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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges

Charles Bechhoefer, Chairman
Glenn O. Bright
Dr. James H. Carpenter

In the Matter of	)	
VERMONT YANKEE NUCLEAR POWER CORPORATION	)	Docket No. 50-271-OLA
(Vermont Yankee Nuclear Power Station)	)	(ASLBP No. 87-547-02-LA)
	)	August 3, 1988

MEMORANDUM AND ORDER
(Motion to Stay License Amendment 104)

This proceeding involves an application by Vermont Yankee Nuclear Power Corp. (Applicant), dated April 25, 1986, to expand the authorized capacity of the spent fuel pool of the Vermont Yankee Nuclear Power Station from 2000 fuel elements to 2870 fuel elements. As part of this application, the Applicant described two facility modifications which were necessary: replacement of the spent fuel storage racks with new racks with a closer spacing of the fuel elements, and the shortening of the two cooling water return sparger lines.[1]

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1 Application, dated April 25, 1986, at 4.

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License Amendment 104 to the Vermont Yankee operating license, issued by the Staff on May 20, 1988 and effective upon issuance, by its terms permits the Applicant to install the new racks and to shorten the sparger lines. It also permits the new racks to be used, although not for more than the 2000 assemblies currently authorized by the license. Thus, as set forth in the letter transmitting Amendment 104 to the Applicant, the amendment was in "partial response" to the April 25, 1986 application, as later supplemented.[2]

On June 13, 1988, the Commonwealth of Massachusetts (Massachusetts) and the New England Coalition on Nuclear Pollution (NECNP) (Movants) filed a Joint Motion requesting a stay of the effectiveness of License Amendment 104. On June 24, 1988, the State of Vermont filed a response in support of the Joint Motion, indicating it joined in sponsoring the motion. At a prehearing conference on June 28, 1988, we held oral argument on certain aspects of the Joint Motion.[3] On July 7 and 12, 1988, respectively, the Applicant and the NRC Staff filed responses in

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2 Letter, dated May 20, 1988, from Vernon L. Rooney, Project Manager, NRC, to R. W. Capstick, Licensing Engineer, Vermont Yankee Nuclear Power Corp.

3 We had identified certain matters to be discussed in our Memorandum (Questions for Parties at Prehearing Conference), dated June 20, 1988 (unpublished). At that conference, we also denied requests of the Movants for temporary, emergency relief. See Second Prehearing Conference Order (Rulings on Temporary Stay Order and on Schedules), LBP-88-18, 28 NRC ____ (July 12, 1988).

opposition to the Joint Motion.[4] On July 15, 1988, the Movants filed a Joint Reply to the responses of the Applicant and Staff.[5] On July 28, 1988, the Applicant filed a response to the Joint Reply.[6]

The Joint Motion is premised on the failure of the Staff, prior to issuing the amendment, to have produced an Environmental Assessment (EA) or other environmental review document governing the entire spent fuel pool expansion application. For reasons set forth below, we find License Amendment 104 to have been improperly issued by the NRC Staff and, indeed, to have been void. However, based on the issuance by the Staff on July 25, 1988 of its EA, covering the entire spent fuel pool expansion application, we also find the validity of the amendment to have been reinstated and the Joint Motion in large measure to be moot. We are dismissing most of it on that basis. Beyond that, we have no authority to grant at this time the further injunctive relief sought by the Movants, extending beyond the release date of the EA. We are denying those aspects of the Joint Motion on jurisdictional grounds.

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4 On June 23, 1988, we granted the Applicant's unopposed request for an extension of time to respond and we provided the Staff a similar extension of its time for response.

5 On July 12, 1988, we granted the unopposed request of Massachusetts and NECNP to file a reply.

6 The Applicant simultaneously filed a motion for leave to file that response. We grant that motion and are considering the response in this ruling.

A. Background

In our Prehearing Conference Order of May 26, 1987, LBP-87-17, 25 NRC 838, we admitted three contentions--one safety contention, dealing with the fuel pool cooling system; and two environmental contentions, one of which dealt with the evaluation of alternatives to the course of action proposed in this proceeding. Upon review of that Order, the Appeal Board permitted only the safety contention to remain in the proceeding but reversed our admission of the other two environmental contentions. ALAB-869, 26 NRC 13 (1987).

