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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
VERMONT YANKEE NUCLEAR POWER CORPORATION	)	Docket No. 50-271-OLA (Spent Fuel Pool Amendment)
	)	
(Vermont Yankee Nuclear Power Station)	)	

NRC STAFF RESPONSE TO JOINT MOTION OF
THE COMMONWEALTH OF MASSACHUSETTS AND
NEW ENGLAND COALITION ON NUCLEAR POLLUTION

I. INTRODUCTION

On May 20, 1988, the NRC Staff issued Amendment No. 104 to the Vermont Yankee Nuclear Power Corporation's (VYNPC) operating license. The amendment authorized VYNPC to install racks in the spent fuel pool at the Vermont Yankee Nuclear Power Station capable of accommodating 2870 fuel assemblies. 1/ On June 13, 1988, the Commonwealth of Massachusetts (Commonwealth) and New England Coalition on Nuclear Pollution (NECNP) filed a motion requesting the Licensing Board to issue an order staying the effectiveness of the license amendment. On June 24, 1988, the State of Vermont joined in the motion. For the reasons discussed, the NRC Staff opposes the motion and urges the Board to dismiss it for lack of jurisdiction or in the alternative to deny it as lacking merit.

1/ The current license authorizes the storage of 2000 fuel assemblies. Amendment No. 104 does not change that limitation.

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II. BACKGROUND

On April 25, 1986, VYNPC filed a request for an amendment that would revise Section 5.5 of the Technical Specifications to increase the number of spent fuel assemblies authorized to be stored in its spent fuel pool from 2000 to 2870. The NRC Staff published a notice of VYNPC's application in the Federal Register on June 18, 1986. 51 Fed. Reg. 22,226. The notice included a proposed finding of "no significant hazards consideration" pursuant to Section 189a(2)(A) of the Atomic Energy Act as amended and the Commission's regulations implementing Section 189a(2)(A), 10 C.F.R. §§ 2.105, 50.58, 50.91, 50.92. On July 21, 1986, NECNP filed comments objecting to the Staff's proposed finding of no significant hazards consideration.

Because the notice published at 51 Fed. Reg. 22,226 failed to comply with the Commission's regulation implementing Section 134 of the Nuclear Waste Policy Act of 1982, i.e. 10 C.F.R. § 2.1107, in failing to include information concerning the availability of hybrid hearing procedures, the Commission renoticed VYNPC's application on December 31, 1986 at 51 Fed. Reg. 47,324. The notice of December 31, 1986 supplied the information that was omitted from the original notice regarding the availability of hybrid hearing procedures, as required by 10 C.F.R. § 2.1107, and stated that anyone whose interest might be affected and who wished to invoke the hybrid hearing procedures should file a written petition for leave to intervene.

Both the Commonwealth and NECNP filed petitions to intervene and subsequently filed contentions. Following a prehearing conference, the Licensing Board issued an order on May 26, 1987, in which it admitted

three contentions. The first, a safety contention proposed by NECNP, alleged that VYNPC's spent fuel pool cooling was not single failure proof. The two admitted environmental contentions, which were proposed by the Commonwealth and NECNP, concerned 1) a need for an Environmental Impact Statement and 2) VYNPC's failure to provide an analysis of alternatives to the proposed action adequate under Sections 102(2)(C) and 102(2)(E) of the National Environmental Policy Act of 1969 (NEPA).

On VYNPC's appeal, the Appeal Board sustained the Licensing Board's admission of NECNP's safety contention concerning whether or not pool cooling was single failure proof. However, it reversed the Licensing Board on its admission of the two environmental contentions. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13 (1987), reconsideration denied ALAB-876, 26 NRC 277 (1987).

On February 9, 1988, VYNPC stated in a meeting with the NRC Staff that it intended to design and install an enhanced pool cooling system that would more than satisfy the Commission's single failure criteria prior to exceeding the authorized limit of 2000 fuel assemblies. On March 2, 1988, VYNPC submitted to the Staff documentation discussing the conceptual design of the enhanced system and on June 7, 1988, the VYNPC submitted a document further detailing its plans for the enhanced system.

