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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

JUDGE IVAN W. SMITH, CHAIRMAN
JUDGE JERRY HARBOUR
JUDGE GUSTAVE A. LINENBERGER, JR.

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

OPPOSITION OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA) TO THE APPLICATIONS FOR SUBPOENAS REQUIRING ATTENDANCE AND TESTIMONY OF PARTICULAR NAMED FEMA EMPLOYEES PURSUANT TO 10 CFR 2.720(a)

The Federal Emergency Management Agency (FEMA) opposes the applications of the Intervenors for subpoenas for certain employees of FEMA to testify at hearings in the above case on the basis of relevancy and executive or deliberative process privilege. The bases are related to one another in the sense that executive privilege is a qualified one and is balanced by the opponent's need to discover the information sought to be protected. It is FEMA's position that the Intervenors in this case have no need to discover the information they seek and so the privilege is not overcome.

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I. The Information Which the Intervenors Seek to Obtain From FEMA Employees Is Not Relevant to This Proceeding.

With all the hundreds of thousands of written and spoken words uttered in this case on the sheltering issue alone, the issue comes down to a fundamental and simply stated conflict. The Intervenors hold that there are too many people at too much risk on the beaches in the summer. The Nuclear Regulatory Commission and the Applicants maintain that there is no specific, pre-set, quantitative standard against which emergency response plans are judged (see Long Island Lighting Company (Shoreham) 24 NRC 22, 29 (CLI-86-13 1986)) and that application of that general principle dictates that sheltering is not required for every subgroup of the population of the Emergency Planning Zone (EPZ). The FEMA testimony which was filed with this Atomic Safety and Licensing Board in September, 1987, was widely interpreted to support the first position; its pre-filed testimony in March, 1988, explicitly adopted the second. Intense interest has been focused on FEMA's shift, but the parties seem to have lost sight of the fact that these positions are mutually exclusive.

This mutual exclusivity is the essence of the ruling which this Board made on November 16, 1987, regarding the admissibility of the Sholley-Beyea testimony proffered by the Commonwealth of Massachusetts. FEMA understands the Board to have ruled that, because there are no specific, pre-set, quantitative minimum dose savings to be achieved by emergency response planning, it is not appropriate to develop a record showing what dose savings might be achieved or not by any particular plan. In addition, FEMA understands the Board 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 Board, 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 Board'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 Board's ruling of November 16, 1987, and the position of the NRC and the Applicants on the lack of a specific, pre-set, quantitative minimum standard for offsite emergency planning is correct, 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's motives for shifting its position were improper (which FEMA does not concede), that would not change the validity of FEMA's position. The issue is not credibility. The issue is what conclusion is compelled by the applicable law, regulations, and guidance.

It is clear from the Intervenors' Applications for Subpoenas that the questions they want to ask FEMA's employees relate exclusively to the deliberative process which culminated in FEMA's decision to file its March 14, 1988, testimony on the sheltering issue in this proceeding. For example, paragraph 2 of the pending Applications for Subpoenas states that "The evidence available from each of the FEMA witnesses is generally relevant to the issue

concerning the decision to change the FEMA position on the beach population...." (Emphasis added.)

At paragraph 4(A) of their Application for Subpoenas, The Intervenors support their request for a subpoena for Edward Thomas on the fact that "Mr. Thomas' testimony has general relevance to the question of the background for, and reasons for, FEMA's change of position." With respect to Julius Becton, the Director of FEMA, the Intervenors acknowledge that he has "not yet (been) identified in any deposition as a party to meetings concerning the Seabrook plans", but the Application for Subpoenas nevertheless speculates at paragraph 4(B) that the Director "may have received input which was relevant to the FEMA change of position (and) may have been involved in the decision to change the FEMA position...."

