

09/15/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	}	Docket No. 50-309 (Spent Fuel)
MAINE YANKEE ATOMIC POWER COMPANY		
(Maine Yankee Atomic Power Station)		

NRC STAFF RESPONSE IN OPPOSITION TO SENSIBLE
MAINE POWER'S PROPOSED SUPPLEMENTAL CONTENTIONS

I. INTRODUCTION AND BACKGROUND

By Memorandum and Order dated April 12, 1982, this Board admitted nine of Sensible Maine Power's (SMP) eighteen original proposed contentions in this proceeding.^{1/} Although certain of SMP's proposed original contentions were denied, the Board stated that if upon issuance of the Staff's Safety Evaluation Report (SER) and environmental analysis SMP desired to offer more specific contentions based upon those documents it should do so within thirty days after their issuance.^{2/} An SER and environmental impact appraisal (EIA) were issued by the Staff on

^{1/} See Memorandum and Order, dated April 12, 1982, at 23-26 (hereinafter "Order") and Intervenor's Specific Contentions, dated October 5, 1982 (hereinafter "Original Contentions"). By that same Order, the State of Maine had five of its sixteen proposed original contentions admitted. Order at 25-26.

^{2/} Order at 5.

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June 16, 1982. The Board subsequently extended the time when EIA and SER related contentions should be filed to August 30, 1982.^{3/}

Pursuant to the Board's scheduling order, SMP filed eight "Additional Specific Contentions on Behalf of Sensible Maine Power" on August 30, 1982 (hereinafter "Proposed Supplemental Contentions"). However, SMP failed to explain in that filing how many of its proposed supplemental contentions stemmed from either the SER or EIA. Rather, SMP candidly admitted that the eight proposed supplemental contentions stem from "several sources", specifically: rejected SMP contentions, admitted contentions which SMP feels warrant additional consideration and several "new" subjects which SMP makes no effort to show stem from either the SER or EIA.^{4/}

The Staff respectfully submits that the only basis upon which a new contention may be admitted at this late date is if, but for the issuance of either the SER or EIA, SMP could not have proffered the contention earlier.^{5/} To the extent any of the proposed supplemental contentions are not directly based upon either the SER or EIA, SMP should have, but

^{3/} Memorandum and Order (Concerning Schedule and Further Proceeding) dated July 20, 1982 at 2.

^{4/} Proposed Supplemental Contention at 1.

^{5/} This threshold test is in keeping with the Board's Orders of April 12, 1982 and July 20, 1982, and should be applied to all contentions before the Board looks further at a contention to determine whether it is otherwise litigable. This approach is consistent with the recent Appeal Board decision in Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, Slip Op. (August 19, 1982).

has not, addressed the five factors governing late filed contentions under 10 C.F.R. § 2.714.

Although each proposed supplemental contention will be addressed in turn, at the onset it should be stressed the Staff opposes the admission of all but one of the proposed supplemental contentions for one of the following reasons:

- (1) SMP has improperly used this filing as an opportunity to resubmit and attempt to cure defects in previously raised contentions which have been properly considered and rejected by this Board;
- (2) SMP has not established the nexus between the general subject matter of each proposed supplemental contention and either the SER or EIA;
- (3) even assuming certain of the proposed supplemental contentions are derived from either the SER or EIA, they are so vague and lacking in the requisite bases and specificity as to be inadmissible under the standards of 10 C.F.R. § 2.714(b);^{6/} and
- (4) SMP has without explanation and unnecessarily restated admitted contentions without explaining how they can form the basis of a new separate contention.

Each contention will now be addressed.

II. DISCUSSION

A. Proposed Supplemental Contention 1

Proposed supplemental contention 1 is substantially the same as SMP's original contention 1.^{7/} Indeed, SMP incorporates by reference

^{6/} The Commission's requirements relative to bases and specificity for contentions was set forth in the Board's April 12, 1982 Order at 2-4 and will not be restated in this pleading.

