

09/13/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
CONSUMERS POWER COMPANY)	Docket No. 50-155
(Big Rock Point Nuclear Power)	(Spent Fuel Pool Modification)
Plant))	

NRC STAFF REPLY TO INTERVENORS' PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW
CONCERNING THE ENVIRONMENTAL IMPACT APPRAISAL

I. INTRODUCTION

On August 21, 1982, Intervenors Christa-Maria et al., filed their Proposed Findings of Fact and Conclusions of Law Concerning the Environmental Impact Appraisal (Findings). In their Findings, Intervenors state that:

1. The Staff's Environmental Impact Appraisal (EIA) does not comply with Section 102(2)(E) of the National Environmental Policy Act (NEPA)^{1/}, and
2. The Staff [should be] directed to study, develop and describe alternatives to recommended course of action of expanding the spent fuel pool and to fill [sic] its results in this proceeding.

For the reasons given below, Intervenors' Findings should be rejected by this Licensing Board.

1/ 42 U.S.C. § 4332(2)(E)

II. ARGUMENT

A. INTERVENORS' ARGUMENT IN THEIR PROPOSED FINDINGS IS UNTIMELY AND IS NOT SUPPORTED BY THE HEARING RECORD.

In their Findings, Intervenors have produced a lengthy legal argument as to why the Staff in its EIA should have discussed alternatives to the proposed action in this proceeding. The Staff submits that such an argument should have been submitted in advance of the hearing and that no attempt was made by the Intervenors at the hearing to lay a foundation for the argument.

On March 1, 1982, during an on-the-record telephone conference, the Chairman of the Atomic Safety and Licensing Board (Board) requested that pretrial briefs be filed by the parties "on the outstanding NEPA issues left after the Appeal Board's decision."^{2/} Tr. at 267.

The briefs were to address two issues:

1. In light of the Staff's Environmental Impact Appraisal (EIA), which was issued on May 15, 1981, whether an Environmental Impact Statement (EIS) on the expansion of the spent fuel pool is called for; and
2. Whether the Board is required to consider alternatives to the expansion by Section 102(2)(E) of NEPA. Tr. at 268.

^{2/} This statement refers to the Atomic Safety and Licensing Appeal Board's decision on Consumers Power Company (Big Rock Point Nuclear Power Plant) ALAB-636, 13 NRC 312 (1981).

All parties filed briefs on these issues.^{3/} At that time, the Intervenor had a full opportunity to raise the issues they now seek to raise in their proposed Findings.

While the Board had not ruled on the positions taken by the parties in their briefs on the "alternatives" issue at the time the EIA was introduced into evidence at the hearing (Tr. 2286), it would only be reasonable for the parties to assume that all legal positions had been stated. The hearing record on the EIA was closed on June 11, 1982 (Tr. 2327). For Intervenor to now come forward with additional legal argument, two months after the hearing and three months after briefs on this issue were to be submitted, is not a practice to be condoned.

In addition, Intervenor made no attempt at the hearing to show by evidence that a discussion of alternatives was required in the EIA. Counsel for Intervenor objected to the admissibility of the EIA on that basis (Tr. 2286), and was informed by the Board Chairman that it was a matter to be demonstrated through proof. (Tr. 2287). Counsel was also informed that if there were matters that Intervenor thought were inadequately covered in the EIA, they may be brought out through cross-examination (Tr. 2289). Not once during Intervenor's cross-examination (Tr. 2290-2323), was the question of alternatives brought up.

^{3/} NRC Staff Brief on NEPA Issues, filed May 17, 1982; Brief of Consumers Power Company on the Status of Remaining NEPA Issues, filed April 27, 1982; Intervenor Memorandum Regarding NEPA Issues, filed May 13, 1982; John O'Neill's Discussion of NEPA, filed May 17, 1982.

The Staff submits that some sort of foundation was required to be laid at the hearing on this issue to allow Intervenors now to present legal arguments concerning alternatives.

