May 2, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	
Public Service Co. of New Hampshire, et al.	Docket No. 50-443-OL 50-444-OL
(Seabrook Station, Units 1 & 2)	Offsite Emergency Planning Issues

FEDERAL EMERGENCY MANAGEMENT AGENCY'S
MEMORANDUM OF LAW IN OPPOSITION TO JOINT
INTERVENORS' MOTION FOR DIRECTED CERTIFICATION

I. INTRODUCTION

The Federal Emergency Management Agency (FEMA) opposes the Joint Intervenors' Motion for Directed Certification on the grounds that the standards for directed certification have not been satisfied. The rulings will not have a pervasive or unusual effect because the scope of FEMA's prefiled testimony is quite limited as required by a previous evidentiary ruling of the ASLB on which the Joint Intervenors have unsuccessfully sought directed certification. FEMA contends that the rulings were correct because the ASLB properly applied the executive privilege claimed by FEMA. FEMA also submits that, even if the challenged rulings were not correct, as a matter of

public policy, its senior management should not compelled to appear in the licensing proceedings.

II. ARGUMENT

A. The Standards for Directed Certification Have Not Been Met.

The Joint Intervenors' Motion for Directed Certification (hereinafter Intervenors' Motion) moves for directed certification of discovery rulings made by the Atomic Safety and Licensing Board. As a general rule discovery orders are interlocutory and are not appealable. 8 Wright and Miller Federal Practice and Procedure, Civil, section 2006 (1970). The Atomic Safety and Licensing Appeal Board has recognized this general rule in numerous cases. See Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-558, 11 NRC 533, 536 (1980); Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 NRC 693, 695 fn. 5 (1979); and Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

The Atomic Safety and Licensing Appeal Board has carved out two limited exceptions to the general rule that interlocutory orders cannot be appealed. Those exceptions are described in Public Service Electric and Gas Co., supra:

> Our decisions establish that discretionary interlocutory review will be granted only sparingly, and then only when a licensing board's action either (a) threatens the party adversely affected with immediate and serious irreparable harm which could not be remedied by a later appeal, or (b) affects the basic structure of the proceeding in a pervasive or unusual manner. 11 NRC at 536.

FEMA contends that the standards established by the Atomic Safety and Licensing Appeal Board for determining when the Appeal Board will grant

interlocutory review have not been met in this proceeding. Therefore, the Appeal Board should decline to grant the Intervenors' Motion.

The Intervenors contend in their Motion for Directed Certification that the second of the two tests described in Public Service Electric and Gas Co., id., has been met. For example, the Intervenors state at page 1 of their Motion that "While the rulings are procedural...they have a pervasive effect on the conduct of the litigation." In addition, the Intervenors state at page 3 of their Motion that "...these (challenged) rulings....have surely had a pervasive and unusual impact in this critical litigation." The Intervenors contend that the licensing board's challenged discovery orders "have affected the basic structure of this proceeding in a pervasive and unusual way." In support of this proposition, the Intervenors state at page 32 of the pending Motion that "If the Intervenors are effectively prevented from developing and presenting these arguments, the outcome of this litigation may well be predetermined."

FEMA does not agree with the Intervenors' contention that "the outcome of this litigation may well be predetermined" if the Intervenors are not permitted to question the proposed FEMA witnesses about the reason that FEMA opted to file its March 14, 1988, testimony. The licensing board's discovery decisions which the Intervenors seek to appeal immediately do not "...fall in that small class (of decisions) which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546

(1949). See also Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, and 3) 3 NRC 223, March 19, 1976.

In seeking to limit the scope of discovery, FEMA has consistently argued that the issue pending before the ASLB is the adequate protection of the transient beach population in the Seabrook Emergency Planning Zone, not FEMA's internal workings. FEMA's point is that the proper scope of discovery should be limited to whether its conclusions are adequately supported and if they are not they should be disregarded. (The related issue of tne rebuttable presumption is discussed below in Section II.B.2.) The Intervenors correctly note, in footnote 1 of their Motion, that the focus of the current prefiled testimony is narrow. It is limited to the adequacy of the New Hampshire Radiological Emergency Response Plan (NHRERP) measured against planning elements J.9. and J.10.m. of NUREG-0654/FEMA-REP 1, Rev. 1. However, in FEMA's view, that is the only approach it could take consistent with the ruling of the ASLB on November 16, 1987, on the admissibility of the testimony of Stephen Sholley, et al. Viewed in that light, the pending Intervenors' Motion could be seen as an attempt to reopen their unsuccessful motion for directed certification of the November 16 ruling.