^{7/} Compare Original Contentions at 3-5 to Proposed Supplemental Contentions at 3-5.

its entire argument from its earlier filing.^{8/} This contention reasserts SMP's claim that the licensing of the Applicant's spent fuel pool expansion constitutes a major federal action significantly affecting the quality of the human environment requiring the Staff to prepare an environmental impact statement under NEPA, 42 USC § 4332. When this contention was first argued the Board correctly ruled that since the Staff had not issued an EIA any contention claiming an EIS should be written must be deferred until the Staff's environmental analysis is issued. Order at 5. In light of the Staff's EIA, SMP now claims that an EIS should be drafted.

This contention is substantially the same as the State of Maine's proposed supplemental contention 6 in that both challenge the conclusion in the Staff's EIA that this is not a major federal action significantly affecting the quality of the human environment. The Staff submits, for the reasons set forth below, that the contention of the State of Maine on this subject is more appropriately framed for litigation, and accordingly, SMP's proposed supplemental contention 1 should be denied and SMP joined as a co-sponsor of the State's contention 6, to include paragraph 1(a) dealing with additional heat which may be added to Montsweag Bay. Paragraph 1(b) of SMP's contention 1 is encompassed within the assigned reason 1 of the State of Maine's contention 6.

The other basis assigned as reasons why an EIS should be prepared are incorrent as a matter of law and must be rejected. SMP maintains in

^{8/} Proposed Supplemental Contention at 3.

1(c) of its contention that the recent Court of Appeal Decision in Potomac Alliance v. Nuclear Regulatory Commission, Case No. 80-1862 (decided July 20, 1982) held that the Staff's failure to consider the long range future effects of permitting increased storage of spent fuel constituted a violation of NEPA. Such is not the holding of Potomac Alliance. Potomac Alliance held that NEPA permitted the long range future effects of permitting the increased storage of spent fuel on site to be considered by the NRC in a generic rulemaking proceeding known as the "Waste Confidence" proceeding. See Potomac Alliance, supra, slip op at 2-4. In accord Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979).

SMP maintains in 1(d) of its contention that People Against Nuclear Energy vs. Nuclear Regulatory Commission (Case No. 81-1131) held that the NRC's failure to consider psychological stress in its environmental assessment action is a violation of NEPA. This case is far more limited than SMP suggests and turns on the unique facts surrounding the TMI restart proceeding. The Commission has recently provided general guidance to any Board which has been presented a psychological stress contention as a result of this decision. See generally Statement of Policy, dated July 16, 1982. As the Commission states in that position paper, contentions alleging psychological stress resulting from Commission licensed activities must meet three criteria:

First, the impacts must consist of "post-traumatic anxieties," as distinguished from mere dissatisfaction with agency proposals or policies. Second, the impacts must be accompanied by physical effects. Third, the "post-traumatic anxieties" must have been caused by "fears of recurring catastrophe." This third element means that some kind of nuclear

accident must already have occurred at the site in question, since the majorities holding was directed to "post-traumatic anxieties" and by fears of a "recurring" catastrophe. Statement of Policy at 4.

Obviously, the Maine Yankee proposed spent fuel pool expansion does not fall within these three criteria and thus psychological stress need not be considered by the Staff.

Finally, SMP proposed supplemental contention 1(e) does nothing more than reference its "Comments" on the Staff's EIA. This critique is offered elsewhere by SMP as its proposed supplemental contention eight and for the reasons set forth in response to that contention, infra at 14, should not be admitted as a contention. In light of the fact SMP's proposed contention 1 lacks the specificity of the State of Maine's comparable contention, and since several of its assigned basis are incorrect as a matter of law, the Staff submits this contention should be denied and SMP joined as a co-sponsor of the State's proposed supplemental contention 6.

