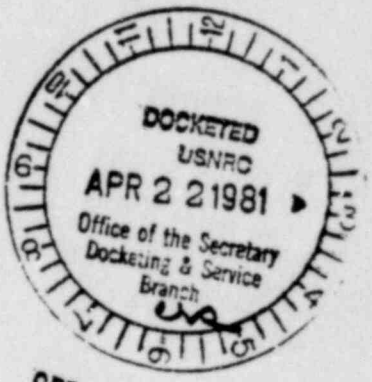
LBP-81-9

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Herbert Grossman, Chairman
Dr. Oscar H. Paris, Member
Frederick J. Shon, Member



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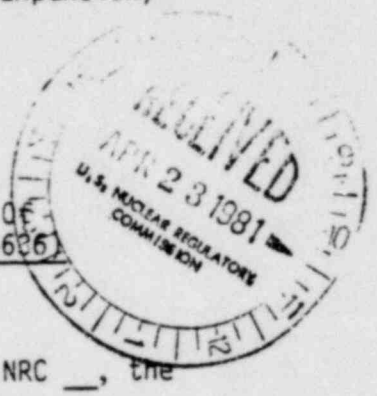
In the Matter of:	)	
CONSUMER POWER COMPANY	)	Docket No. 50-155 OLA
(Big Rock Point Nuclear Plant)	)	(Spent Fuel Pool Expansion)
	)	April 22, 1981



MEMORANDUM
(Reassuring Staff Of Lack Of Prejudgment Of Environmental Assessment Suggested By ALAB-636)

In its decision of March 31, 1981, ALAB-636, 13 NRC __, the Appeal Board reversed this Licensing Board's September 12, 1980 determination, LBP-80-25, 12 NRC 355, that §102(2)(C) of the National Environmental Policy Act (NEPA), 42 USC 4332(2)(C), requires the preparation of an environmental impact statement (EIS) covering the impacts of a proposed spent fuel pool expansion for a plant that had been licensed before NEPA.[1] We had based our decision on the

[1] The EIS we had required would have been considerably more limited than a construction permit or operating license review since it would not have included as an environmental cost either the cost of constructing the facility or the cost of operating the facility to the extent the operation would not be directly facilitated by the spent fuel pool expansion. LBP-80-25, supra, 12 NRC 365.

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grounds that the expansion was for the sole purpose of permitting an additional ten-year term of reactor operation that had never been environmentally reviewed because the facility had been licensed before the passage of NEPA and had never had any of its term of operation environmentally reviewed. The Appeal Board held that NEPA does not require considering the environmental impacts resulting from a Federal action that merely permits continued reactor operation without any change in reactor operation.[2/] We cannot, of course, quarrel with the Appeal Board's reversal of our holding.

The Appeal Board also directed the Licensing Board to "rethink" (Op. 35) and "reconsider" (Op. 41) its purported further determinations that (1) the Staff would inevitably decline to prepare an EIS and (2) the failure to issue an EIS would be erroneous also because the impacts from the physical expansion of the spent fuel pool (disregarding the continued plant operation that the expansion might afford) themselves necessitate the preparation of an EIS. The Appeal Board discoursed at length about the "chilling effect" our "unwise, if not improper" premature decision would have in "inhibit[ing]" the Staff from doing its job of determining whether an EIS is necessary in an "honest and objective fashion," and would result in compromising the "integrity of the hearing process." Op. 35-38.

[2/] The Appeal Board disclaimed any reliance upon the prohibition against a retroactive application of NEPA for its decision. Op. 33, fn. 32. Such reliance could have served to distinguish this situation from a license renewal application.

This Board has no little difficulty in rethinking something that it had not thought in the first place and in reconsidering "an inappropriate prejudgment of the staff's position" (Op. 37) that is not evidenced in our decision. Simply stated, we never decided that the Staff was unalterably committed to not preparing an EIS or that any effect of the proposed spent fuel pool expansion other than the continued plant operation it would afford necessitated the preparation of an EIS. We have carefully reexamined our Memorandum and Order, as well as the Appeal Board's decision, in order to locate the source of the confusion. On reflection, it appears to us to stem from our beginning assumption, apparently not shared by the Appeal Board[3/], that a single Federal action such as the proposed amendment of the license to permit a spent fuel pool expansion, requires and permits the preparation of but a single environmental document encompassing all of the impacts of that action: an environmental impact statement, if the action is major and has a significant effect upon the human environment; an environmental impact appraisal (EIA), accompanied by a negative declaration if otherwise. §102 of NEPA, 42 USC 4332, supra,; 10 CFR §§51.5, 51.7. We had never considered that a single major action having a number of environmental impacts would require or even permit the preparation of separate environmental reviewing documents covering separate impacts, some which may be minor and some major, with an EIS (or EISs) covering the major impacts and an EIA (or EIAs) covering the minor ones. Hence, once we had determined that one of the effects of

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3/ See ALAB-636, supra, Op. 34-35.

the licensing action, viz. the continued operation of the facility over a lengthy term, necessitated the preparation of an EIS, we ordered that the document also cover all other environmental impacts of the licensing action, even though those impacts standing alone might not have required an EIS. It was this part of our order (12 NRC 366) which was the apparent source of confusion.

