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NUCLEAR REGULATORY COMMISSION

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In the Matter of
PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE, et al.
(Seabrook Station, Units 1
and 2)

Docket Nos. 50-443-OL
50-444-OL
(Off-site Emergency
Planning Issues)

DECISION

CLI-92-08

As part of their challenge to the adequacy of emergency planning for the Seabrook Station, various intervenors questioned whether the New Hampshire Radiological Emergency Response Plan (NHREEP) made sufficient provisions for the use of the protective action option of sheltering. Their central concern in this regard was planners' utilization of sheltering for those members of the public who frequent the New Hampshire Atlantic Ocean beach areas that lie within ERPA A, the portion of the Seabrook plume exposure pathway emergency planning zone (EPZ) within a two-mile radius from the facility. The matter is now before us pursuant to the appeal of intervenors Massachusetts Attorney General (MassAG) and the New England Coalition on Nuclear Pollution (NECNP) from LBP-91-24, 33 NRC 446 (1991), a Licensing Board final ruling on this

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subject.¹ These intervenors maintain the Licensing Board erred in accepting applicants' position that earlier Appeal Board directives to consider further whether State planners had provided sufficient implementing measures for sheltering the beach population are now moot. In doing so, they contest the Licensing Board's pivotal finding that the adjudicatory record now demonstrates that emergency planning officials for the State of New Hampshire (State) have concluded that in all foreseeable circumstances in a general emergency (the highest emergency action level classification), evacuation -- not sheltering -- is the planned protective action option for the general beach population (i.e., the ninety-eight percent of the beach population that has evacuation transportation). Because we find intervenors' substantive and procedural challenges to the Licensing Board's summary disposition determination are unavailing, we uphold the Board's determination.

I. BACKGROUND

The controversy now before us has its roots in testimony presented to the Licensing Board in May 1988. Responding to assertions by appellant NECNP and other intervenors that State planners had not properly employed sheltering as a protective action option for the general beach population, State emergency response officials (in conjunction with applicants' planners) testified that they intended to utilize the plan's "shelter-in-place" option

¹ In accordance with the Commission's interim procedures governing any appeal "as of right" filed in proceedings that were before an Appeal Board prior to October 25, 1990, see 55 Fed. Reg. 42,944 (1990), intervenors' June 11, 1991 notice of appeal was filed with the Appeal Board conducting appellate review of Seabrook offsite emergency planning matters. With the dissolution of the Atomic Safety and Licensing Appeal Panel at the end of June 1991, the Appeal Board referred intervenors' appeal to the Commission.

for the general beach population.² It was, however, to be invoked only in a limited number of instances, namely when that protective action would afford "maximum dose reduction" or when local conditions (such as weather or road construction) presented impediments that made evacuation -- the principal protective action option for the general beach population -- impractical.³ In addition, these State officials agreed with applicants' planners that they could envision essentially one instance that would fulfill the "maximum dose reduction" prerequisite under condition 1: the so-called "puff release," a

² Throughout the plan, references to "sheltering" are to be understood as invoking the concept of "shelter-in-place." In the version of the NHRERP initially admitted into evidence before the Licensing Board, the "shelter-in-place" option is described as follows:

This concept provides for sheltering at the location in which the sheltering instruction is received. Those at home are to shelter at home; those at work or school are to be sheltered in the workplace or school building. Transients located indoors or in private homes will be asked to shelter at the locations they are visiting if this is feasible. Transients without access to an indoor location will be advised to evacuate as quickly as possible in their own vehicles (i.e., the vehicles in which they arrived). . . . If necessary, transients without transportation may seek directions to a nearby public building from local emergency workers. Public buildings may be set up and opened as shelters for transients, on an ad hoc basis, if any unforeseen demand for shelter arises during an emergency.

NHRERP, Vol. 1, at 2.6-6 (rev. 2 Aug. 1986) (admitted as Applicants' Exhibit 5).

³ Applicants' Direct Testimony No. 6 (Sheltering), fol. Tr. 10,022, at 19. See also *id.* app. 1, at 7-8 (Letter from R. Strome to H. Vickers (Feb. 11, 1988), encl. 1, at 5-6).

