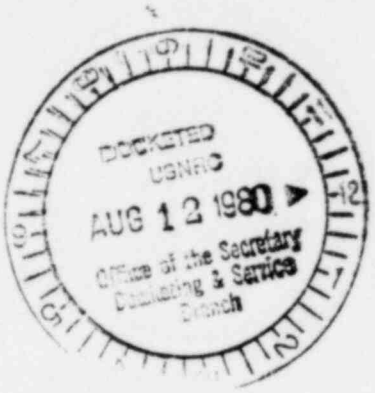
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Richard S. Salzman
Dr. W. Reed Johnson

SERVED AUG 12 1980

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

Mr. John M. Cannon and Ms. Susan W. Wanat, Chicago, Illinois, for the appellant, Chicago Section, American Nuclear Society.

Attorney General of the State of Illinois William J. Scott and Assistant Attorneys General Susan N. Sekuler and Mary Jo Murray, Chicago, Illinois, for the intervenor, State of Illinois.

Mr. Roy P. Lessy for the Nuclear Regulatory Commission staff.

DECISION

August 12, 1980

(ALAB-606)

I

Several years ago, the Nuclear Engineering Company (NECO) filed an application for renewal and amendment of its existing license to operate a low-level radioactive waste burial site

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near Sheffield, Illinois. The sought amendment would have, inter alia, allowed the applicant to increase the size of the site from 20.45 acres to 188.45 acres. In the wake of a number of successful petitions for leave to intervene and requests for a hearing, a notice of hearing was issued by the Licensing Board in March 1978.

A year later, on March 8, 1979, the applicant notified the Board that it had just informed the Director of the Commission's Office of Nuclear Material Safety and Safeguards (NMSS) that it was withdrawing its application for license renewal and site expansion. The applicant further indicated that it was terminating immediately "its license for activities at Sheffield". Attached to the notice was a proposed order dismissing the adjudicatory proceeding.

Treating the notice as a motion under 10 CFR 2.730, the Board called for responses from the other parties. On March 20, 1979, the NRC staff filed its answer. Although acquiescing in the abandonment of the application insofar as it sought approval of an expansion of the Sheffield site, the staff registered its objection to the applicant's "attempt to withdraw the license application for the 20-acres where waste is already buried". According to the staff, the applicant had a continuing responsibility under the terms of its existing license and NRC

regulations to safeguard properly the buried waste and that responsibility could not be shed by seeking to terminate the license renewal proceeding.[1/] In line with this position, on the same day the NMSS Director issued an immediately effective show cause order directing the applicant to resume its responsibilities under the existing license. Thereafter, on April 10, 1979 (following oral argument on the matter on March 27), the staff submitted to the Board a list of proposed conditions precedent to the dismissal of the proceeding.

On May 3, 1979, the Licensing Board entered an unpublished order in which it dismissed so much of the application as pertained to the expansion of the site. The Board declined, however, either to permit the applicant to withdraw its application for license renewal or to dismiss the proceeding. In this connection, the Board pointed out that both the staff's request that conditions be imposed upon such dismissal and the related show cause order would require evidentiary hearings. (One month later, on June 6, the Commission ordered a hearing on the show cause order before the same Licensing Board.)

1/ The staff's view was subsequently endorsed in a March 24, 1979 filing by the intervenor, State of Illinois.

No endeavor was made to appeal from any portion of the May 3 order. On January 24, 1980, however, intervenor Chicago Section, American Nuclear Society, moved the Licensing Board "to declare as final" that portion of the May 3 order "terminating application for site expansion at the Sheffield * * * site if said Order did, as a practical matter, finally dispose of that portion of the case". On May 7, the Board entered an unpublished order in which it dealt principally with another motion which had been filed by the Chicago Section.[2/] At the end of that order, the Board took note of the January 24 motion and responded to it as follows:

> 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).
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> Consequently, Chicago Section's motion to declare as final the board's May 3, 1979 decision and order is granted to the extent stated above.

Founding its right to do so upon the May 7, 1980 order, the Chicago Section now seeks to challenge the May 3, 1979 order.

2/ See fn. 3, infra.