As stated above, on May 20, 1988, the NRC Staff issued Amendment No. 104, in which it authorized VYNPC to install new racks in its spent fuel pool with a capacity of 2870 assemblies but did not authorize the use of the racks beyond that previously authorized, i.e., the storage of 2000 assemblies. The Staff issued a Safety Evaluation Report discussing the

amendment, in which, among other things, it indicated that its environmental review led it to a conclusion that the action satisfied the categorical exclusion criteria of 10 C.F.R. § 51.22(c)(9).

On June 13, 1988, the Commonwealth and NECNP filed a joint motion for a stay of Amendment No. 104. At a status conference held on June 28, 1988, movants orally sought an emergency stay presumably to preserve the status quo pending a Licensing Board ruling on the motion. While not otherwise addressing the merits of the stay request, the Board denied the oral motion on the grounds that movants had not shown irreparable harm. Tr. 316. The Board's denial was without prejudice to its ruling on the written motion. Id.

III. DISCUSSION

A. The Licensing Board lacks the authority to grant the motion.

1. The Licensing Board lacks jurisdiction over the subject matter of the stay request because the only admitted contention concerns a safety matter.

The Licensing Board, while not making a finding that it has jurisdiction, indicated that it might have jurisdiction over the joint motion for stay in order to protect its consideration of any environmental contentions that might be submitted on the issuance of the Staff's environmental assessment on the proposed amendment to raise the spent fuel pool storage limit to 2870 assemblies. Tr. 293. The fact is that there are no environmental contentions pending before the Licensing Board, the two environmental contentions that were admitted having been rejected by the Appeal Board. Since a Licensing Board's jurisdiction in an operating license amendment case is limited to the admitted contentions, the

Licensing Board's jurisdiction in this matter is limited to the one admitted safety contention. See, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-674, 15 NRC 1101, 1102-03 (1982) (regarding operating license proceedings). See also, Consolidated Edison Co. of N.Y. (Indian Point, Units 1, 2, & 3), ALAB-319, 3 NRC 188, 190 (1976); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1933 (1982), citing, 10 C.F.R. § 2.760a; Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1216 (1983); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 545 (1986).

The one admitted safety contention in this proceeding concerns a matter that is not related to rack design. Thus, 10 C.F.R. § 2.717(b), which confers on presiding officers the authority to modify, as appropriate, orders issued by the Director of Nuclear Reactor Regulation or the Director of Nuclear Materials Safety and Safeguards that are related to the subject matter of the pending proceeding, does not come into play. Further, that section would not confer jurisdiction on this Board to grant the joint motion even if the proposed amendment had been noticed for prior hearing, which it was not.

2. The Licensing Board also lacks jurisdiction over the matter because the Commission's regulations implementing § 189a(2)(A) of the Atomic Energy Act as amended do not authorize Licensing Boards to review the Staff's final finding of no significant hazards consideration.

Section 189a(2)(A) of the Atomic Energy Act, as amended, the "Sholly" amendment, authorizes the Commission to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards considera-

tion, notwithstanding the pendency before the Commission of a request for a hearing from any person.

The Commission's implementation of Section 189a(2)(A) may be found in 10 C.F.R. § 2.105, § 50.58, § 50.91 and § 50.92. Section 50.58(b)(6) states that no petition or other request for review of or hearing on the Staff's significant hazards consideration determination will be entertained by the Commission and that the Staff's determination is final, subject only to the Commission's discretion, on its own initiative, to review the determination. The Commission's decision in Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plants, Units 1 and 2), CLI-86-12, 24 NRC 1 (1986) reversed and remanded on other grounds, San Luis Obispo Mothers for Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986), makes clear that it is not just the final NSHC determination itself that it insulated from review by the boards but also the immediate effectiveness of the authorization that the determination supports. Any reading of Section 189a(2)(A) and the Commission's regulations thereunder inconsistent with the Commission's reading in CLI-86-12 would lead to anomalous results that would undermine the purpose of the Sholly amendment, which, according to the Commission, was to avoid unnecessary disruption or delay in the operations of nuclear power plants by imposing regulatory burdens unrelated to significant safety matters. Final Procedures and Standards on No Significant Hazards Considerations, 51 Fed. Reg. 7744 at 7746 (March 6, 1986).