Planning officials also stated in this testimony that sheltering would be utilized as a protective action for those beach transients without transportation when evacuation is the recommended protective action option for the beach population. *Id.* at 19-20. Appellants raise no issues before us concerning the New Hampshire plan's utilization of sheltering for this portion of the beach population.

short duration, nonparticulate (gaseous) release that would arrive at the beach area within a relatively short time period when, because of a substantial beach population, evacuation time would be significantly longer than exposure duration.⁴ Intervenor's own expert witness agreed that this scenario satisfied condition 1's "maximum dose savings" requirement, but asserted that other circumstances met this condition as well.⁵ In their testimony concerning the use of sheltering under the NHRERP, officials of the Federal Emergency Management Agency (FEMA) supported the State's conclusion, declaring that "[t]here exists a technically appropriate basis for the choice made by the State of New Hampshire not to shelter the summer beach population except in very limited circumstances."⁶

In its December 1988 partial initial decision regarding intervenor challenges to the adequacy of the NHRERP, among the matters the Licensing Board addressed was the use of sheltering as a protective action option for the general beach population. See LBP-88-32, 28 NRC 667, 750-76 (1988). The Board concluded that Commission emergency planning requirements and guidance did not mandate that State planners adopt sheltering as a protective action option for the general beach population, but only that they give careful consideration to the use of that option.⁷ The Board accepted FEMA's technical findings endorsing the State's limited use of sheltering as a

⁴ See Tr. 10,719-20.

⁵ See Tr. 11,461-64.

⁶ Amended Testimony of William R. Cumming and Joseph H. Keller on Behalf of [FEMA] on Sheltering/Beach Population Issues, fol. Tr. 13,968, at 11.

⁷ As our effectiveness determination in this proceeding suggests, the Board's analysis in this regard was correct. See CLI-90-3, 31 NRC 219, 244 (1990), aff'd sub nom. Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir.), cert. denied, 112 S. Ct. 275 (1991).

protective action option for the beach population and concluded that the State had given adequate consideration to sheltering the New Hampshire beach population. In doing so, it rejected intervenors' additional assertion that the New Hampshire plan was inadequate because it lacked implementing detail for the sheltering option as applied to the general beach population. The Licensing Board found that, given the uncertainties involved in invoking this option, it was better left without implementing details so that decisionmakers would not misunderstand its utility.

Various intervenors challenged this and other aspects of the Licensing Board's determination before the Appeal Board. The Appeal Board addressed their claims regarding sheltering for the beach population in a November 1989 decision. ALAB-924, 30 NRC 331, 362-73 (1989). The Appeal Board rejected intervenors' assertion that the FEMA technical evaluation was insufficient to support the Licensing Board's findings regarding the adequacy of the State's choice to utilize sheltering for the general beach population only in the limited circumstances outlined in conditions 1 and 2 (i.e., when it achieved maximum dose reduction or when evacuation was a physical impossibility). The Appeal Board, however, did not accept the Licensing Board's conclusion that no additional implementing measures were necessary. Instead, the Appeal Board found that implementing detail was required to provide decisionmakers with an understanding of that protective action's benefits and constraints, thereby allowing them to make an informed judgment about whether to utilize sheltering in the circumstances, albeit limited, apparently contemplated by State planners. The Appeal Board also rejected applicant and staff arguments that the low probability that the sheltering option would be employed justified the lack of implementing details. As a consequence, the Appeal Board remanded

this matter (along with several others) to the Licensing Board for appropriate corrective action.

The efforts of the Licensing Board to comply with this Appeal Board ruling spawned a series of party filings and Board decisions in which the central focus became the intent of State planners regarding the use of sheltering as a protective action option for the ERPA A general beach population under condition 1 (i.e., maximum dose reduction). See ALAB-939, 32 NRC 165 (1990); LBP-91-8, 33 NRC 197 (1991); LBP-90-12, 31 NRC 427 (1990). Ultimately, in its response to the second of two Licensing Board certified questions regarding its remand directive, the Appeal Board observed that the decisional process relative to its remand had culminated in State, FEMA, and staff filings that "make clear that the entities most directly responsible for the administration and evaluation of the NHRERP now insist that sheltering is not a planned protective action option for the general beach population in any foreseeable circumstance." ALAB-945, 33 NRC 175, 177 (1991). The Appeal Board advised that if the adjudicatory record in fact reflected that this "'evolution' of the consideration of sheltering as a protective action for the general beach population has reached the point where it effectively has been discarded as such an option," then the sheltering issues previously identified by the Appeal Board would be moot. Id. The Appeal Board, however, left it to the Licensing Board to ensure that the administrative record, as developed through appropriate procedural avenues, reflected whatever information was necessary to support this resolution.