Reasoning that its effect was to terminate all future operations at the Sheffield site, the Chicago Section claims that the 1979 order had to be preceded by an environmental impact statement and the consideration of alternatives to such termination.[3] Both the staff and the intervenor State of Illinois oppose the appeal on the principal grounds (1) that it is untimely;[4] and (2) that it lacks merit.[5] For its part, NECO did not file a brief.

II

At the outset, we are confronted with the question of the timeliness of the appeal. Both Illinois and the staff maintain

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3/ On August 24, 1979, the Chicago Section had moved the Licensing Board for an order compelling the staff "to file a draft environmental impact statement" and "to study, develop and describe alternatives to suspension of operations at Sheffield". That motion had been denied on December 3, 1979. The ground assigned was that the Board had no authority to require either (1) that the staff prepare an environmental impact statement prior to a ruling on the motion to withdraw the application or (2) that the applicant or anyone else operate the burial site "simply because it may be an environmentally preferable course of action". On December 21, 1979, the Chicago Section sought to have that ruling reconsidered or certified to the Commission. The May 7, 1980 order denied that relief.

4/ On May 27, 1980, Illinois moved to strike the Chicago Section's exception to the May 1979 order as untimely. By order of May 30, we directed that the timeliness question be briefed by the parties along with the merits of the appeal. This was done.

5/ Although those parties also raise other points in urging affirmance, we need not and do not reach them.

that, insofar as it dismissed that portion of the NECO application as pertained to expansion of the burial site, the May 1979 order was final and subject to appeal within ten days under 10 CFR 2.762. In response, the Chicago Section asserts that that order was wholly interlocutory and did not achieve any degree of finality for appellate purposes until the issuance of the May 1980 order.[6/] It presses this assertion in the face of the Licensing Board's observation in the May 1980 order that it deemed the partial dismissal of the NECO application to have constituted final action at the time taken because "it disposed of a major segment of the case". See p. 4, supra.[7/]

6/ In addition, the Chicago Section argues that the May 1979 order was not appealable under 10 CFR 2.762 because it did not qualify as an "initial decision". That argument obviously proves too much. Nothing in the May 1980 order converted the May 1979 order into an initial decision. Thus, if the latter order was not subject to appeal when rendered because not an initial decision, it still is non-appealable. We need not pursue the matter any further, however, because the Chicago Section's premise is incorrect; i.e., under Commission practice, an appeal may be taken from final orders of the Licensing Board whether or not embodied in an initial decision. See, e.g., Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-76-1, 3 NRC 73, 74 (1976); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-122, 6 AEC 322 (1973); Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-331, 3 NRC 771, 774 (1976). See also, discussion at p. 7, infra.

7/ In the circumstances, we need not decide what would have been the operative effect of that order had the Licensing Board reached a different conclusion therein respecting the time at which its prior order had acquired finality.

In light of our 1975 decision in the Davis-Besse antitrust proceeding,[8] the Board below was clearly correct in this appraisal of the situation. There, we were called upon to determine the appealability as a matter of right of certain discovery rulings made below. Concluding that the answer turned upon whether the rulings amounted to a "final decision", we held

> The test of "finality" for appeal purposes before this agency (as in the courts) 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.

2 NRC at 758 (footnotes omitted). It cannot, of course, be seriously disputed that the portion of the May 1979 order here under attack did (as the Board below noted) dispose of a very major segment of the present proceeding.[9] Nor did the Board leave room for the slightest doubt that that order represented its ultimate word on the subject of the proposed expansion of the burial site.

8/ Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752. As seen, p. 4 , supra, the Board was quite aware of that decision.

9/ Indeed, in its argument on the merits, the Chicago Section not merely recognizes but appears to emphasize that fact. See pp. 9-10 , infra.