Of particular pertinence to the Joint Motion, the Appeal Board rejected Contention 3, dealing with alternatives, on the ground that it was premature and that any contention dealing with alternatives in a license amendment proceeding of this type had to await the issuance by the NRC Staff of an EA or other environmental review document. (In its July 21, 1987 ruling, the Appeal Board noted that an EA was expected "soon." 26 NRC at 34, n. 32. Almost a year later, at the time of the filing of the Joint Motion, the EA had not yet been issued; indeed, it was only released a few days ago.)

Accompanying Amendment 104 was a Safety Evaluation Report (SER) concerning only the reracking, together with the modification of the sparger lines (which was to be carried out as a necessary condition for the reracking). Included in the SER was a finding that the reracking and related activities (alone) presented "no significant hazards consideration." This determination covered only the reracking and related activities and did not extend to the entire application, as to

which the Staff had previously made a proposed "no significant hazards consideration" finding.[7] Also included in the SER was a determination, likewise limited to the reracking and related activities, that an EA was not required since those activities (standing alone) qualified as a categorical exclusion from environmental review pursuant to 10 C.F.R. § 51.22(c)(9).

The Joint Motion seeks an order staying the effectiveness of License Amendment 104, on the ground that the Staff, in issuing the amendment, had failed to perform the requisite environmental review. According to the Movants, the activities authorized by the amendment prejudice their ability to litigate a contention on alternatives, which cannot be considered prior to issuance of the Staff's environmental review document. The motion goes on to seek an order for "the Applicant to cease all work, if any, on the installation of the new racks in the spent fuel pool pending the preparation and issuance of an environmental impact statement or assessment addressing the use of the increased capacity provided by the racks of new design" (Joint Motion, at 11). At the June 28, 1988 prehearing conference, the Movants clarified that they wanted the stay to extend not only until issuance of the Staff's EA or other environmental review document (an event that has now taken place) but also until the Movants had an opportunity to examine its adequacy (Tr. 271).

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7 See 51 Fed. Reg. 22226, 22245 (June 18, 1986).

In essence, the Joint Motion claims that there is no "independent utility" to the reracking, that there accordingly was an improper segmentation of the environmental review of the spent fuel pool expansion application, and that an environmental review of the entire expansion application must be performed prior to the grant by the Staff of any significant portion of the application, such as the reracking and related activities approved by License Amendment 104 Absent such review of the entire application, the amendment is asserredly void and its effectiveness accordingly must be stayed.

The Applicant and Staff oppose the Joint Motion on a variety of grounds. Primarily, they assert that we lack jurisdiction to grant it. They also point to certain procedural deficiencies in the motion. Finally, they assert that on the merits the motion should be denied.

The EA issued by the Staff on July 25, 1988 of course moots much of the requested relief. We turn here to each of the points raised by the Applicant or Staff to the extent necessary to resolve the request for further relief which remains before us.

B. Jurisdiction

1. The only jurisdictional authority cited by the Joint Motion is 10 C.F.R. § 2.718(m), which grants us authority to "[t]ake any other action consistent with the [Atomic Energy] Act, this chapter, and sections 551-558 of title 5 of the United States Code." The Applicant takes the position that 10 C.F.R. § 2.718(m) is not a grant of jurisdiction but relates to the powers possessed by a Board once it has jurisdiction. The Staff asserts only that the Section does not provide

authority to issue injunctions against the immediate effectiveness of an amendment covered by a "no significant hazards consideration" finding.

It is clear that § 2.718(m) provides us authority, in appropriate circumstances, to take actions not explicitly spelled out by other sections of the Rules of Practice. Injunctive relief may be one of the actions we could take by virtue of that section. Cf. Kansas Gas and Electric Co. (Wolf Creek Nuclear Generation Station, Unit No. 1), ALAB-321, 3 NRC 293 (1976), aff'd, CLI-77-1, 5 NRC 1 (1977) (authority to issue "declaratory order"). It is not that clear, however, whether the section could provide a jurisdictional base for consideration of a particular course of action or whether subject matter jurisdiction would first have to be founded on some other provision. That in turn might depend upon the degree to which a particular action might bear upon or be disruptive of the resolution of other issues in the proceeding.