The Intervenors hold that there are too many people at too much risk on the beaches in the summer. However, FEMA understands the ASLB to have ruled on November 16 that, because there are no specific, pre-set, quantitative minimum dose savings to be achieved by emergency response planning (see Long Island Lighting Company (Shoreham) 24 NRC 22, 29 (CLI-86-13 1986)), it is not appropriate to develop a record showing what dose savings might be achieved or not achieved by any particular plan. In addition, FEMA understands the ASLB

to have ruled that it is not appropriate to present evidence on the level of risk or a dose consequence analysis of any accident sequence or range of accident sequences. In view of this understanding, FEMA took a generic approach, based on the rulings of the Commission and the ASLB, and NRC regulations and guidance. The real issue is whether the approach is the legally correct one, not what motivated the choice of approaches. In view of the ASLB's ruling, any other choice would have defied the law of the case.

If the Intervenors' position about too many people at too much risk is correct, then FEMA has, by necessary inference, applied the wrong standard and its testimony ought to be disregarded or even stricken. If FEMA has correctly interpreted the ASLB's ruling of November 16, 1987, and it is correct that there is no specific, pre-set, quantitative minimum standard for offsite emergency planning, then the importance of FEMA's testimony is simply that it articulates the legal and technical conclusions which are implicit in the NRC's rulings, regulations, and guidance documents. The only relevant inquiry is whether FEMA's logic is correct. Even if FEMA had improper motives for shifting its position from that of its September, 1987, prefiled testimony (which FEMA does not concede), that would not change the validity of the current position. The issue is not credibility. The issue is what conclusion is compelled by the applicable law, regulations, and guidance.

For these reasons, FEMA contends that the information which the Intervenors seek to develop in the context of the beach population issue is not relevant in this proceeding. There is no need to accept the directed certification which the Intervenors seek because in fact the challenged discovery orders have had no pervasive or unusual impact on this proceeding

and certainly no impact beyond that of the November 16 ASLB ruling. Therefore, the Intervenors' Motion should be denied.

B. The Relief Sought by Joint Intervenors Should be Denied.

1. The Mental Processes of Government Officials May Not Be Probed.

There are many cases which have established a concept of executive process privilege relating to predecisional deliberations which occur before final agency decisions are made. The leading case in this context is United States v. Morgan, 313 U.S. 409 (1941). In that case the Supreme Court was critical of the District Court for having permitted deposition and trial testimony of the Secretary of Agriculture in litigation relating to a secretarial rate order determination. The Court stated:

> ...the secretary should never have been subjected to this examination. The proceeding before the Secretary 'has a quality resembling that of a judicial proceeding.'...Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that 'it was not the function of the court to probe the mental processes of the Secretary.'...Just as a judge cannot be subjected to such a scrutiny,...so the integrity of the administrative process must be equally respected. (Emphasis added.)

The Morgan decision reaffirmed the Supreme Court's decision in DeCambra v. Rogers, 189 U.S. 119, 122 (1903). That case involved a dispute between two parties as to the ownership of a parcel of land. The Supreme Court stated:

> It is hardly necessary to say that when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination. (Emphasis added.)

The Supreme Court had occasion to address this same issue in Chicago, Burlington & Quincy Railway Company v. Babcock, 204 U.S. 585, 593 (1907)

shortly after it decided DeCambra v. Rogers, supra. The petitioning railroad companies contended that a state Board of Equalization and Assessment had improperly assessed the railroads' property because the Board was subject to political duress. The Court stated:

> The members of the Board were called, including the Governor of the State, and submitted to an elaborate cross-examination with regard to the operation of their minds in valuing and taxing the roads. This was wholly improper. (Emphasis added.)

These three Supreme Court cases provide the basis upon which other courts have consistently ruled that inquiries into the deliberative process by which governmental decisions are made - as opposed to the rationale for the ultimate decision - are not permitted. Kaiser Aluminum and Chemcial Corp. v. United States, 157 F.Supp. 939 (U.S.Ct.Cl. 1958) is one of the seminal cases which addresses this proposition. Although Kaiser dealt with the production of documents, the principle of that case also applies in the context of deposition and trial testimony. See ISI Corp. v. United States, 503 F.2d 558, 559 (9th Cir. 1974); and Smith v. Federal Trade Commission, 403 F.Supp. 1000, 1018 (D.C.Dela. 1975) . The Court in Kaiser denied the plaintiff's request for the production of a document which contained intra-office advice on policy. The Court stated:

> Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act....There is a public policy involved in this claim of privilege for this advisory opinion - the policy of open, frank discussion between subordinate and chief concerning administrative action. (Emphasis added.) Id. at 945-946.