B. Proposed Supplemental Contention 2

Proposed supplemental contention 2 is an effort by SMP to improperly use this filing opportunity to resubmit and attempt to cure defects in a previously raised contention which has been properly considered and rejected by this Board. SMP's original proposed contention 3 claimed, as its proposed supplemental contention 2 now claims, that the Applicant has not adequately identified, described or analyzed the specific operating procedures to govern its proposed d/r/c scheme.^{9/} SMP has completely

^{9/} Compare Original Contentions at 6-2 Proposed Supplemental Contentions at 5-7.

failed to establish a nexus between this contention and the recent issuance of the Staff's SER and EIA. Moreover, SMP has also failed to address the late filed contention requirements of 10 C.F.R. § 2.714.

The Board correctly ruled on this earlier contention, noting that there is no requirement that operating procedures be submitted now and therefore rejected the contention. However, the Board further stated that it expects the Staff will have an opportunity to review these procedures before they are implemented by the Licensee. In accordance with established Staff procedures, the Staff will perform an audit of the implementing procedures after this amendment has been authorized but before Maine Yankee undertakes the actions necessary to implement the spent fuel pool expansion.^{10/} Moreover, SMP has not detailed which, if any, particular implementing procedures need be examined before the amendment is issued, in order to protect the public health and safety. Where an issue is not concrete it must be rejected as lacking the requisite specificity to put parties on notice as to what is to be litigated. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). In light of this fact and the fact proposed

^{10/} Indeed, the well established sequence of NRC review in all licensing matters is that implementing or operating procedures are audited by the appropriate regional office after a license or amendment has been authorized but before the licensee undertakes the actions authorized by the license or amendment. In this case, the Office of Nuclear Reactor Regulation has reviewed a description of the proposed licensing action in order to calculate the radiological effects of the amendment but has not assured itself that all implementing procedures have been defined and will be in place prior to the Applicant undertaking the authorized activity. This is the task of the appropriate regional office after issuance of the amendment. In this regard, it must be remembered that licensing is not a single discreet action but an on-going activity. cf. New England Power Company, et al. (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 281 (1978).

supplemental contention 2 is substantially the same as a previously rejected contention and the rationale for why that contention was earlier rejected remains in force, this contention should be similarly rejected. See Order at 6.

C. Proposed Supplemental Contention 3

In proposed supplemental contention 3, SMP lists a number of alternatives to the Applicant's proposed license amendment which it alleges are environmentally preferable and have not been considered by either the Licensee or Staff. Apparently, this proposed supplemental contention is built upon the same premise as proposed supplemental contention 1 - that this is a major federal action significantly affecting the quality of the human environment and therefore alternatives should be examined under § 102(2)(C) of NEPA.^{11/} This supplemental contention is virtually identical to proposed original contention 4 which was rejected by this Board as premature.^{12/} The Board took the opportunity in ruling on this contention to state its understanding of when alternatives must be considered under NEPA:

"Moreover, it is the understanding of the Board that NEPA requires consideration of alternatives "only when the proposed action is a 'major' one 'significantly affecting the quality of the human environment' or 'involves unresolved conflicts

^{11/} SMP has not alleged that this amendment involves unresolved conflicts concerning alternative uses of available resources, thus requiring an examination of alternative resources under § 102(2)(E), regardless of the findings under § 102(2)(C). See 42 USC § 4332(2)(C) and (E), as amended.

^{12/} Order at 7, compare Proposed Supplemental Contentions at 7-8 to Original Contentions at 6-8.

concerning alternative uses of available resources.' 42 U.S.C. 4332(2)(C), (E)." Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1) ALAB-650, 14 NRC 43, 65 n.33 (1981); see Virginia Electric Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 457-58 (1980).

Thus, until the Staff's conclusion that this license amendment does not involve a major federal action significantly affecting the quality of the human environment is refuted, alternatives need not be examined and this contention should be denied.

Notwithstanding the above, several additional points should be made at this time relative to SMP's proposed supplemental contention 3. First, nowhere has SMP explained why the discussion of alternatives in the generic EIS on the "Handling and Storage of Spent Light Water Power Reactor Fuel," NUREG-0575, does not adequately resolve its concerns. NEPA may be satisfied by coupling a generic treatment of an issue with a plant specific EIA. Potomac Alliance, supra and Minnesota, supra.