Fortunately, we need not here resolve these questions. Our jurisdictional base for considering the instant motion is clearly founded on another provision, 10 C.F.R. § 2.717(b). We turn now to that section.

2. The provision upon which our jurisdiction is based, 10 C.F.R. § 2.717(b), reads as follows:

> (b) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, may issue an order and take any otherwise proper administrative action with respect to a licensee who is a party to a pending proceeding. Any order related to the subject matter of the pending proceeding may be modified by the presiding officer as appropriate for the purpose of the proceeding.

Although the major portion of its opposition to the Joint Motion was premised on our alleged lack of jurisdiction, the Applicant failed even to refer to this section, much less discuss its applicability or non-applicability to the instant motion. This failure occurred notwithstanding our having referred to the applicability of § 2.717(b) during the oral argument at the recent prehearing conference (Tr. 251, 304).[8]

For its part, the Staff asserts that § 2.717(b) is not applicable as a jurisdictional foundation because the license amendment does not relate to a currently admitted contention in the case. Based on applicable precedents, however, we conclude that the order of the Director of Nuclear Reactor Regulation (such as License Amendment 104) need only relate to a matter which could be admitted as a late-filed contention, if one were proffered. We regard the motion itself as the proffer of a late-filed contention.

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8 The negative inferences which we might draw from the Applicant's failure in these circumstances to discuss this section are obvious. However, we are not relying on any such inferences. In that connection, we note that the Movants also have not mentioned this section as a basis for our jurisdiction, either in the Joint Motion or their reply. The Applicant asserts that the Movants have the burden of showing that we have jurisdiction. Initially, as a matter of pleading, we are aware of no such requirement. If a jurisdictional question is raised--as it has been here--the burden may then shift to the Movants to remove any doubts about jurisdiction. Given the obvious applicability of 10 C.F.R. § 2.717(b), however, we would be remiss in not relying on it, irrespective of its not being cited by the Movants.

The most comprehensive examination of the meaning and scope of 10 C.F.R. § 2.717(b) was undertaken by the Licensing Board in Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226 (1979). There, in an operating license proceeding governed by 10 C.F.R. Part 50, two intervenors sought an order delaying the delivery of unirradiated fuel to the site. The NRC had issued a materials license pursuant to 10 C.F.R. Part 70 permitting such shipments. The Applicants opposed granting of the motion on both jurisdictional grounds and on the merits; the Staff urged denial on the merits but took the position that the Board had jurisdiction to grant the requested relief. The Board denied relief on the merits but held that it had jurisdiction to consider the question, as urged by the Staff. In particular, that Board rejected a claim by the Applicants that the Staff order being reviewed had to be "directly pertinent" to a contention in the proceeding. Id., 10 NRC at 229-30.

In Zimmer, there had been no contention which directly raised any question concerning the shipment of unirradiated fuel. There assertedly was some connection with a contention dealing with the lack of training of the populace in communities through which "radioactive materials" would be transported--about as close a connection as the modification of the spargers in the Vermont Yankee fuel pool has to the adequacy of the fuel pool cooling system which is the subject of Contention 1 in this proceeding.

The Board in Zimmer accepted the analysis of the scope of § 2.717(b) offered by the Staff. It portrayed three types of situations:

(1) an activity so closely related to the subject matter of a proceeding that any Staff order may normally not be issued (or if issued must be stayed pending resolution of the contested issue); (2) at the other extreme, a particular subject so far removed from a pending proceeding that its consideration is inappropriate--i.e., consideration of an antitrust question in a hearing on public health and safety and the environment, such antitrust question being beyond the subject matter jurisdiction of a Board; and (3) matters with respect to which independent Staff action is appropriate but which bear enough relationship to the subject of a pending proceeding to make review by the Licensing Board in that proceeding appropriate. The third situation was found to be present in Zimmer, and we find it to be applicable here and to undergird our jurisdiction to consider the Joint Motion.