Applicants responded to this guidance by filing a motion for summary disposition with the Licensing Board. In support of that motion, applicants submitted a statement of material issues not in dispute that declared

"[s]heltering is not a planned protective action option under the NHRERP for the general beach population in ERPA-A in a general emergency or in any other foreseeable circumstance."⁸ Applicants justified this statement by reference to 1) a Licensing Board-ordered "Common Reference Document" that the parties stipulated contains all NHRERP provisions associated with an ERPA A general emergency protective action response from the August 1986 record version of the plan through the current February 1990 version of the plan, and 2) a January 1991 State memorandum, as attested to by State Emergency Management Director George Iversen during a later telephone conference with the Board. Intervenors countered with a statement that there were genuine issues in dispute concerning "[w]hether sheltering is an anticipated and thus, planned, protective action option under the NHRERP," and "[w]hether sheltering as it is presently a protective action option under the NHRERP accomplishes the stated goal of maximizing dose savings for the beach population of ERPA-A under the current provisions of the plan which contain no implementing procedures for that option and which apparently distinguish between different classes of beach goers."⁹ As support for their statement, intervenors submitted the affidavit of Jeffrey Hausner, a self-employed emergency planning consultant who, for three years prior to April 1991, was the principal radiological emergency response official for the Commonwealth of Massachusetts.

⁸ Licensees' Motion for Summary Disposition of Record Clarification Directive in ALAB-939 (Mar. 29, 1991) at 3.

⁹ Opposition of the MassAG and NECNP to the Licensee[s'] Motion for Summary Disposition (Apr. 22, 1991) at 9 [hereinafter Intervenors' Summary Disposition Opposition].

In a May 1991 order, the Licensing Board ruled upon applicants' summary disposition request. LBP-91-24, 33 NRC 446 (1991). Refusing to accept intervenors' statement of material issues in dispute, the Licensing Board declared that their statement was based upon the already rejected assumption "that New Hampshire should [shelter the general beach population] because of the advantages of that option and because of the guidance in NUREG-0654/FEMA REP 1." Id. at 451 (emphasis in original). Instead, finding applicants' statement that there is no genuine issue to be heard was supported by the administrative record, the Licensing Board granted summary disposition in favor of applicants and declared the Appeal Board's prior concerns regarding the sheltering issue were now moot. Intervenors appeal this determination.¹⁰

¹⁰In ALAB 924, the Appeal Board remanded three other matters to the Licensing Board in addition to the issue of the adequacy of the NHRERP's provisions regarding sheltering for the general beach population. See 30 NRC at 373. The Licensing Board previously issued other rulings resolving those issues, see LBP-90-44, 32 NRC 433 (1990); LBP-90-12, 31 NRC 427 (1990), from which intervenors also noted an appeal, see Notice of Appeal (June 11, 1991) at 1-2. In their merits brief filed with the Commission, intervenors nonetheless have limited their appellate challenge solely to the Licensing Board's beach population sheltering decision in LBP-91-24.

Also in this regard, as was noted earlier, see supra p. 5, in ALAB-924 the Appeal Board suggested that sheltering implementation would be necessary to ensure the appropriate use of that protective action option in situations falling under condition 2 involving physical impediments to evacuation, such as fog, snow, hazardous bridge or road conditions, or highway construction. In LBP-90-12, the Licensing Board found additional planning for condition 2 circumstances unnecessary because it involves a response to the complicating effects of a low probability event occurring independently of the accident sequence that triggered the emergency response. See 31 NRC at 453 (citing Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-12, 20 NRC 249, aff'd sub nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1288 (D.C. Cir. 1984), vacated in part and rehearing en banc granted, 760 F.2d 1320 (D.C. Cir. 1985), aff'd en banc, 789 F.2d 26 (D.C. Cir.), cert. denied, 479 U.S. 923 (1986)). Before us, intervenors have not contested that ruling.