3. The Licensing Board lacks the authority to stay the implementation of the Staff's authorization.

In their "Conclusion," NECNP and the Commonwealth state that the stay is sought under 10 C.F.R. § 2.718(m) of the Commission's regulations.

Motion at 11. That regulation bestows upon presiding officers all powers necessary to the ends of conducting a fair and impartial hearing, taking appropriate action to avoid delay and maintaining order including the power to "(m) take any action consistent with the Act, this chapter and Sections 551-558 of Title 5 of the United States Code." The moving parties did not invoke 10 C.F.R. § 2.788 of the Commission's regulations, which specifically addresses the issuance of stays. That regulation is specifically applicable to stays of decisions of presiding officers and Atomic Safety and Licensing Appeal Boards pending review. As it was a Staff authorization and not a Licensing Board decision that the movants sought to stay, they acted appropriately in not invoking 10 C.F.R. § 2.788. The Commission in Diablo Canyon, supra, addressed this issue in the context of an effort to stay the effectiveness of an amendment issued by the NRC Staff authorizing the expansion of the storage capacity of the spent fuel pools at Diablo Canyon. The Commission stated that the authority of licensing boards and appeal boards under 10 C.F.R. § 2.788 extends only to decisions of those boards.

In Diablo Canyon, supra, the Staff had issued a final finding of no significant hazards consideration and the requested amendments authorizing PG&E to begin the reracking process without awaiting the outcome of the ongoing hearing process. Intervenors directed stay requests to the Commission, the Appeal Board and the Licensing Board. The Licensing Board and the Appeal Board dismissed the requests. As the Commission stated, because the petitioners did not challenge any Licensing Board or Appeal Board decision, neither Board had jurisdiction to hear the stay request. 24 NRC at 4. The Licensing Board seems to have said as much at the status

conference held in Brattleboro, Vermont on June 28, 1988, where the Board expressed its doubts concerning the applicability of the criteria of 10 C.F.R. § 2.788 to the Commonwealth and NECNP's motion. Tr. 316. Nevertheless, it refused to grant a temporary stay on the basis that irreparable injury had not been shown as required by 10 C.F.R. § 2.788(e). Id.

Accordingly, the Commission's decision in Diablo Canyon, supra, makes it clear that a stay motion against an action made immediately effective by a final finding of no significant hazards consideration by the NRC Staff will not lie. Further, the Commission, having denied its boards jurisdiction to issue stays of actions authorized by amendments issued by the Staff pursuant to the regulations in 10 C.F.R. §§ 50.91 and 92, did not contemplate that its boards would find jurisdiction to accomplish that very result by another means, namely invocation of 10 C.F.R. § 2.718(m).

B. The Movants have not shown that they have any interest to be protected by the grant of a stay.

Should the Licensing Board determine that it has the jurisdiction and authority to consider the stay request, the Staff believes that the Licensing Board should deny the motion because the movants have not shown any interest to be protected by the grant of a stay.

In a section entitled "Grounds for Stay Request" NECNP and the Commonwealth state that the installation of new racks lacks utility apart from authorization to increase the capacity of the pool. Even if this were so, the movants have not shown how they would be harmed by the installation of new racks or how the utility or disutility of the new racks is of concern to them. As noted above, there are no admitted

environmental contentions in this proceeding. Therefore, discussions of segmentation and of independent utility are out of place here.