The jurisdictional analysis by the Licensing Board in Zimmer apparently never received Appeal Board review. Another Licensing Board, however, subsequently reached a similar conclusion, relying in part on the jurisdictional precedent of Zimmer. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-16, 19 NRC 857, 862-64 (1984). In reviewing and affirming that determination, the Appeal Board cited the jurisdictional holding in Zimmer (LBP-79-24)

approvingly, noting that the Commission had never interceded to terminate that Board's action. ALAB-765, 19 NRC 645, 652 (1984).[9]

The Staff has not set forth any reason for its change of position on the applicability of 10 C.F.R. § 2.717(b) between Zimmer and this case. There seem to be no intervening regulatory or decisional changes which would limit the applicability of § 2.717(b) to matters directly bearing on an already admitted contention--at least, no party has advised us of such changes. Unless other matters raised by the Applicant or Staff suggest that we are deprived of jurisdiction for some other reason, we opine that our jurisdiction to consider the Joint Motion properly rests on 10 C.F.R. § 2.717(b). We turn now to the other jurisdictional arguments advanced by the Applicant and/or Staff.

3. In addition to its position with respect to 10 C.F.R. § 2.718(m), which we have described above, the Applicant advances three arguments as to why we lack jurisdiction to consider the Joint Motion. The first is that our authority is limited to resolving issues raised by the amendment application before us and that the reracking and related activities authorized by Amendment 104 are not within the scope of the license amendment application, which assertedly is limited to a proposed change in the number of fuel assemblies which may be stored in the fuel pool at any one time. On the other hand, the Joint Motion (at ¶ 23)

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9 See also Nuclear Fuel Services, Inc. (Western New York Nuclear Service Center), LBP-82-36, 15 NRC 1075, 1082 n. 14, aff'd. ALAB-679, 16 NRC 121 (1982).

asserts that the installation of new racks is "inextricably related to the proposed increase in the authorized storage capacity of the spent fuel pool and does not have any utility without authorization to increase the capacity of the pool." The Staff response does not address this particular argument.

We agree with the Joint Motion on this point. Although our jurisdiction is limited by the scope of the amendment application before us, the reracking and related facility modifications are specifically described by the amendment application as being integral to that application and hence are encompassed within the scope thereof.[10] Indeed, Amendment 104 recites that it grants that application in part. Whether or not the Applicant might have taken the actions authorized by Amendment 104 without the benefit of that amendment, as it claims, it chose not to do so. It refrained from any reracking activities until Amendment 104 was issued (Tr. 233-34). That being so, we find the activities authorized by Amendment 104 to be part and parcel of the application which is subject to our review and hence within our jursidiction to consider.

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10 The case cited by the Applicant, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-674, 15 NRC 1101 (1982), stands for the proposition that an operating-license Licensing Board has no authority to suspend activities authorized by a construction permit. We have no quarrel with that proposition, although it is inapplicable to the motion before us (over which we have jurisdiction pursuant to 10 C.F.R. § 2.717(b)). The Midland situation involved no order of the Director of Nuclear Reactor

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4. The second jurisdictional argument advanced by the Applicant factually parallels that presented by the Staff with regard to 10 C.F.R. § 2.717(b)--i.e., that we have jurisdiction to consider only admitted contentions and that Amendment 104 bears no relationship to the one contention remaining in this proceeding. In its response to the Movants' reply, the Applicant cites authority indicating that a Board's jurisdiction to resolve certain questions is limited to admitted contentions. That does not constitute a bar to considering matters advanced by a party within the subject-matter jurisdiction of the Board. Moreover, the Applicant concedes that we have authority to consider late-filed contentions, although it does not regard the Joint Motion as presenting such a contention.

We have already rejected the Staff's claim, and the Applicant has presented no authority of its own (and we are aware of none) which would lead us to accept its position in this regard. As we have observed, the relationship of Amendment 104 to the admitted contention is as close as the relationship of many matters considered under 10 C.F.R. § 2.717(b) to the admitted contentions in cases in which the use of that section has been sanctioned. Accordingly, the asserted lack of a direct relationship between Amendment 104 and the pending safety contention

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(Footnote Continued)
Regulation which would bring § 2.717(b) into play; moreover, it involved consideration of matters which the operating-license board in any event could not have considered.

presents no jurisdictional bar to our considering and acting upon the Joint Motion.

