor's position that the termination of future operations at Sheffield would constitute "major federal action" within the meaning of NEPA. Several months later, on December 3, 1979, the Board ruled that it did not have authority to compel the staff to prepare or file an EIS or to study reasonable alternatives to cessation of activities at Sheffield. Intervenor, Chicago Section, then moved for reconsideration or certification of the question presented for review. In the alternative, Chicago Section moved the Licensing Board to declare as

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<sup>/1</sup> Technically, it should be noted that NECO did not move to withdraw the expansion application at all. The Licensing Board sua sponte deemed NECO's abandonment of the entire site to be two separate motions, one to withdraw the application to expand which it allowed, and the other to withdraw from the original site which it denied.

final that portion of the May 3, 1979 order which granted "motions to withdraw and dismiss" NECO's application to expand. On May 7, 1980 the Licensing Board granted the motion to declare that portion of the May 3, 1979 order as final.

The Chicago Section appealed by filing an exception pursuant to 10 C.F.R. §2.762(a) on May 21, 1980.

The designated portion of the decision appealed from was 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, have 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. (p. 4).

On June 20, 1980 pursuant to 10 C.F.R. §2.762(a), Chicago Section filed its brief on appeal and argued that termination of normal operation at Sheffield, including reasonable addition to the original 20 acre site, is a major federal action requiring the preparation of an environmental impact statement and the study of alternatives. The federal action was asserted to be the dismissal of NECO's application to expand after the Licensing Board failed to curtail staff demands upon the applicant for new and expensive geological data. The staff demands were based upon the premise that continued burial operations in the expansion area at Sheffield would constitute an entirely new federal action but that, regardless of the consequences, termination would not.

This petition seeks review of the August 12, 1980 decision of the Appeal Board affirming the order of the Licensing Board.

3. Error in the August 12, 1980  
Decision of the Appeal Board.

The Appeal Board erroneously concluded that the action of the Licensing Board on NECO's application to expand the Sheffield disposal site did not constitute "major federal action" within the meaning of §102(2)(C) of the National Environmental Policy Act, 42 U.S.C. §4332(2)(C), requiring preparation of an Environmental Impact Statement ("EIS") and an assessment of the alternatives. The misguided premise for this decision was the conclusion that both the Licensing and Appeal Boards were without authority to order NECO to expand its operations. As a consequence the Appeal Board improperly characterized the withdrawal of NECO's application as voluntary, private action, even though "this step was at least indirectly a result of NRC staff actions" and "[t]he record of this proceeding indicates that NECO's decision was prompted in part by the imposition of requirements by the NRC staff which seriously impaired the economic feasibility of the proposed site expansion." (ALAB - 606 at 15, Johnson, concurring opinion with general agreement of Rosenthal and Salzman).

More appropriately, the issue is whether either the Board or the Commission itself has the power and responsibility to order an EIS which would examine alternatives (such as transcontinental shipment or procurement of additional operators) to termination of disposal operations at the only licensed site in the midwest, Sheffield. The Appeal Board too narrowly construed the scope of the Licensing Board's delegated responsibilities and totally ignored the general authorization for the presiding officer and licensing board to

"[t]ake any other action consistent with the Act...." 10 C.F.R. §2.718(1) (emphasis added). At the very least this action ought to have included a decision to indefinitely postpone or suspend further proceedings on Sheffield pending the requisite environmental assessment by the staff. The rulings represent a construction of delegated authority limited by their terms to the NECO application. As a matter of policy this focus is too narrow for the issues presented. Once the question of site expansion at Sheffield was delegated to the panel, related authority to consider all dimensions of the problem was implied, particularly since the panel authorized the staff to require data from NECO well beyond the standards applicable to activity which was being conducted under federal authorization in 1969 when the National Environmental Policy Act became effective.

On appeal, an issue larger than the Board's power is the Commission's responsibility and authority to require the staff to prepare an EIS and to study alternatives to the cessation of operations at Sheffield. If the Commission has the authority to direct the staff to prepare such statements, as this intervenor consistently has suggested it does, then so may the Licensing Board. If all of the power of the Commission with respect to Sheffield was not delegated to the Board, then the Commission either may delegate that power now or decide for itself whether it should order the staff to prepare an EIS and study alternatives.