Also as "Grounds" the movants state that authorization of increased capacity would involve noncompliance with the single failure criterion. However, the action sought to be stayed does not authorize an increase in capacity. Therefore, the grounds invoked under Paragraph 24 of the motion are simply irrelevant.

In Paragraph 25, movants state that an environmental impact statement or environmental assessment will need to be prepared in conjunction with the proposed increase in authorized capacity. The Staff does not acknowledge the need for either an EIS or an EA in conjunction with Amendment No. 104. However, the Staff intends to issue an EA shortly concerning the proposed amendment authorizing an increase in the number of assemblies allowed to be stored in the spent fuel pool.

In Paragraph 26, movants argue that the Staff's action constitutes a segmentation improper under NEPA. However, in the case they cite in support of the proposition, Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 298 (D.C. Cir. 1987), the Court of Appeals summarily affirmed a District Court order granting summary judgment for the Urban Mass Transportation Administration where the taxpayers' association had sought to enjoin the Administrator from disbursing federal funds to Southern California Rapid Transit District for construction of a metro rail system in the city. Thus, the holding goes against the position urged by NECNP and the Commonwealth. While the Court does make the statement attributed to it by movants here, that "the rule against segmentation was developed to insure that interrelated projects the overall effect of which is

environmentally significant not be fractionalized into smaller, less significant actions," the statement is at best dictum. The Court in Taxpayers Watchdog also stated in dictum that if the responsible officer makes a threshold determination that the proposed action will have an insignificant effect upon the environment, an EIS will not be required and that an agency's decision not to issue an EIS for an activity it claims has an insignificant impact may be reversed only if that decision is arbitrary and capricious, 819 F.2d at 298, citing Asphalt Roofing Mfg Ass'n v. Interstate Commerce Comm'n, 567 F.2d 994, 1004 (D.C. Cir. 1977); West Chicago, Ill. v. U.S. Nuclear Regulatory Comm'n, 701 F.2d 632, 651 (7th Cir. 1983).

Movants do not offer any basis for disputing NRC Staff's analysis supporting the conclusion that the environmental effects of the authorized action, namely the emplacement of the racks, is environmentally insignificant.

C. Movants claim irreparable harm; however, they have shown nothing to support this claim.

The only stay standard that movants address is irreparable harm. See 10 C.F.R. § 2.788. Movants state that they are irreparably harmed by the issuance of Amendment No. 104 in that such issuance unlawfully prejudices the consideration of alternatives by reducing the cost of the proposed action relative to the alternatives of dry cask or independent pool storage. Even if such prejudice did exist, any harm that movants might suffer could be redressed at the end of the proceeding. The only harm standard applicable to the Staff's NSHC determination is the one set out in § 50.92(b), where it is stated that the Commission will be sensi-

tive to a license amendment request that involves irreversible consequences (such as one that permits a significant increase in the amount of effluents or radiation emitted by a nuclear power plant). As discussed above, that standard is for the Staff and not for this Licensing Board to apply. In any event, the authorization does not raise the issue of increase in effluents or radiation.

IV. CONCLUSION

As discussed above, this Licensing Board has no jurisdiction to grant the stay sought by NECNP and the Commonwealth. The Board should, therefore, dismiss it. If the Board reaches the merits, it should deny the motion as failing to show an interest to be protected by the grant of a stay.

Respectfully submitted,

Ann P. Hodgdon

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Counsel for NRC Staff

Dated at Rockville, Maryland
this 12th day of July, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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VERMONT YANKEE NUCLEAR POWER CORPORATION	Docket No. 50-271-OLA (Spent Fuel Pool Amendment)
(Vermont Yankee Nuclear Power Station)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO JOINT MOTION OF THE COMMONWEALTH OF MASSACHUSETTS AND NEW ENGLAND COALITION ON NUCLEAR POLLUTION" 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 12th day of July 1988.

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