5. The most serious of the three jurisdictional arguments advanced by the Applicant (as well as by the Staff) is that we are deprived of jurisdiction to act on the Joint Motion by virtue of the so-called Sholly regulations, 10 C.F.R. §§ 2.105, 50.58, 50.91 and 50.92. These regulations permit the Staff, in conjunction with a request for an operating license amendment, to make a "no significant hazards consideration" finding; when it does so, a license amendment may go into effect prior to the completion of any hearings on that amendment. Under 10 C.F.R. § 50.58(b)(6), the Staff's "no significant hazards consideration" finding is not subject to review by Licensing Boards:

> (6) No petition or other request for review of or hearing on the staff's significant hazards consideration determination will be entertained by the Commission. The staff's determination is final, subject only to the Commission's discretion, on its own initiative, to review the determination.

The Applicant (and Staff as well) seek to envelope the entire procedure followed with respect to Amendment 104 into the jurisdictional bar contained in 10 C.F.R. § 50.58(b)(6). They attempt to create an umbrella under which any aspect of a license amendment covered by a "no significant hazards consideration" finding, including Amendment 104, can be challenged, if at all, only through an initial decision in a proceeding such as this. The Movants, however, would confine the jurisdictional bar of that section only to the "no significant hazards

consideration" finding standing alone; they claim that the NEPA finding which must precede any license amendment is separate and apart from the "no significant hazards consideration" finding and may be reviewed separately. They limit their NEPA claims to situations where the NEPA finding is either missing or (as they claim here) on its face defective (Tr. 274). In that situation, the issuance of the license amendment is said to be void. They concede that other types of NEPA claims--such as to the sufficiency of the discussion of a particular subject in an EA--would be subject to after-the-fact consideration under the generally applicable Sholly rules (Tr. 275).

In support of its claim of a jurisdictional bar, the Applicant cites abstracts from the Statement of Considerations for the Sholly rules which suggest that the Commission was interested in avoiding delay with respect to amendments which are essentially routine in nature. We have no quarrel with that general proposition. But no place does the Applicant discuss the interrelationship of the requirements of NEPA to an amendment like License Amendment 104 for which a "no significant hazards condition" finding has been made.

We agree with the Staff that the jurisdictional bar of 10 C.F.R. § 50.58(b)(6) extends not only to the "no significant hazards consideration" finding itself but also to the immediate effectiveness of an amendment issued after all steps requisite to the issuance of such an amendment have been taken by the Staff. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1 (1986). But the jurisdictional bar cannot be properly read to insulate

from adjudicatory review Staff actions which must be (but have not been) taken prior to the issuance of an amendment. Particularly is this so with respect to NEPA requirements. Those requirements cannot be ignored with impunity and insul- ɔd from any review by virtue of a procedural finding based solely on safety (not NEPA) considerations. Where the Staff fails to undertake a mandatory NEPA review requisite to grant of a license amendment, the amendment may be nullified prior to any final ruling on the public health and safety aspects of the amendment.

It is clear to us that the Staff must perform an environmental review of a license amendment prior to putting that amendment into effect. 10 C.F.R. § 51.25. Depending upon the circumstances of a particular amendment, the review may take the form of an Environmental Impact Statement (EIS) pursuant to 10 C.F.R. § 51.20, an EA pursuant to 10 C.F.R. § 51.21, or a categorical exclusion pursuant to 10 C.F.R. § 51.22. Nothing in the Sholly regulations abrogates those requirements.

Moreover, in issuing its Sholly rules, the Commission made it clear that NEPA requirements would continue to be followed. For example, the Statement of Considerations states:

> Before NRC issues an amendment, a State and the public can have a say about any amendment request that involves an environmental impact. The procedures . . . have been designed so that at the time of NRC's proposed determination (1) the State within which the facility is located is consulted, (2) the public can comment on the determination, and (3) an interested party can request a hearing.

51 Fed. Reg. 7744, 7755 (March 6, 1986).

Applying the Sholly rules to Amendment 104, once the Staff has made a determination, following public comment, that at least purports to

respond to the requirements of Part 51, any challenge entertained by us to the Staff's performance would, by virtue of the Sholly rules, be litigable only after the license amendment went into effect. However, to the extent the Staff had neglected to perform one or more of the duties mandated by the Sholly rules as a precondition of license amendment issuance, including duties emanating from the requirements of Part 51, the amendment would be void (rather than voidable) and within our authority to review prior to our final decision in this proceeding.

