

09/15/82

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)

NRC STAFF RESPONSE IN OPPOSITION TO THE STATE
OF MAINE'S PROPOSED SUPPLEMENTAL CONTENTIONS

I. INTRODUCTION AND BACKGROUND

By Memorandum and Order dated April 12, 1982, this Board admitted five of the State of Maine's (hereinafter the "State") sixteen original proposed contentions in this proceeding.^{1/} Although certain of the State's proposed original contentions were denied, the Board stated that if upon issuance of the Staff's Safety Evaluation Report (SER) and environmental analysis the State 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

^{1/} See Memorandum and Order, dated April 12, 1982, at 25-26 (hereinafter "Order") and Amended Contentions of the State of Maine, dated October 5, 1982 (hereinafter "Original Contentions"). By that same Order, Sensible Maine Power had nine of its eighteen proposed original contentions admitted. Order at 23-26.

^{2/} Order at 17.

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on 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, the State filed ten "Additional Contentions of the State of Maine" on August 30, 1982 (hereinafter "Proposed Supplemental Contentions"). However, the State failed to explain in that filing how many of its proposed supplemental contentions stemmed from either the SER or EIA. Rather, in its most recent filing the State has simply resubmitted its prior rejected contentions as if the board's grant to file EIA/SER related contentions implied permission to attempt to cure defects in those previously rejected contentions.^{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, the State could not have proffered the contention earlier.^{5/} To the extent any of the proposed supplemental contentions

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

^{4/} Many of the State's proposed supplemental contentions are substantially the same as contentions filed by Sensible Maine Power in its most recent pleading, "Additional Specific Contentions on Behalf of Sensible Maine Power", dated August 30, 1982. Accordingly, wherever possible so as to avoid unnecessary duplication of argument, the Staff will refer to the appropriate page in its response to the filing of Sensible Maine Power.

^{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).

are not directly based upon either the SER or EIA, the State should have, but 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) the State 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) the State has not established the nexus between the general subject matter of each proposed supplemental contention and either the SER or EIA; and
- (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/}

Each contention will now be addressed.

II. DISCUSSION

A. Proposed Supplemental Contention 6

Proposed supplemental contention 6 is substantially the same as the State's original contention 1(a)-(d).^{7/} Indeed, the State incorporates

^{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 1-7 to Proposed Supplemental Contentions at 2-9.

by reference its entire argument from its earlier filing.^{8/} This contention reasserts the State's claim that for four assigned reasons 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 17. In light of the Staff's EIA, the State now claims that an EIS should be drafted.

This contention is substantially the same as Sensible Maine Power's (SMP) proposed supplemental contention 1 and should be admitted, as modified, for the reasons set forth below.

The Rules of Practice provide that in a licensing action, such as here, where it has been determined no environmental impact statement need be prepared, any party to the proceeding may challenge that determination. 10 C.F.R. § 51.52(d). The United States Court of Appeals for the Third Circuit has recently stressed that for an Intervenor in a spent fuel pool case to upset an agency determination not to prepare an impact statement it is incumbent upon that party to show that the project could significantly affect the quality of the human environment. The Township of Lower Alloways Creek v. Nuclear Regulatory Commission, No. 81-2335, Slip Op. at 19-20 (3rd Cir. August 27, 1982). In NRC practice, this is done in the first instance by pleading a contention

^{8/} Proposed Supplemental Contention at 4.

with sufficient basis to alert the parties as to the nature of the claim and what will be litigated. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

The State of Maine's proposed supplemental contention 6 is acceptable for litigation provided it is limited to only those reasons set forth in its basis which are appropriate areas of inquiry by this Board. Specifically, assigned reason four - exploring the environmental affects of storing fuel at Maine Yankee after the expiration of the operating license - is the proper subject of the Waste Confidence proceeding and should not be examined in individual licensing cases. NEPA is satisfied by addressing this concern in a generic rulemaking proceeding and the Commission has chosen to so proceed. Potomac Alliance v. Nuclear Regulatory Commission, No. 80-1862, (D.C. Cir. July 20, 1982) and Order at 18. It is stressed by the Staff that the burden in showing an EIS should have been prepared now shifts to the State. Lower Alloways Creek, supra; however, as modified, this is an acceptable contention for litigation.

B. Proposed Supplemental Contention 7

Proposed supplemental contention 7 is an effort by the State 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. Other than alleging that the Staff has failed to address its concerns in the area of this contention, no effort has been made by the State to show the nexus between the subject of this contention and either the SER or EIA.

In proposed supplemental contention 7 the State claims that the spent fuel pool expansion will increase the probability and consequences of a total or partial loss of coolant from the spent fuel pool. This contention is near identical to the State's originally rejected contention 2.^{9/}

The Board earlier rejected this contention stating:

The Board finds this contention inadmissible. This contention is so lacking in specificity that the parties are not on notice about its content. No reasonably specific mechanism for such an accident is alleged, nor is it clear how the probability of an accident would be increased. Order at 17.