II. ANALYSIS

Intervenors challenge the Licensing Board's summary disposition decision on two grounds, one procedural and one substantive. They assert initially that the Licensing Board improperly granted applicants' summary disposition request without first permitting them to undertake discovery. Intervenors also attack the merits of the Board's ruling, claiming that its decision in applicants' favor was grounded upon a misinterpretation of the term "planned" as State emergency response officials have employed it to describe the use of evacuation as the protective action option for the ERPA A general beach population. According to intervenors, the Licensing Board incorrectly concluded that the State's description of evacuation as the only "planned" option for the beach population was equivalent to saying that the shelter-in-place option had been discarded, as opposed to simply not planned for, as a protective action choice for that population. As support for this premise, they rely principally upon Mr. Hausner's conclusion, as set forth in his affidavit, that on the basis of his review of the relevant portion of the record and his experience in emergency planning matters he believes the State still contemplates using the shelter-in-place option for the general beach population. Intervenors assert that his declaration created a material issue of fact that precluded the Board from entering summary judgment in applicants' favor.

Both applicants and the staff urge us to reject these intervenor challenges. They assert that intervenors were not entitled to any discovery because they failed to comply with the requirements of 10 C.F.R. § 2.749(c) concerning discovery relating to summary disposition motions. Both these parties also contend that applicants' showing established that sheltering is

not a protective action option for the ERPA A general beach population and that Mr. Hausner's affidavit was insufficient to establish any genuine issue of material fact in this regard.

A. Looking first to intervenors' discovery entitlement claim, it is apparent that section 2.749(c) furnishes the template against which we must gauge intervenors' procedural concern. That section provides:

Should it appear from the affidavits of a party opposing the motion [for summary disposition] that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the presiding officer may refuse the application for summary decision or may order a continuance to permit affidavit to be obtained or make such other order as is appropriate and a determination to that effect shall be made a matter of record.

In line with this provision, a party asserting that it needs discovery to respond to a summary disposition motion must identify by affidavit what specific information it seeks to obtain; in the absence of such a showing, a Board is free to grant summary disposition (upon a determination that there are no genuine issues of material fact) without providing for discovery. See Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 & n.32 (1982).

In this instance, in responding to applicants' summary disposition request, intervenors made only a general statement suggesting that further discovery should be permitted and, thereafter, a hearing should be held.¹¹ They did not, by affidavit or otherwise, make a specific showing establishing what information they expected to gain through discovery and how that information was essential support for their opposition to applicants' summary disposition motion. Because they failed to make the appropriate presentation

¹¹ See Intervenors' Summary Disposition Opposition at 7-8.

consistent with section 2.749(c), intervenors cannot now complain that they have been deprived of any right to conduct discovery. We thus find no foundation for this assignment of error.

B. Turning to intervenors' substantive complaint, we did note previously in this proceeding, although as part of our effectiveness decision, that "so long as sheltering remains a potential, albeit unlikely, emergency response option for the beach population, the NHRERP should contain directions as to how this choice is to be practicably carried out." CLI-90-3, 31 NRC 219, 248 (1990), aff'd sub nom. Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir.), cert. denied, 112 S. Ct. 275 (1991). We observed further that one way to resolve the Appeal Board's concerns would be "identification of the location of sufficient available shelter together with the means to notify the beach population as to where this shelter is located," an exercise we believed would not be "especially difficult or time-consuming." Id. This, however, assumes that sheltering is to be utilized as a protective action option for the general beach population. As the Appeal Board later acknowledged in ALAB-945, if the record in this proceeding now reflects that under the NHRERP "sheltering is not a planned protective action option for the general beach population in any foreseeable circumstance," 33 NRC at 177, then the previously identified issue of what actions the State need take to implement such a protective action option is, as a practical matter, moot.

In their motion for summary disposition, applicants sought to establish that the State's position is as the Appeal Board suggested. As support for this supposition, applicants relied upon two factors. One is the NHRERP's current provisions regarding protective action options for the general beach population. As is reflected in the relevant portions of the current version

of the plan contained in the "Common Reference Document" accepted by the parties, sheltering is not identified as a protective action option for the general beach population in ERPA A in a general emergency.¹² In addition, applicants referenced statements in a January 1991 pleading, which was signed by a State Deputy Attorney General and confirmed in a sworn statement given by the State's emergency planning director shortly thereafter.¹³ Intervenors' protestations to the contrary notwithstanding,¹⁴ on their face these declarations by responsible State officials provided substantial support for applicants' position that the State does not plan to utilize sheltering as a protective action option for the general beach population in ERPA A in any circumstance it can now foresee.¹⁵

¹²See Licensees' Response to Memorandum and Order of January 24, 1991 (Jan. 28, 1991) at 71-109 (NHRERP, Vol. 8, at 6.0-1 to .10-4 & Form 210A (rev. 3 Feb. 1990)).