Here, no public notice of the proposed issuance of Amendment 104, and no proposed "no significant hazards condition" determination for that amendment, appear to have been published. The only proposed "no significant hazards condition" determination of which we are aware in this proceeding is that covering the entire amendment to increase the capacity of the spent fuel pool (see n. 7, supra). Thus, States and the public were never afforded the opportunity to provide comments comparable to the complaints set forth in the Joint Motion, to the effect that the proposed Amendment 104 represented improper segmentation of the environmental review, or that there was no independent utility to reracking and associated activities standing alone. Furthermore, the SER which issued for Amendment 104 does not even purport to represent an environmental review or assessment of the action for which the proposed determination was published. In these circumstances, we have jurisdiction at this time to review, at the request of the Movants, whether, given the apparent failure of the Staff to have followed both

Sholly and NEPA requirements, Amendment 104 was improperly issued and hence void.

C. Procedural Question

We have disposed of a number of procedural questions raised by the parties during the course of our resolution of various jurisdictional questions. The Applicant additionally asserts that the requested stay of License Amendment 104 would be a "futility" since it could accomplish the reracking and related activities by virtue of 10 C.F.R. § 50.59, which permits a licensee to make certain changes in the facility without Staff approval, reporting the changes to the Staff on an after-the-fact basis. The Movants assert that the reracking and related activities are not among the classes of changes authorized by § 50.59. The Staff acknowledged that reracking has been undertaken pursuant to 10 C.F.R. § 50.59, although it did not elaborate on the particular circumstances in which that approach had been used, or whether those circumstances were comparable to the present case.[11] Further, the Staff advised us at oral argument that last Summer it had requested the Applicant not to engage in reracking pending review by the Staff.[12]

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11 Tr. 248-50. But cf. Tr. 257, 284.

12 Tr. 283-84. See also letter from Steven A. Varga, NRR, to Mr. Warren P. Murphy, of the Applicant, dated July 15, 1987. Copies of this letter were served on all parties but not on this Board. We obtained a copy through search of NRC's Nuclear Document System (NUDOC). The letter presents the Staff's position but makes no attempt to present any legal analysis of activities which may or

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We reject the argument that our granting of the Joint Motion would be a futile act. The short answer is that the Applicant in fact took action only following the issuance of License Amendment 104. We are unwilling to presume that the Staff engaged in a useless act in issuing the amendment.

Furthermore, there are good arguments both in favor of and opposing use of § 50.59 for reracking under varying circumstances. We decline to decide that question, for lack of an adequate record to determine whether the Applicant acted pursuant to that section or to License Amendment 104.

We note, however, that any action taken by the Applicant pursuant to its own license and § 50.59 would not involve a separate Federal action and hence would not be subject to NEPA; the substantive foundation giving rise to the Joint Motion would not be present. We would also lack jurisdiction pursuant to 10 C.F.R. § 2.717(b), inasmuch as there would be no order of the Director of Nuclear Reactor Regulation to review. Thus, in terms of the Joint Motion, there would be no

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may not be undertaken under the authority of § 50.59.

In its initial response (at 4), the Applicant advises that it was requested by the Staff in early 1988 to defer the reracking and related activities, but we have not been able to locate any documentation of such request. The Applicant did not commence rack installation until after the issuance of License Amendment 104 (Tr. 233-34).

substantive or jurisdictional basis for us to stay any action taken pursuant to § 50.59.

D. Ruling on the Merits

In issuing Amendment 104, the Staff determined that the reracking and related actions, standing alone, qualified for a categorical exclusion pursuant to 10 C.F.R. § 51.22(c)(9). If it were proper to consider the reracking and related actions, standing alone, for environmental review purposes, there would be little question that the Staff had made a proper determination, at least to the extent that the immediate effectiveness of the amendment under the Sholly rules would come into play.