In sum, Intervenors neither made their legal arguments at the proper time, i.e., in their prehearing brief, nor made any effort at the hearing to put into question by cross-examination the lack of discussion of alternatives in the Staff's EIA. For these reasons, the Board should reject the Intervenors' proposed Findings.

B. THE STAFF DID COMPLY WITH SECTION 102(2)(E) OF NEPA AND DID NOT NEED TO DISCUSS ALTERNATIVES IN THE EIA

Intervenors state that the Staff has not demonstrated that there is no unresolved conflict concerning alternative resources, as required by Section 102(2)(E) of NEPA.^{4/} Findings at 1. However, in their argument, there is no mention of Section 7.2.2 of the EIA which states:

7.2.2 Material Resources

In order to carry out the proposed modification, the licensee will require racks fabricated of stainless steel. The construction of the new racks will require the commitment of 63,000 pounds of stainless steel. The amount of stainless steel used annually in the U. S. is about 2.82×10^{11} pounds. Thus, the amount of stainless steel required for fabrication of the new racks is a

^{4/} Section 102(2)(E) of NEPA, 42 U.S.C.A. § 4332(2)(E), provides that "all agencies of the Federal Government shall -- develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."

small fraction of this resource consumed annually in the U. S. We conclude that the amount of stainless steel required for the racks for the proposed modification is insignificant and does not represent an irreversible commitment of natural resources. We also conclude that there are no unresolved conflicts in alternative uses of available resources associated with the fabrication of the new stainless steel racks. (emphasis added).

As explained in the NRC Staff Brief on NEPA Issues, filed May 17, 1982, at pp. 6, 7 the "resources" in question are the materials that go into making the new spent fuel racks, i.e. the stainless steel. See Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 265 (1979), cited with approval in Virginia Electric and Power Co. (North Anna Nuclear Power Station), ALAB-584, 11 NRC 451, 457 (1980). Neither at the hearing during cross-examination, nor in their proposed Findings, have the Intervenor's addressed, much less challenged, the Staff's analysis or conclusion in Section 7.2.2 of the EIA. Intervenor's merely note they could find only two cases which refer to "unresolved conflicts," then make the conclusionary statement that to determine "unresolved issues", the Staff must study the alternatives. Findings at 6, 7.

In Big Rock Point, the Appeal Board noted that "some factual basis . . . is necessary to determine whether a proposal 'involves unresolved conflicts concerning alternative uses of available resources'." ALAB-636 at 332.

The Staff has introduced its EIA, including Section 7.2.2, into evidence. The Intervenor's have not attempted to contradict the conclusion of Section 7.2.2; rather, they conclude that alternatives need to be studied. The Supreme Court has stated that "administrative proceedings should not be a game or a forum to engage in unjustified

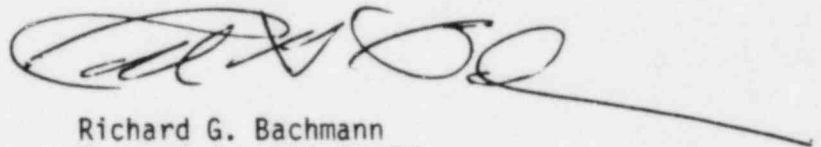
obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered . . .". Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978), accord, The Township of Lower Alloways Creek v. Public Service Electric and Gas Co. and U.S. Nuclear Regulatory Commission, No. 81-2335, slip op. at 21, (3rd Cir. Aug. 27, 1982).

In sum, contrary to Intervenor's assertions, the Staff has made factual findings, and has determined that there are no unresolved conflicts concerning alternative uses of available resources. Intervenor has not challenged that determination on the record. Therefore, the Board should find that the Staff's EIA is in compliance with Section 102(2)(E) of NEPA, that the Staff need not consider alternatives to the proposed action, and that Intervenor's proposed Findings are without merit.

III. CONCLUSION

For the reasons discussed above, this Licensing Board should reject the Intervenor's proposed findings.

Respectfully submitted,



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Counsel for NRC Staff

Dated at Bethesda, Maryland
this 13th day of September, 1982.