¹³ See Memorandum in Support of Licensees' Motion for Summary Disposition of Record Clarification Directive in ALAB-939 (Mar. 29, 1991) at 5 (citing Memorandum of the [State] on ALAB-939 (Jan. 10, 1991) at 1-2; Tr. 28,493).

¹⁴ The thrust of intervenors' attack upon these record statements by State officials is that they do not reflect the State's actual intention regarding use of sheltering for the beach population. In light of intervenors' failure to provide any concrete evidence that these officials' statements cannot be taken at face value, see infra p. 13, we see no reason not to do so. This is particularly so given the State's failure to object to applicants' representations regarding its emergency planning posture, an action that it previously has shown itself more than willing to undertake if it perceives that its position is being misstated. See [State]'s Comments Regarding Applicants' Response to Licensing Board Order of January 11, 1990 (Feb. 16, 1990) at 2.

¹⁵See also Tr. 28,468. At earlier points in this proceeding, the record was unclear regarding the State's plan for sheltering, and the State's plan, as originally understood by the parties, seems to have evolved. See ALAB-939, 32 NRC at 173-79 (1990). As currently understood, however, the State's plan not to include the shelter-in-place option for the general beach population in a general emergency is fully consistent with evidence on the record on the limited value of sheltering as a protective option. See LBP-88-32, 28 NRC at 759-68 (1988). Indeed, the evolution in the State's plan (or at least the
(continued...)

In the face of the plan's current provisions and these statements "straight from the horse's mouth" that both fully corroborate applicants' position that no genuine issue of material fact exists relative to the State's intention not to use the shelter-in-place option for the general beach population, to avoid summary disposition on this matter intervenors had to present contrary evidence that was so "significantly probative" as to create a material factual issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986). In his affidavit, Mr. Hausner does declare that the State intends to utilize sheltering as a protective action option for the beach population. As his affidavit nonetheless makes clear, Mr. Hausner's position in this regard is not based upon any concrete, first-hand knowledge about what the State intends to do. Rather, he provides what is at best an "educated guess" about the State's intentions. His speculation in this regard can hardly be described as so "significantly probative" that it creates a material factual issue.

Simply put, intervenors failed to counter the applicants' showing that was based upon the record before the Licensing Board and established that no material issue of fact now exists regarding the State's intention not to use sheltering as a protective action option for the general beach population in ERPA A in a general emergency. Because the matters remanded by the Appeal Board were rooted in the central premise that it was the State's intent to employ sheltering in some form as a protective action option for this population, applicants also were correct in asserting that those matters are

¹⁵(...continued)
parties' understanding of that plan) has been in a direction that makes the plan more consistent with the weight of evidence on the record than it was at the time of LBP-88-32, the Licensing Board's initial decision addressing sheltering.

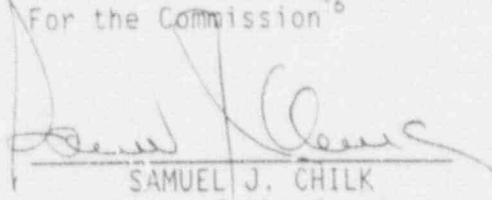
no longer at issue. Therefore, contrary to intervenors' claim, the Licensing Board acted appropriately in granting summary disposition in favor of applicants.

III. CONCLUSION

For the foregoing reasons, the Licensing Board's decision in LBP-91-24, 33 NRC 446, is affirmed.

I IS SO ORDERED.



For the Commission¹⁶

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland
this 3^d day of April 1992

¹⁶ Commissioner de Planque abstained, and Commissioners Curtiss and Remick did not participate in this matter.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

PUBLIC SERVICE COMPANY OF NEW
HAMPSHIRE, ET AL.
(Seabrook Station, Units 1 and 2)

Docket No.(s) 50-443/444-OL

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM DECISION (CLI-92-8) - 4/3 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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