In addition, to the extent that subsection 3(b) of this contention asks this Board to examine alternatives to continued plant operation, 10 C.F.R. § 51.53 of the Commission's regulations has recently been amended to eliminate such issues. Paragraph (c) states:

"(c) Presiding officers shall not admit contentions proffered by any party concerning need for power or alternative energy sources for the proposed plant in operating license hearings." 47 Fed. Reg. 12943, March 26, 1982. Effective date April 26, 1982. See Proposed Supplemental Contention 3(b).

Moreover, in challenging whether the licensing amendment will satisfy ALARA requirements under subsection 3(a), this aspect of the contention merely duplicates the issue brought into question by admitted SMP contention 1 and should not form the basis for a new redundant contention.

D. Proposed Supplemental Contention 4

Proposed supplemental contention 4 is essentially the same as proposed original contention 11.^{13/} In both contentions, SMP maintains that an independent seismic standard, assumedly more stringent than Maine Yankee's existing seismic design criterion, must be established for the spent fuel pool in light of the proposed d/r/c scheme.

The Board found that any contention on the seismic design of the Maine Yankee Station is admissible only to the extent it relates to the effect the spent fuel pool modification may have on the ability of the spent fuel pool to withstand earthquakes which the plant is currently designed to withstand. Order at 12. Accordingly, the Board modified and admitted SMP's proposed original contention 11 as follows:

"The spent fuel pool, when fully loaded or in any configuration now contemplated, will not comply with Class I seismic design criteria for MYAPS."
SMP admitted contention 6.

By resubmitting proposed original contention 11 SMP has ignored the Board's ruling on its earlier contention. This is but another attempt

^{13/} Compare Proposed Supplemental Contentions at 8-9 to Original Contentions at 11-12.

by SMP to improperly use this filing opportunity to resubmit a previously raised contention which has been properly considered and rejected by this Board. Nowhere in its most recent filing does SMP show a nexus between its proposed supplemental contention 4 and either the SER or EIA. Therefore, the reasons set forth in the Board's previous order, this contention should again be rejected. See Order at 11-12.

E. Proposed Supplemental Contention 5

SMP's proposed supplemental contention 5 merely reasserts previously rejected proposed contention 14. No attempt is made to establish that this contention stems from either the SER or EIA. Rather, the basis upon which SMP asserts this contention is a recent Court of Appeals decision. See Potomac Alliance, supra.

Proposed supplemental contention 5 maintains that the Staff and Applicant should consider and analyze the long term health, safety and environmental costs of the proposed amendment with respect to maintaining and operating the pool after the facility's operating license expires.^{14/} Relying upon Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 68-69 (1981), this Board earlier held that the long term affects of storage of spent fuel on site not be considered in a licensing context since it would constitute an inadmissible challenge to the Commission's "Waste Confidence" rulemaking proceeding. Order at 14.

^{14/} See Original Contentions at 13, Proposed Supplemental Contentions at 9-10 and Order at 14.

SMP, however, maintains that the holding in Potomac Alliance, supra, warrants reconsideration of that Board ruling. It is argued that Potomac Alliance held that a failure to consider such long term effects during a spent fuel amendment is a violation of NEPA. Proposed Supplemental Contentions at 9-10. The Staff disagrees with this reading of Potomac Alliance. Potomac Alliance held that NEPA is not violated if the long range future effects of permitting spent fuel on site are considered in a generic rulemaking proceeding. See Potomac Alliance, supra, at 3-4. The Court of Appeals did warn the Staff that the failure to reach a determination in the Waste Confidence proceeding by June 30, 1983, will place in jeopardy the Court of Appeals conclusion that this is a valid means to satisfy NEPA. Id. at 4. However, Potomac Alliance does not justify disruption of the Board's earlier rejection of this contention. The costs associated with maintaining and operating a spent fuel pool after a plant's operating license has expired will be addressed in the Waste Confidence proceeding and Potomac Alliance indicates that such a generic proceeding satisfies NEPA. Id. at 4.

