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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD

'84 JUL 26 P2:06

Before Administrative Judges:
Peter B. Bloch, Chairman
Dr. Jerry R. Kline
Mr. Glenn O. Bright

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of

Docket Nos. 50-440-OL
50-441-OL

CLEVELAND ELECTRIC ILLUMINATING
COMPANY, et al.

(Perry Nuclear Power Plant, Units 1 & 2)

July 26, 1984

MEMORANDUM AND ORDER
(Particularization of Emergency Planning Contention)

Cleveland Electric Illuminating Company, et al. (Applicants) filed their Motion for Particularization of Issue No. 1 (Motion) on June 26, 1984. The Motion is opposed by Sunflower Alliance Inc., et al. (Sunflower) and by Ohio Citizens for Responsible Energy (OCRE) but it is supported by the Staff of the Nuclear Regulatory Commission (Staff).

Issue #1, on emergency planning, was admitted to this proceeding in 1981, prior to the completion of any local plans. We considered the contention to have an adequate basis in part because those plans were not completed and were, therefore, inadequate to assure the adequacy of off-site emergency planning. The contention we admitted was:

> Applicants' emergency evacuation plans do not demonstrate that they provide reasonable assurance that adequate protective measures can and will be taken in the event of an emergency.[1]

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[1] LBP-81-24, 14 NRC 175, 189 (1981), as modified by LBP-81-35, 14 NRC 682, 686 (1981). Staff has correctly pointed out that the contention is erroneously worded since it challenges the state and local plans rather than "Applicants'" plan. Henceforth, the words "State and
(Footnote Continued)

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At the time, we considered the contention to be broad but not vague. We also recognized that it would be necessary to narrow this issue prior to trial and we indicated that intervenors would have the burden of going forward to show that factual issues exist which require a hearing.[2]

Our ruling on the pending motion is controlled by our commitment to using the hearing process as a way of protecting the public health and safety rather than as a sterile adversary process. Since intervenors filed their motion the entire emergency planning context has shifted. Before, when the contentions were admitted, there were no plans. Now, as applicants have asserted in their Motion without direct disagreement from the intervenors, evacuation planning for the Perry Nuclear Power Plant is well advanced:

> Emergency plans for Lake, Ashtabula and Geauga counties exist in revised form, and have been available in public libraries in their respective counties for as long as a year and a half. . . . Further, the Federal Emergency Management Agency ("FEMA") Region V has completed its informal reviews of the county plans and has issued an interim report concluding that there is reasonable assurance that appropriate protective measures can be taken in the event of a radiological emergency at [Perry].[3]

We are convinced that our action in admitting this contention was correct--although other Boards faced with similar situations have

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(Footnote Continued)
local" should be substituted for the word "Applicant's" in the wording of this issue.

[2] Id.

[3] Applicants' Motion at 3-4 (citing its discovery response and a staff letter as authority for the factual statements).

deferred acting on the contentions at all until after the emergency plans have been drafted. However, we also are convinced that the underlying factual situation has shifted so dramatically that the original basis for the contention has been undermined. Consequently, a motion for reconsideration might be in order if there were no other remedy to force Sunflower to make its contention relevant to the current situation.

The principal remedy provided for in the rules for paring down a broad contention is a Motion for Summary Disposition. We consider Applicants' present motion for "particularization" to be partly in the nature of a motion to reconsider the admission of the contention and partly in the nature of a generalized motion for summary disposition. 10 CFR §§ 2.714(b) and 2.749. In either case, this is the type of motion that we invited as a condition of admitting this broad contention. LBP-81-24, 14 NRC 175, 189 (1981).

Because of the changed circumstances, which we anticipated, it is now appropriate that the intervenors place a new set of cards on the table. It is time for the intervenors to state with specificity, and with bases, the particular deficiencies that currently exist in the draft plans. See 10 CFR § 2.714(b). Or, if they do not find such deficiencies, they may withdraw their contention.

It does not do for intervenors to argue that the emergency plans are not finished. Yes, there are additional steps being taken to modify

and further improve those plans.[4] However, the plans have reached a mature state of development and it is time for intervenors to state their objections so that meritorious objections may be met. This is not a game. If there are problems intervenors know of, those problems should be remedied. It is not appropriate to lie in wait, stalking the plan like prey in the jungle.

It is the nature of emergency planning that it is an evolving process. The fact that plans are not "finished" is not ground for avoiding the responsibility for specifying the grounds for a contention, if there be such grounds. Similarly, the fact that flaws in the plan may show up during an emergency planning exercise is not an excuse for deferring litigation of the adequacy of the plan until the exercise is conducted.[5] Nothing in any court decision suggests otherwise.

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[4]Emergency plans are never "final," since they must be reviewed, updated and amended annually. 10 CFR § 50.47(b)(4); 10 CFR Part 50, App. E § IV.G; NUREG-0654, Criterion P.4.

[5]A recent Court of Appeals' decision (still subject to a motion for rehearing) that the emergency planning exercise must be subject to litigation is irrelevant to a decision concerning whether intervenors must update their contentions now so that they reflect the current state of the record. See Union of Concerned Scientists v. NRC, No. 82-2053 (C.A.D.C.), slip op. at 23.

O R D E R

For all the foregoing reasons and based on consideration of the entire record in this matter, it is this 26th day of July 1984

ORDERED:

Sunflower Alliance Inc., et al. shall, prior to August 22, 1984, specify in a written filing the specific inadequacies alleged to exist in the draft local and state emergency plans and shall provide a reasoned basis for believing that the allegations concerning inadequacies are true. If there are relevant sections of the applicable plans or of applicable regulations or guidance documents, those sections must be cited to support the claim of inadequacy.

FOR THE
ATOMIC SAFETY AND LICENSING BOARD

Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Glenn O. Bright
ADMINISTRATIVE JUDGE

Bethesda, Maryland