III

Although the time limits established by the Rules of Practice with regard to appeals from Licensing Board decisions and orders are not jurisdictional, our general policy has been to enforce them strictly. See Iowa Electric Light & Power Co. (Duane Arnold Energy Center), ALAB-108, 6 AEC 195 (1973). Without implying an alteration in that policy, we nevertheless lay to one side the untimeliness of the appeal in this instance. Giving Chicago Section the benefit of all reasonable doubt, it appears that the lateness likely was not occasioned by a lack of diligence but, rather, stemmed from an unfortunate misapprehension respecting the immediate appealability of the portion of the May 1979 order in question. Granted, had Davis-Besse, ALAB-300, supra, been consulted, Chicago Section would (or at least should) have detected the error in its thinking. We see no compelling necessity, however, to visit the heavy penalty of appeal dismissal for the failure of its counsel to have uncovered that decision. In this connection, none of the other parties to the proceeding has asserted that it would be materially prejudiced by our consideration of the merits of the May 1979 order at this late date.

Accordingly, we shall now move on to examine the Chicago Section's claim that the portion of NECO's application which sought authorization to expand the Sheffield burial site could

not be dismissed without the prior preparation of an environmental impact statement and the evaluation of alternatives. That examination compels the conclusion that the claim is insubstantial.

1. As previously mentioned, central to the Chicago Section's position is its premise that, unless the Sheffield burial site is enlarged, "operations" at that site will have been "effectively terminated". By this, we understand the Chicago Section to have in mind that the existing site will not accommodate any further low-level nuclear wastes. Thus, absent site expansion, "the Sheffield operation [is] converted from an active low-level nuclear waste disposal site to a collection and distribution center where such waste is assembled and shipped to other licensed disposal facilities" in far-removed areas of the United States.[10/]

From this premise, the Chicago Section proceeds to the conclusion[11/] that the dismissal of NECO's application (to the extent it sought authorization to expand the burial site) constituted a "major Federal action significantly affecting the quality of the human environment" within the meaning of

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10/ Br. pp. 3-4.

11/ Id. at pp. 4-6.

Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C). That action is said to be "the abandonment" of the Sheffield "project". Accordingly, we are told, the preparation of an environmental impact statement was a condition precedent to the dismissal.

2. There is a fundamental difficulty with this thesis. The Chicago Section has gone astray in its characterization of the nature and effect of the Licensing Board's action. The May 1979 order did not, of course, allow NECO to "abandon" the 20.45 acre burial site currently under license. To the contrary, the Board expressly denied NECO's motion to withdraw its application for renewal of its existing license. Moreover, whether (and, if so, on what conditions) NECO will be allowed to abjure further responsibility for the licensed site remains to be adjudicated.

It well may be that, as matters now stand, no additional low-level radioactive wastes will or could be stored at Sheffield and that such wastes therefore will have to be transported to alternate, distant burial sites. But whatever environmental consequences may flow from that reality are not attributable to Federal action within the contemplation of NEPA. Although the Chicago Section does not say so explicitly, it seemingly assumes that this Commission has the statutory authority to

compel NECO to expand its burial site and then to receive and store additional waste materials. We know of no such authority and Chicago Section has pointed to none.[12/] As we see it, in this respect NECO is in no different position than an electric utility in possession of an operating license for a single-unit nuclear power facility. Surely, it could not be prevented from withdrawing an application for a permit to construct a second unit unless and until the alternatives to building that unit (e.g., the substitution for it of a fossil-fuel plant) had received a NEPA assessment.

In view of these considerations, Chicago Section's heavy reliance[13/] upon City of New York v. United States, 337 F. Supp. 150 (E.D.N.Y. 1972), is misplaced. That case involved the grant by the Interstate Commerce Commission of the application of a terminal railroad for permission to abandon its entire existing line in the New York City area. Such permission was required by reason of the provision of Section 1(18) of the Interstate Commerce Act, 49 U.S.C. 1(18), to the effect that no rail carrier subject to that Act "shall abandon all or any

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12/ We do not mean to suggest that the Commission may not compel one of its licensees to take additional steps where necessary to protect the public health and safety from the direct consequences of licensed operations. The Chicago Section does not claim, of course, that the expansion of the burial site might be such a step.