Filed in virtually the same form as the previous contention, proposed supplemental contention 7 continues to suffer from a lack of specificity. More importantly, this contention should be rejected as not stemming from either the SER or EIA.

C. Proposed Supplemental Contention 8

Here again, the State is merely resubmitting a contention previously rejected by this Board without even making an effort to establish how this contention is derived from either the SER or EIA. Proposed supplemental contention 8 asserts there is no reasonable assurance that the use

^{9/} Compare Original Contentions at 7 to Proposed Supplemental Contentions at 10-12. See also Petition for Reconsideration Filed By the State of Maine, dated April 30, 1982, wherein the State further presses its argument that this is a proper contention. The State's arguments were rejected for the second time by this Board in Memorandum and Order (Concerning Petition for Reconsideration Filed By the State of Maine) dated July 21, 1982 at 2-3.

of the cask laydown area for storage of spent fuel will not endanger public health and safety in that it will prevent or significantly impede the removal of spent fuel from the existing pool. This is nothing more than the resubmittal of previously rejected proposed contention 3.^{10/}

The Board rejected the predecessor of this contention, agreeing with the Staff and the Applicant that there is no basis for this contention. Order at 18. The issuance of the SER and EIA does not provide an opportunity for the State to attempt to cure defects in former contentions rejected by the Licensing Board and this contention should be rejected. Catawba, supra.

D. Proposed Supplemental Contention 9

Proposed supplemental contention 9 is substantially the same as the State's original contention 4.^{11/} Both contentions assert that this proceeding should be deferred until after the "Waste Confidence" proceedings are completed, and alternatively, assert that the question of whether spent fuel can be safely stored at Maine Yankee following the expiration of the operating license should be considered.

The Board has already squarely addressed this argument:

The Board rejects this contention. The Commission has stated that licensing practices need not be changed during the "Waste Confidence" rulemaking. 44 Fed. Reg. 45362 (1979). Deferring this proceeding would be inconsistent with Commission policy. The State argues that the Commission has

^{10/} Compare Original Contentions at 7-8 to Proposed Supplemental Contentions at 13-14.

^{11/} Compare Original Contentions at 8-9 to Proposed Supplemental Contentions at 14-13.

not absolutely prohibited a delay of the type sought. However, we believe that the Commission has, at a minimum, provided strong guidance against it. Nor can the State show any regulatory requirement for such a postponement. Therefore, we find no basis for that contention. Order at 18.

The Board should therefore similarly reject proposed supplemental contention 9 for the above reasons and those set forth in response to proposed supplemental contention 6.

E. Proposed Supplemental Contention 10

Proposed supplemental contention 10 is substantially the same as the State's original contention 5.^{12/} Both contentions assert that certain alternatives to the proposed spent fuel pool have not been analyzed. The State's contention is substantially the same as Sensible Maine Power's (SMP) proposed contention 3 and should be denied for the reasons set forth in the Staff's response to SMP's contention.^{13/} Specifically, 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.

F. Proposed Supplemental Contention 11

The State's proposed supplemental contention 11 is the same as its previously filed and rejected contention 6.^{14/} The State maintains in

^{12/} Compare Original Contentions at 9-12 to Proposed Supplemental Contentions at 18-23.

^{13/} See NRC Staff Response in Opposition to Sensible Maine Power's Proposed Supplemental Contentions, dated August 15, 1982 at 8-11.

^{14/} Compare Original Contentions at 12-13 to Proposed Supplemental Contentions at 23-25.

this contention that the Applicant has not demonstrated a need for pin compaction in addition to reracking. Apart from the primary criticism that this contention does not relate to anything in either the SER or EIA, the State appears to have failed to understand why this contention was first rejected.

The Board has explained:

In Contention 6 [now proposed supplemental contention 11], the State asserts that the Licensee has not demonstrated a need for the pin compaction procedures. Both the Staff and Licensee believe this contention should be rejected. As we discussed in connection with SMP's Contention 2, there is no regulatory requirement that the Licensee show an immediate or any need for an amendment. Therefore, this contention is not admitted.

Proposed supplemental contention 11 should be similarly rejected.

G. Proposed Supplemental Contention 12

This contention is similar to the State's initially filed contention 11.^{15/} By this contention, the State claims that since the Applicant has failed to provide specific implementing procedures at this time, it has not provided reasonable assurance that the proposed storage of spent fuel will not endanger public health and safety. In substance, this proposed contention is identical to Sensible Maine Power's proposed supplemental contention 2 and should be denied for the reasons set forth in the Staff's response to SMP's filing.^{16/} Specifically, implementing

^{15/} Compare Original Contentions at 17-18 to Proposed Supplemental Contentions at 25-28.