The Court in Kaiser relied on the Supreme Court's opinion in Morgan v. United States, supra, as support for its decision. See also Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd per curiam, 384 F.2d 979 (D.C.Cir. 1967) (adopting district court's reasoning in its entirety), cert. denied, 389 U.S. 952 (1967); and Grumman Aircraft Eng. Corp. v. Renegotiation Board, 482 F.2d 710 (D.C.Cir. 1973), rev'd. on other grounds, 421 U.S. 168 (1975).

In First Federal Savings and Loan Association v. Federal Home Loan Bank Board, 496 F.Supp. 227 (D.C.Minn. 1980), the court prevented discovery directed at members of the Federal Home Loan Bank Board. The court recognized that interrogatories seeking information about the portions of the record which each Board member had consulted before reaching a decision to permit the opening of a savings and loan branch office were objectionable. The court stated:

> It is well established that a party may not probe the mental processes of the decision makers. United States v. Morgan, citations omitted. Plaintiff's request is simply a sub rosa attempt to probe the mental processes of the decision makers cast in procedural terms. 496 F.Supp. at 230.

For the reasons articulated by the ASLB in the rulings of April 1 and April 5, 1988, executive privilege has been correctly applied to deny inquiry into the mental processes of FEMA officials in developing the position taken by FEMA in its prefiled testimony.

2. Intervenors' Reliance on the Rebuttable Presumption is Misplaced.

The Intervenors are in the curious position of arguing that the rebuttable presumption which NRC regulations bestow on FEMA findings (10 CFR

50.47(a)(2)) have an important place in these proceedings so that they can have the privilege of rebutting it. Directed certification is not necessary for that to take place. In fact, the presumption will already have disappeared by the time this Memorandum is filed. That happened when the Intervenors prefiled testimony contesting FEMA's position and will certainly have happened as soon as the Intervenors begin crossexamining the Applicants' witnesses. In Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP 82-472, 23 NRC 294, 365 (1986), it was stated:

> In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability.
>
> 10 C.F.R. § 50.47(a)(2). This means that a FEMA position on an issue ... may be accepted by a licensing board if that issue is uncontested. But if an intervenor contests such an issue, the rebuttable presumption "dissolves" and the FEMA testimony is given no special weight "beyond that to which [it] would be entitled by virtue of the expertise of the witnesses and the bases presented for their views." Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1298 (1982), aff'g LBP-81-59, 14 NRC 1211, 1460-66 (1981). See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-39, 15 NRC 1163, 1213 (1982).

A truer reading of the Intervenors' Motion is not that they have to be able to overcome the rebuttable presumption, but that they will be satisfied with nothing less than destroying the credibility of FEMA. See Intervenors' Motion at 20, 21. This is not an appropriate application of directed certification, especially in light of the quite limited focus of FEMA's prefiled testimony, which the Intervenors themselves have noted.

3. Intervenors' Reliance on the Waiver of Executive Privilege is Misplaced.

The heart of Intervenors' Motion is that they want to be able to depose the senior management of FEMA so that, assuming that they will be subpoenaed, they may be effectively crossexamined. They want to examine Julius W. Becton, the Director of FEMA, a Presidential appointee; Henry Vickers, Regional Director of FEMA, a Presidential appointee; Grant Peterson, Associate Director of FEMA, a Presidential appointee; David McLoughlin, Deputy Associate Director of FEMA; Richard Krimm, Assistant Associate Director of FEMA; and Craig Wingo, whom the Intervenors identify as a "key policy maker." Intervenors' Motion, 5. In a separate proceeding before the ASLB, they have sought subpoenas for those officials as well as George Watson, Acting General Counsel of FEMA; Edward Thomas, Director of the Natural and Technological Hazards Division, FEMA Region 1; and Margaret Lawless, who works in the branch of which Mr. Wingo is Chief.