F. Proposed Supplemental Contention 6

Proposed supplemental contention 6 is yet another example of SMP's effort to improperly use this filing opportunity to resubmit and attempt to cure defects in a previously raised contention which has been properly considered and rejected by this Board. SMP concedes that proposed supplemental contention 6 is the same as proposed original contention 7. Proposed Supplemental Contentions at 10-11. Initially, and most importantly, no showing has been made, nor could one be, of the nexus between

supplemental contention 6 merely reasserts that there is not reasonable assurance that the spent fuel pool could continue to operate safely in the event of a Class 9 accident. In response to proposed original contention 7 this Board has already ruled:

"This Board has jurisdiction to consider only issues concerning the application to modify the spent fuel pool which were specified by the Commission's notice of hearing. See Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426-27 (1980). It is unclear that this contention relates to the proposed amendment. There is no indication how the proposed modification could affect the ability of the spent fuel pool to operate in the event of a Class 9 accident in the reactor. Therefore, the contention is rejected as vague and without basis. Order at 9.

Nothing in SMP's most recent filing cures this defect. Accordingly, the Staff submits this proposed supplemental contention should be dismissed outright as not stemming from either the EIA or SER; or in the alternative, rejected as it had earlier as lacking the basis and specificity required by 10 C.F.R. § 2.714.

G. Proposed Supplemental Contention 7

Proposed supplemental contention 7 is concerned with the risks associated with increased fuel handling occasioned by the Applicant's amendment. This concern is already the subject of admitted SMP contention 7. SMP admitted contention 7 states:

"Applicant has not significantly considered or analyzed the consequences of an accident involving the dropping of a fuel assembly or fuel cask in the pool under the conditions created by its d/r/c scheme. Given the higher concentration of fuel in the spent fuel pool; such accident is more likely to yield a greater generation of heat and radioactivity.

Further, Applicant has neither analyzed or demonstrated the means of protecting against accidents in which dropped fuel assemblies or spent fuel casks could be deflected by the edge of the spent fuel pool and into stored fuel." Order at 24.

In addition to the fact that it has not been shown how this contention is derived from either the EIA or SER, the concerns set forth in this proposed supplemental contention are encompassed by admitted SMP contention 7 and accordingly should not form the basis of a new separate contention.

H. Proposed Supplemental Contention 8

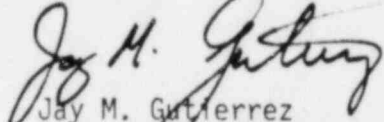
The subject matter of proposed supplemental contention 8 is derived from the EIA and SER. However, it is not in litigable form. SMP urges this Board to require the Staff and Applicant to make greater assurances in light of a series of "comments" SMP offers on the EIA and SER. This is not a contention but a critique of the Staff's SER and EIA. Such a critique completely fails as a contention, when examined in light of the basis and specificity requirements of 10 C.F.R. § 2.714. The proffered contention is entirely too vague and lacking in specificity to itself constitute a contention. See Peach Bottom, supra and Order at 2-4.

III. CONCLUSION

For the aforesaid reasons, SMP should be joined as co-sponsor of the State of Maine's proposed supplemental contention 6 and each of the

remaining proposed supplemental contentions of Sensible Maine Power should be denied.

Respectfully submitted,


Jay M. Gutierrez
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 15th day of September, 1982.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
MAINE YANKEE ATOMIC POWER COMPANY) Docket No. 50-309
(Maine Yankee Atomic Power Station)) (Spent Fuel)

CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF RESPONSE IN OPPOSITION TO SENSIBLE MAINE POWER'S PROPOSED SUPPLEMENTAL CONTENTIONS 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 15th day of September, 1982.

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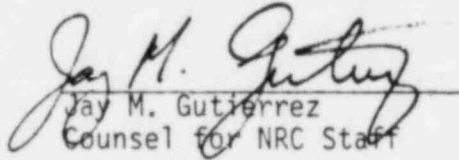
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