It was, moreover, improper for the Board to reach a so-called "final" decision on NECO's withdrawal when the Commission's own regulations, 10 C.F.R. §51.52(a), contemplate that the staff shall have completed a final environmental impact statement before taking a position in licensing proceedings.

Finally, to the extent the Appeal Board and the Licensing Board decisions claim both bodies are without authority to have done otherwise than permit withdrawal, they belie their purported description as final. A dismissal without prejudice usually is not final. It is only final until the applicant seeks to reinstate his requested authorization. Since motions of the staff and the other intervenors to dismiss the application to expand were also granted, the strong reliance of the Appeal Board upon the "voluntary" nature of NECO's withdrawal clearly is misplaced.<sup>/2</sup>

4. Statement Why Commission Review Should be Exercised.

The ruling of the Licensing Board dismissing the application for expansion of the Sheffield, Illinois low-level radioactive waste disposal site terminated disposal operations at Sheffield and effectively condoned a course of action which significantly affects the public health and safety and the environment. Yet to this day no EIS has been prepared to evaluate such action and no study of alternatives has been made.

Since there are no currently licensed sites in the midwest for the disposal of low-level nuclear waste and no licensing application pending as a result of the Board's order on NECO's application, low-level nuclear waste must be shipped over 1,000 miles for burial in other licensed sites.<sup>/3</sup> Transcontinental shipment of

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<sup>/2</sup> Technically, NECO never did move to withdraw. See note 1 supra. Only if NECO is also permitted to withdraw from the original 20 acres as well could the withdrawal of the application to expand be properly characterized as voluntary.

<sup>/3</sup> It must be noted that no EIS has been prepared for the primary alternate sites at Beatty Flats, Nevada or Barnwell, South Carolina.

radioactive waste will continue indefinitely. The Licensing Board's decision, therefore, has had a significant impact on public health and safety and the environment. Clearly it falls within the meaning of a major federal action for which an EIS must be prepared and the alternatives studied.

It is the position of Chicago Section that termination of normal operations at Sheffield, including reasonable addition to the original 20 acres, is a major federal action which may not be undertaken or approved without appropriate consideration of the human and environmental consequences attending such action.

The environmental consequences which require a weighing and balancing of risks and benefits include the increased risk of accident or leakage during shipment of low-level nuclear waste and the increased fuel consumption involved in the transportation to other sites. The human costs to be considered include the potential for shortage of nuclear materials for use in medicine, research and energy production due to the increased cost of disposal, or concurrently, higher rates for the consumers of these resources and services together with the increased risk of improper disposal due to the increased cost of proper disposal.

The Chicago Section is prepared to brief for the Commission the legal errors in the position of the Licensing Board that it did not have the authority to require the staff to prepare an EIS and study alternatives and in the position of the Appeal Board that no major federal action was involved because NECO's withdrawal was voluntary. However, the Chicago Section respectfully suggests that detailed consideration of the legal and factual niceties involved in such issues are completely overshadowed by the policy issues presented.

The Commission has unquestioned authority to cure whatever deficiency there may have been in the Licensing Board's authority to order the staff to prepare an EIS on the approval or disapproval of continued operation at Sheffield and to study the alternatives. Limiting the inquiry to narrow issues on the precise scope of the original delegation of authority or on the voluntariness of NECO's action, completely overlooks the primary responsibility of the Commission to protect the public health and safety in nuclear activities. Accordingly, Chicago Section suggests that as a matter of policy, the Commission should authorize and direct the Licensing Board to consider the consequences of both continuing and discontinuing operations at Sheffield before taking final action on NECO's application to expand - whether or not initially so authorized.

In light of the known risks and costs associated with trans-continental shipment of nuclear waste, it would be irresponsible to continue or terminate these proceedings without benefit of an objective evaluation of their impact on human safety and the environment. The possibility of damage due to accident or leakage during shipment cannot be ignored. Furthermore, the resolution of the issues regarding transportation could substantially alter or simplify the questions regarding liability for long-term maintenance at Sheffield which are still pending before the Board. If, for example, the risks of transportation and disposal at another site were found to exceed the risks of burial in the 168 acre proposed extension of the Sheffield site or the most suitable portion thereof, NECO or another operator might willingly maintain the original site.



Independent of the obligation to prepare an EIS, 42 U.S.C. §4332(2)(E), mandates that an agency "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."