The Joint Motion claims, however, that there is no "independent utility" to the proposed reracking, standing alone; and that, although the new racks could be employed in lieu of the old, the only reason for installing the new racks at this time was a step toward the implementation of the spent fuel pool expansion application. That being so, they allege that there has been improper segmentation of the NEPA review of the expansion application and, in effect, no environmental review which even purports to satisfy applicable NEPA requirements. As a result, they claim Amendment 104 to be illegally issued and in effect void.

In order to qualify as an action which may properly be segmented for environmental review purposes from the entire action, the segmented portion of the action must possess some "independent utility" of its own and not merely as an adjunct of a larger project. Kerr-McGee Chemical

Corp. (West Chicago Rare Earths Facility), LBP-84-42, 20 NRC 1296, 1314 (1984); Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-664, 15 NRC 1, 7-10 (1982); Duke Power Co. (Amendment to Materials License SNM-1773--Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-651, 14 NRC 307, 311-15 (1981). To assist us in determining whether the reracking and related activities, standing alone, had any "independent utility," we posed a question to that effect to the parties, for response at the June 28, 1988 prehearing conference. Memorandum (Questions for Parties at Prehearing Conference), dated June 20, 1988 (unpublished).

All parties responded. The Applicant provided many reasons why going ahead with the reracking was advantageous to it from a business standpoint, and it claimed certain environmental advantages, all on the assumption that the expansion in capacity of the spent fuel pool would be eventually approved. It also argued that the new racks were as usable as the old ones, even though an expansion in capacity were not approved. But it did not even assert that there was an "independent utility" to the reracking apart from its usefulness in terms of the proposed expansion in capacity.

Indeed, in its initial response to the Joint Motion, the Applicant did not even deal with the alleged NEPA violation. Its entire argument

on the merits went to whether the stay standards have been satisfied.[13] Those standards, however, are not even properly applicable to the Joint Motion. In the first place, as the Staff points out, the stay standards spelled out in 10 C.F.R. § 2.788 are only applicable to proposed stays of orders issued by adjudicatory bodies such as this Board. They are not applicable to a Board's consideration of a Staff order such as is involved here.[14]

Secondly, however, and more important, the Joint Motion's request for injunctive relief or for a stay is an inaccurate characterization of the course of action which follows from a review of NEPA conformance. It appears to us that what the Joint Motion is really seeking is a review of the environmental aspects of a Staff action and, assuming error in the action, an invalidation of the action itself.[15] Once the license amendment is found to be invalid, the necessary course of action is to undo the improper Staff action and to prevent the Applicant from undertaking further activities on the basis of the invalid amendment.

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13 Applicant's Response at 15-25 (page 18 is blank). In its response to the Joint Reply, the Applicant does claim that the segmentation cases require a significant impact for the initial segment. See pp. 24-25, infra, for a discussion of this claim.

14 Contrary to the Applicant's claim (Response to Joint Reply, at 4-5) our authority to grant stay orders is not necessarily confined to circumstances spelled out in 10 C.F.R. § 2.788. See our discussion of 10 C.F.R. § 2.718(m), supra, p. 7.

15 The Movants, in their Joint Reply (at 3, n. 4) acknowledge this to be the case.

(As we held earlier, we lack jurisdiction to order the Applicant to cease taking actions which it could take under authority other than the improperly issued license amendment.)

Finally, it is important to note that the Staff's failure to perform an environmental review (such as occurred here) in itself has been held to give rise to damage to interested persons such as the Movants. State of California v. Bergland, 483 F. Supp. 465, 498-99 (1980). Once a substantial NEPA violation is shown, traditional equitable principles do not come into play in considering relief to be granted. Id.; Lathan v. Volpe, 455 F.2d 1111, 1116 (9th Cir., 1971), relying on U.S. v. City and County of San Francisco, 310 U.S. 16, 30-31 (1940). This standard applies at least in "exceptional cases" (such as this one) where there are serious and substantive deficiencies in an environmental review or, perforce, no environmental review at all. Essex County Preservation Association v. Campbell, 536 F.2d 956, 962-63 (1st Cir., 1976). One such situation is where a review improperly covers only the first phase of a multi-phase project. Atchison, Topeka and Santa Fe Ry. Co. v. Callaway, 382 F. Supp. 610, 620-22 (D.D.C. 1974).[16]

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16 The cases cited by the Applicant (Response to Joint Reply, at 5-6) hold only that equitable principles may be applicable where minor defects in an EIS have been demonstrated--not the situation here.