^{16/} See NRC Staff Response in Opposition to Sensible Maine Power's Proposed Supplemental Contentions, dated August 15, 1982 at 6.
[FOOTNOTE CONTINUED ON NEXT PAGE]

procedures will be examined after this amendment has been authorized but before the actions necessary to implement the expansion of the spent fuel pool are undertaken. Therefore, there is no basis for this contention.

H. Proposed Supplemental Contention 13

Proposed supplemental contention 13 raises for the third time the State's claim that in a licensing amendment proceeding, such as this case, each unresolved generic safety issue must be addressed.^{17/} The Board first rejected this contention since "the State has not shown how these matters relate to the spent fuel pool expansion other than to boldly assert that they do so. This is not a sufficient basis for the contention, and it is rejected." Order at 22. Upon reconsideration the Board concluded:

[I]t is manifestly evident that the State has not cured the defect in its proposed contention. While the State may have "mentioned the specific aspects

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

16/ In addition to the arguments set forth in the above pleading an additional point made by the State should be addressed. The State cites a May 21, 1981, unpublished Appeal Board Order in Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit 1), Docket No. 50-272-OLA, for the proposition that the Staff must know the exact specifications of equipment in order to properly review an application. Proposed Supplemental Contentions at 27. The Staff agrees with this and only points out that equipment specifications are not analogous to implementing procedures. Implementing procedures are derived from a general program description and typically tell an employee how to do a defined task. In contrast, equipment specifications are the standards against which an item is constructed and from which it can be determined how that piece of equipment will function.

17/ See Original Contentions at 20-23; State's Petition for Reconsideration, dated April 30, 1982; Memorandum and Order (Concerning Petition for Reconsideration Filed by the State of Maine) dated July 30, 1982 and Proposed Supplemental Contentions at 28-33.

of each of the generic unresolved safety issues which were of concern", the State does not even allege, how these "aspects" relate to the contemplated fuel pool expansion. Accordingly, we reaffirm our previous ruling that no basis for proposed Contention No. 16 has been shown. Memorandum and Order (Concerning Petition for Reconsideration Filed by the State of Maine) dated July 21, 1982 at 4.

The Board has reminded the parties that it may only consider matters relevant to the modification of the spent fuel pool. Order at 4, citing Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980). The State has added nothing to its most recent attempt to have this contention admitted that was not previously considered and rejected by this Board. Moreover, no nexus has been shown between this previously raised contention and the issuance of the SER and EIA. Accordingly, this contention should be rejected for the third time.

I. Proposed Supplemental Contention 14

Based upon what the State views as a poor compliance record with 10 C.F.R. Part 50, Appendix B, this contention asserts the Applicant has not demonstrated it can comply with a quality assurance program. Recent newspaper articles are cited as further evidence that there are recurring problems with the facility's quality assurance department. Proposed Supplemental Contentions at 34-35. Beyond citing the obvious that the expansion of the spent fuel pool will be subject to the criteria of Appendix B,^{18/} the State makes no attempt to tie the Applicant's compliance record to this license amendment, let alone the issuance of the Staff's EIA or SER. Any contention alleging problems in the quality

^{18/} Proposed Supplemental Contentions at 35 n.18.

control area must specify how that general concern relates to the spent fuel pool modification. Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980). Moreover, at this late date a nexus must be shown between a specific concern and the Staff's treatment of that matter in either the SER or EIA. Catawba, supra. The State has not attempted to make either of these showings and therefore proposed supplemental contention 14 should be denied.

J. Proposed Supplemental Contention 15

Proposed supplemental contention 15 once again presents an example of the State attempting to use this filing opportunity to cure defects in previously raised and properly rejected contentions. This contention is substantially the same as previously filed contention 13.^{19/} This contention maintains that the licensee has not provided adequate assurance that the proposed modifications to the spent fuel pool assure adequate safety under normal and postulated accident conditions, and therefore, has not complied with 10 C.F.R. Part 50, Appendix A, General Design Criterion 61. Previously filed contention 13 was rejected as vague and lacking specificity. Order at 21. The Staff submits that this most recent draft, being essentially in the same form, should similarly be rejected.^{20/}

^{19/} Compare Original Contentions at 19 to Proposed Supplemental Contentions at 36-37.

^{20/} The Staff notes that the State makes reference to the SER at 21-22 in regard to fuel handling accidents. SMP admitted contention 7 already addresses the State's concern. Although the State's contention should be rejected for the reasons stated above, the State could apply to the Board as a cosponsor of SMP admitted contention 7 in light of the areas cited in the SER by the State.

III. CONCLUSION

For the reasons aforesaid, the State's proposed supplemental contention 6 should be admitted, as modified, and each of the remaining proposed supplemental contentions should be denied.

Respectfully submitted,



Jay M. Gutierrez
Counsel for NRC Staff

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

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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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MAINE YANKEE ATOMIC POWER COMPANY)
(Maine Yankee Atomic Power Station))

Docket No. 50-309
(Spent Fuel)

CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF RESPONSE IN OPPOSITION TO THE STATE OF MAINE'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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