We did not believe that the continued plant operation effect and other effects of the expansion could be viewed as separate Federal actions requiring the preparation of separate environmental documents (e.g., 2 EISs, 2 EIAs, or an EIS and EIA).[4/] As we read 10 CFR §§51.5 and 51.7, the action to be assessed was the amendment of the license to permit the spent fuel pool expansion. Thus, the environmental review would have considered all of the impacts resulting from that action and, in our view, those impacts included continued plant operation.[5/]

From the foregoing discussion, it is clear that the parties can be further reassured that our Memorandum and Order did not also postulate, as suggested by the Appeal Board (Op. 36, fn. 36), that an action that otherwise does not have a significant effect on the environment may be transformed into one that does by the absence of an environmental review of a different, prior action. The Appeal

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4/ Ibid.

5/ We concede that if one were to begin with the assumption (as we did not) that the separate impacts of a single licensing action may require the preparation of separate environmental documents, one could easily misinterpret our decision as requiring an EIS to cover continued plant operation and at least one other EIS to cover all other impacts arising from the spent fuel pool expansion. In fact, all that we determined was that the action facilitating continued plant operation required the preparation of an EIS.

Board's suggestion was in the context of our having distinguished the instant proposed spent fuel pool expansion from other spent fuel pool expansions in which EISs were not required.[6/] We noted that in those cases there had been prior environmental reviews that need not be duplicated for the spent fuel pool expansion. However, as we thought was apparent in our opinion, those prior environmental reviews were prepared at the operating license stage and covered the impacts from the operation of the reactor that we recognized should not have to be duplicated in the spent fuel pool expansion proceeding. Since none of the other impacts of the spent fuel pool expansions in those cases could have been covered in the environmental review at the operating license proceeding, the only portion of the review of the proposed spent fuel pool expansion that could have duplicated the prior environmental review was that regarding the continued plant operation. The impacts of the change in fuel pool itself have been deemed negligible in all cases we have discovered. We do not disagree with the findings in those cases: we thought we had carefully distinguished them from the case at bar.

6/ Commonwealth Edison Company (Zion Station, Units 1 and 2), LBP-80-7, 11 NRC 245 (1980); Portland General Electric Company (Trojan Nuclear Plant), LBP-78-32, 8 NRC 413, 449-50 (1978), aff'd, ALAB-531, 9 NRC 263 (1979), Duquesne Light Company (Beaver Valley Power Station, Unit 1) LBP-78-16, 7 NRC 811, 816 (1978); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-77-51, 6 NRC 265, 268 (1977), aff'd, ALAB-455, 7 NRC 41 (1978), remanded on other grounds, sub. nom. State of Minnesota v. NRC, 602 F 2d 412 D.C. Cir. 1979).

In sum, we need not await the preparation of the Staff's environmental analysis as suggested by the Appeal Board (Op. 35, 41), to affirm to the parties that our September 12, 1980 Memorandum and Order did not in any measure prejudge the issue of whether the effects of expanding the spent fuel pool, per se, necessitate the preparation of an EIS.[7/] If one purpose of the Appeal Board's discussion is to facilitate the Staff's making its analysis in "an honest and objective fashion," we have concluded that we would be better advised to clarify our position before the Staff makes its assessment. The Staff should be reassured, regardless of the outcome of Commission review, that it can proceed totally uninhibited by our September 12, 1980 Order, which was directed solely towards the question of whether the additional term of operation that the expansion would permit necessitated the preparation of an

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7/ ALAB-636 faulted us for purportedly prejudging the question of whether an EIS is necessitated by the impacts that might result from the spent fuel pool expansion, other than from continued plant operation. However, it decided the continued plant operation issue on the merits, apparently accepting our view that this issue could be considered ripe for determination as a matter of law, notwithstanding that the environmental assessment had not yet issued. See LBP-80-25, supra, 12 NRC 364, fn. 2. We concede that a strict adherence to NRC procedures might have required our also delaying this question until after the Staff had spoken. But we were aware that operation of a nuclear plant for some years has heretofore always required an EIS, and we were reluctant to delay such a decision lest the delay result in a shutdown for lack of storage space.

EIS,[8/] a matter on which the Appeal Board has now spoken. Similarly, in view of the Appeal Board opinion, we take no position at this juncture on whether the other effects of the spent fuel pool expansion require the preparation of more than one environmental document.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Herbert Grossman, Chairman
ADMINISTRATIVE JUDGE

Oscar H. Paris
Dr. Oscar H. Paris, Member
ADMINISTRATIVE JUDGE

Frederick J. Shon, Member
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 22nd day of April 1981.

8/ That we had requested the parties to assume only "arguendo" the Staff's prospective issuance of an EIA was recognized early in the Appeal Board's decision. Op. 4. It was apparently forgotten when we were later seen as promoting this assumption into "an inappropriate prejudgment of the staff's position." Op. 37.