The Applicant also attempts to prove that the Movants have not demonstrated likelihood of success on the merits by creating three (Footnote Continued)

The Staff does argue that Amendment 104 does not infringe any interest of the Movants, but its rationale is that the amendment does not relate to any admitted contention.[17] We have already rejected the claim that an admitted contention is necessary for us to consider the Joint Motion; and, were it not rendered moot by issuance of the EA, we also would have elected to treat the Joint Motion as a late-filed contention (subject, of course, to a balancing of the factors set forth in 10 C.F.R. § 2.714(a).)

The Staff also re-asserts that it determined that the reracking and related actions alone had an insignificant environmental impact. And the Applicant would limit application of the segmentation cases to situations where the initial phase itself has significant impacts.[18] The trouble with segmentation, however, is that it permits an agency to shave off insignificant aspects of an action which in totality may be significant, thereby undermining the purpose of NEPA to identify environmental actions which in their totality may be significant. Until the Staff prepared its EA, there had been no determination by the Staff as to whether the entire expansion application involves significant

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(Footnote Continued)
hypothetical straw persons (or legal scenarios) and then knocking them down, one by one (Applicant's Response, at 17-19 (page 18 blank)). It seems rather obvious that the Movants are not attempting to succeed on the merits by bringing about any of the three scenarios described by the Applicant.

17 Staff Response, at 8-10.

18 Response to Joint Reply, at 7.

environmental impacts. Moreover, given such effects as the occupational radiation exposure identified in the SER for Amendment 104 (at 12-14), it is clear that the environmental impacts, while perhaps insignificant, are not de minimis. Given the improper segmentation which, we find, attended the environmental review of Amendment 104, that amendment lacked a requisite Staff determination and could have no force or effect, at least until the Staff prepared and released its environmental review document.

In short, until the Staff issued its EA, it had not even purported to perform an environmental review of the application before us. It had improperly fractionalized from that application a project which it deems to have an insignificant environmental impact. Until resurrected by issuance of the EA, that action was invalid, and the license amendment resulting therefrom was void.

E. Relief

As we held earlier, we are jurisdictionally precluded from enjoining the Applicant from continuing the reracking and related activities to the extent they may be permitted under authority other than License Amendment 104. We have determined that License Amendment 104, at the time of its issuance, was void for lack of a proper NEPA review. But because the deficiency in License Amendment 104 was caused by an error by the Staff and not by any planned activity of the Applicant (insofar as we are aware), the deficiency could be and was cured by the issuance by the Staff of its EA, which purported to cover the entire spent fuel pool capacity expansion. As far as is relected by

the record before us, the Staff has now performed all actions necessary for the issuance of Amendment 104. No stay of activities authorized by Amendment 104 is thus called for at this time.

We also are declining (for lack of jurisdiction, pursuant to the Sholly rules) to grant the additional stay requested orally by the Movants (Tr. 271), to give them a chance to explore the validity of the Staff's EA. Assertions by the Movants with respect to the validity of the EA can, of course, be entertained by us (under applicable standards, including those governing late-filed contentions) but are subject to the Sholly rules--i.e., the amendment may remain in effect pending any litigation of its propriety. Any proposed contentions concerning the validity of the EA would be considered under the terms spelled out in our May 26, 1987 Prehearing Conference Order, LBP-87-17, supra, 25 NRC at 862.

F. Order

For the foregoing reasons, it is, this 3rd day of August, 1988

ORDERED:

1. The Joint Motion under consideration is dismissed as moot (to the extent it seeks to stay the effectiveness of License Amendment 104). To the extent it seeks additional relief at this time, it is denied for lack of authority.

2. This Order becomes effective upon issuance.

3. Proposed late-filed contentions arising from the EA may be submitted on the schedule set forth in LBP-87-17, supra, 25 NRC at 862--i.e., by August 15, 1988, within 14 days of service of the EA (taking into account weekends and mailing time).

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer
Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Glenn O. Bright
Glenn O. Bright
ADMINISTRATIVE JUDGE

James H. Carpenter
Dr. James H. Carpenter
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 3rd day of August, 1988.