Intervenor submits that this statutory directive requires an evaluation of alternatives to the suspension of operation at Sheffield before action is taken to close that facility. Intervenor further contends that the only reasonable alternatives are other currently licensed sites since no other alternatives could provide an immediate solution to the problem of low-level waste disposal. Therefore, at the very least, the Commission's mandate to safeguard the public health and safety requires that it balance the risks of permitting the reasonable addition of acreage and continued operation of the Sheffield site against the risks of the alternative transcontinental shipments.

Unless the activities which generate the waste normally destined for Sheffield also are terminated, either approval or disapproval of NECO's applications will have an impact on human safety and the environment. That the specific impact may be different in the case of disapproval does not change the unavoidable nature of the impact.

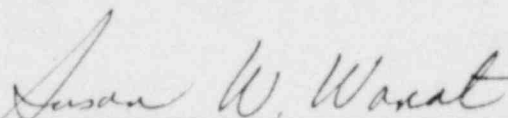
The policy ramifications of the Appeal Board decision supply another reason why this Commission's review prerogative ought to be exercised. Both the Licensing Board and the Appeal Board suggest a construction of NEPA totally inconsistent with the objectives of the statute. Once the panel determined it was essential to consider

the environmental and alternative implications of site expansion within the context of NEPA, it was fatuous to disavow comparable responsibility for discontinuance of the identical operations. The effect of the rulings below is to tolerate and ignore adverse health, safety and environmental consequences by applying the fiction that the precipitating action was voluntary and private, while acknowledging that its converse would have been major federal action.

For the foregoing reasons, this Commission should review the August 12, 1980 decision of the Appeal Board.

Respectfully submitted,

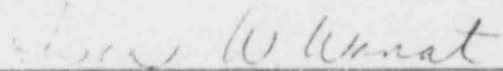
CHICAGO SECTION/AMERICAN NUCLEAR SOCIETY

  
\_\_\_\_\_  
John M. Cannon  
Susan W. Wanat  
Its Attorneys

Mid-America Legal Foundation  
Suite 2245  
20 North Wacker Drive  
Chicago, Illinois 60606  
(312) 263-5163

CERTIFICATE OF SERVICE

I hereby certify that copies of the accompanying "Petition for Review" filed on behalf of Chicago Section, American Nuclear Society in connection with the above-entitled matter have been served upon all the persons listed below by depositing such in the U.S. mail, first-class postage prepaid, this 2nd day of September, 1980.



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Susan W. Wanat

Mr. Andrew C. Goodhope  
3320 Estelle Terrace  
Wheaton, Maryland 20906

Dr. Forrest J. Remick  
305 East Hamilton Avenue  
State College, PA 16801

Dr. Linda W. Little  
Member, Atomic Safety and  
Licensing Board Panel  
5000 Hermitage Drive  
Raleigh, NC 27612

Ms. Susan Sekuler  
Mr. Dean Hansell  
Assistant Attorney General  
Environmental Control Division  
188 West Randolph Street  
Suite 2315  
Chicago, Illinois 60601

Atomic Safety and Licensing  
Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Mr. D. J. McRae  
217 West Second Street  
Kewanee, Illinois 61443

Mr. Donald D. Rumley  
Mr. Scott Madson  
601 South Main Street  
Princeton, Illinois 61356

Ms. Ellen B. Silberstein Fridell  
Office of the Executive Legal  
Director  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Mr. Troy B. Conner, Jr.  
Conner, Moore & Corber  
1747 Pennsylvania Avenue, N.W.  
Suite 1050  
Washington, D.C. 20006

Mr. Charles F. Eason  
Nuclear Engineering Company, Inc.  
1100 17th Street, N.W.  
Suite 1000  
Washington, D.C. 20036

Docketing and Service Section  
Office of the Secretary  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555

Atomic Safety and Licensing  
Appeal Panel  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555

Mr. Lee Armbruster  
General Counsel  
Nuclear Engineering Company, Inc.  
P. O. Box 7246  
Louisville, Kentucky 40207

Mr. Roy Lessy  
Office of the Executive Legal  
Director  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Mr. Robert Russell  
Johnson, Martin & Russell  
10 Park Avenue West  
Princeton, Illinois 61356

Cornelius J. Hollerich  
State's Attorney  
Bureau County Court House  
Princeton, Illinois 61356