From the outset of the discovery period on the sheltering issues, it was FEMA's intention to permit an exploration of the bases for the opinions and conclusions stated in its prefiled testimony. The testimony sets forth an explanation (which appears in summary form in Section II.A., above) of both the bases for the conclusions and the events which led to a reexamination of FEMA's earlier position. Without question, it is an appropriate use of discovery for the Intervenors to probe that explanation. FEMA's current position and the way it is different from its earlier position do not make sense without the knowledge of how FEMA came to feel constrained by the precepts that sheltering is not required under all circumstances for each subgroup within the population of the EPZ, that there are no specific,

pre-set, quantitative dose savings which must be achieved by offsite emergency planning, that there are no minimum evacuation times required, and their corollaries. That history includes debate within FEMA, events within the licensing proceeding, written communications directly from NRC Staff, and discussions with NRC Staff. It is a delicate matter to establish a precise balance between those matters on the one hand which can and ought to be protected by executive or similar privilege and those on the other the disclosure of which will clarify and focus the litigation. This present controversy arose, in part, because FEMA counsel chose to assert a privilege as to a meeting with NRC Staff when (a) it was mentioned for the first time and (b) described, by a non-participant, in rather polarized terms.

The Intervenors' position seems to be that (a) because FEMA allowed discovery of any communications from NRC Staff, all discussions with NRC Staff may be fully explored, (b) because FEMA allowed any parties to those communications to testify about them, all participants should be made available to testify about them, and (c) they cannot make their case before the ASLB without being able to challenge the credibility of every participant in FEMA's decision making. FEMA submits that it does not give up all protection of executive privilege the minute any of it is waived, but, more importantly, the waiver as to a particular subject matter under discussion with a particular witness does not amount to a license to corral the senior management of a Federal agency.

The NRC protects itself from such treatment through its own regulations. 10 CFR 2.270(h). Arguably, this rule also applies to FEMA. FEMA is not a party to licensing proceedings and appears, in effect, as an extension of NRC

Staff. Since FEMA is not a party, it is only because of its relationship to the NRC through the Memorandum of Understanding between the agencies that the NRC licensing and appeals boards have any in personam jurisdiction over FEMA officials, if indeed they have any at all. But even if it was not the intent of 10 CFR 2.270(h) to protect FEMA officials, there is an important public policy reason to extend its application to FEMA. The resources of FEMA are considerably more limited than those of the NRC. However, under the Memorandum of Understanding, FEMA is expected to review offsite emergency response plans and observe and evaluate exercises of those plans. It is currently involved in reviewing two separate plans for the Seabrook EPZ, another for Shoreham, planning exercises for both sites sites and several others. All of the officials named above are directly involved with these activities in one way or another and each of them has significant other responsibilities. To put them through weeks or months of depositions and hearings will disrupt the plan reviews and exercise evaluations, not to mention FEMA's other activities.

III. CONCLUSIONS

For the reasons argued above, FEMA submits that the Intervenors have not established that the discovery rulings of the ASLB affect the basic structure of the licensing proceedings in a pervasive or unusual manner. If their arguments establish anything it is simply that the rulings frustrate their strategy of making the credibility, integrity, and motivations of FEMA policy makers the central focus of the hearings. These issues are irrelevant to the outcome of the proceedings since the essence of FEMA's testimony is that NRC's

regulations, guidance and the law of this case have brought it to the conclusions expressed in its testimony. Indeed, it seems to FEMA that the ASLB would be drawn to those same conclusions even if there were no testimony from FEMA at all.

It is FEMA's position that the ASLB correctly applied executive privilege. The ASLB correctly understood that even if FEMA policy makers are thoroughly debilitated, it would not have a bearing on the logic of FEMA's conclusions. The ASLB correctly understood that the rebuttable presumption is a red herring in this case. In addition, this Appeals Board needs to consider the far-reaching effect a reversal of those rulings might have on the operations of a sister Federal agency.

As a final note, FEMA intends to initiate discussions with the Intervenors to attempt to resolve the contentious issue which is the subject of the Intervenors' Motion. FEMA believes that there is a substantial likelihood that there will be some mutually satisfactory agreement made with the Intervenors on this issue. Such an agreement would obviate the need for the Appeal Board to rule on the pending question. Therefore, it would be premature for the Appeal Board to conclude that the challenged discovery orders have already had a pervasive and unusual impact on this proceeding. Under these circumstances the Intervenors' Motion for directed certification should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Federal Emergency Management Agency's Memorandum of Law in Opposition to Joint Intervenors' Motion for Directed Certification and Petition for Leave to File have been served on the following by depositing them with the U.S. Postal Service on this 2nd day of May, 1988.

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