13/ Br. pp. 7-8.

portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the [ICC] a certificate that the present or future public convenience and necessity permit of such abandonment". It was in this context that the court held the approval of the abandonment application to be a major Federal action subject to NEPA's commands (and, indeed, the ICC did not contend otherwise).[14/] We need add only that there is nothing in the City of New York opinion which even remotely suggests that the court would have similarly viewed an ICC order which had done no more than to allow a railroad to exercise its right to withdraw an application seeking authorization to expand its existing facilities.[15/]

In sum, all that the Licensing Board did was to allow NECO to pull back the portion of its application which looked to the receipt of authorization to engage voluntarily in activities (i.e., the storage of radioactive wastes on an additional 168 acres) which at present it is not licensed to undertake. This Commission could not have forced NECO to seek such authorization

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14/ See 337 F. Supp. at 158-59.

15/ Suffice it to say that none of the other judicial decisions cited by the Chicago Section involved a situation even remotely analogous to that in the case before us.

(let alone to conduct such activities); hence, it cannot insist that NECO prosecute that portion of the application any further. Far from being a major Federal action depending for its validity upon the results of a prior NEPA appraisal of its consequences, the May 1979 order thus was essentially ministerial in character. It accorded relief which could be withheld from NECO neither as a legal nor as a practical matter, irrespective of how the Chicago Section or anyone else might regard the desirability of an expansion of the Sheffield site to permit further waste storage thereon. Consequently, no environmental impact statement was required. NAACP v. Wilmington Medical Center, Inc., 436 F. Supp. 1194, 1202 (D. Del. 1977), affirmed, 584 F.2d 619 (3rd Cir. 1978).16/

Insofar as it dismissed that portion of the NECO application which sought authorization to expand the Sheffield burial

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16/ For these reasons, it also follows that there is no merit to Chicago Section's further argument (Br. p. 8) that, even if the preparation of an environmental impact statement was not necessary, the Commission has violated its statutory obligation to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources". Section 102(2)(E) of NEPA, 42 U.S.C. 4332(2)(E). Once NECO had elected (as was its right) to withdraw its request for authorization to expand the burial site, there was no longer a proposal for such expansion before the agency.

site, the Licensing Board's May 3, 1979 order is affirmed.[17/]

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Bishop
Secretary to the
Appeal Board

The concurring opinion of Dr. Johnson follows, pp. 15-16, infra.

17/ Needless to say, nothing we have said in this opinion implies any belief as to NECO's continuing obligations with regard to the previously-licensed site. That matter is not now before us.

Concurring Opinion of Dr. Johnson:

I agree that granting NECO's motion to withdraw its application for permission to expand the Sheffield site was not a major Federal action for NEPA purposes, and for this reason I join in the Board's opinion. In doing so, however, I must record my belief that this outcome has disturbing elements. While the decision of NECO to withdraw its application was voluntary in a strict legal sense, there is room to conclude that this step was at least indirectly a result of NRC staff actions.[1/] The 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.

It is axiomatic that the NRC must adopt and impose those criteria for the siting and operation of low level waste disposal facilities which are necessary to assure reasonable protection of the public health and safety. But that process cannot be dealt with in the abstract. Radioactive waste products will continue to be generated in Illinois. If they cannot be interred at Sheffield, an alternative is that they be trucked elsewhere for disposal. That, too, is hazardous. Obviously then, both licensing and not licensing Sheffield's expansion have consequences

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1/ See for instance the letter of James N. Neel (President of NECO) to William J. Dircks (Director of the Office of Nuclear Material Safety and Safeguards), dated December 27, 1978.

for the public health and safety. The choice cannot be avoided. If the requirements for siting and operating waste disposal facilities are so stringent as to rule out the economical operation of such facilities, this simply forces selection of alternative waste disposal methods with their attendant hazards and environmental impacts.

I am not able to say what waste disposal alternative would be preferable. But NEPA compels such considerations to be taken into account. It is apparent on this record, however, that no thoughtful assessment was made by the staff respecting the consequences of the requirements it imposed on NECO. This is a manifestly serious omission and it deserves the Commission's attention and corrective action for future cases.

My colleagues have authorized me to state that they are in general agreement with the views expressed in the first two paragraphs of the foregoing opinion. They are not prepared, however, to go so far as to say that it is apparent on the record before us that the staff failed to make a thoughtful assessment of the consequences of the requirements it imposed on NECO's site expansion proposal. In their judgment, the most that can be said is that the record does not affirmatively establish that such an assessment was made.