The Intervenors state at paragraph 4(C) of their Application for Subpoenas that Grant Peterson "...is said to have presided at a FEMA meeting...at which the formal FEMA decision on changing its position...was made...." Their justification for applying for a subpoena for Dave McLoughlin relates to his having been one of the attendees at a March 4, 1988, meeting at which FEMA's beach population testimony was discussed. The Intervenors base their request for a subpoena for Richard Krimm on the fact that he may have attended meetings which culminated in FEMA's filing its March 14, 1988, testimony. The basis the Intervenors cite in support of their application for a subpoena for George Watson is his attendance at a January 19, 1988, meeting among FEMA and NRC representatives. The Intervenors base their request for a subpoena for Craig Wingo on his presence at two meetings at which FEMA's beach population testimony was discussed. The Intervenors base their subpoena

request relating to Henry Vickers on the fact that he "was either involved in the decision, or communicated the decision to replace Mr. Thomas as a FEMA witness in regard to Seabrook." In addition, the Intervenors note that Mr. Vickers attended a March 4, 1988, meeting during which FEMA's beach population testimony was discussed. In their second Application for Subpoenas, dated April 24, 1988, the Intervenors argue that the testimony of Margaret Lawless is necessary because she attended meetings on March 4, 1988, June 19, 1987, June 2, 1987, which representative of NRC also attended, October 12 and/or 28, 1987, and February 15, 1988, in which FEMA's position was or may have been developed.

FEMA's March 14, 1988, testimony is obviously relevant to the beach population issue which is before the Board in this proceeding. FEMA does not dispute the Intervenors' right to examine designated FEMA witnesses concerning the legal, technical, and policy rationale for FEMA's testimony in this regard. However, the explicit terms of the pending Applications for Subpoenas reveal that the Intervenors want to question the FEMA employees for whom they have requested subpoenas about <u>why</u> FEMA decided to file its March 14, 1988, testimony, rather than inquiring about the basis for the testimony. As described in Part 2 of this Argument, the deliberative process by which FEMA decided to file its March 14, 1988, testimony is not a relevant inquiry. Therefore, the Intervenors' Applications for Subpoenas relating to FEMA employees should be denied.

II. 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 et al., 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 pp. 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.

Although this decision related to pretrial discovery matters, the rationale of the court's decision is equally applicable to the Intervenors' pending Applications for Subpoenas.

The Intervenors argue in their Memorandum in Support of Application for Subpoenas that "when...executive privilege is asserted with respect to administrative or agency meetings...and it is the very deliberations which took place during those discussions which are at issue, there can be no privilege." (Emphasis in original.) The Intervenors cite no authority for this proposition, and their assessment of the executive process privilege is incorrect. If the Intervenors' statement of what they believe is the law in this regard were accurate, the concept of executive privilege would not exist because the privilege is by definition only claimed in the context of predecisional deliberations which culminate in decisions that are subsequently challenged.

The Intervenors also cite Village of Arlington Heights et al. v. Metro Housing Development Corporation et al., 429 U.S. 252 (1977) in support of the proposition that there is no deliberative process privilege "when the deliberations relate to a particular action taken, and such action appears to have been arbitrarily or irrationally made." The Intervenors' reliance on Arlington Heights is misplaced. In that case the Supreme Court held that the respondents had not established that there was a discriminatory purpose in the decision of Arlington Heights not to permit rezoning which the respondents had sought. Arlington Heights did not address the issue of executive privilege, and there is no support in that decision for the Intervenors' claim that Arlington Heights suggests that FEMA cannot claim the privilege in this action.

The Intervenors' want to question FEMA representatives about why FEMA decided to file its March 14, 1988, testimony in this proceeding. However, this is precisely the type of testimony which the case law described above prohibits. Therefore, the Intervenors' Applications for Subpoenas relating to FEMA employees should be denied.

III. If the Board Issues Any of the Requested Subpoenas to FEMA Employees, It Should Issue a Protective Order Limiting the Scope of Questioning at the Hearing to Relevant Matters Forming the Basis for FEMA's March 14, 1988 Testimony.

If the Board should decide to issue any of the subpoenas for FEMA employees which the Intervenors have requested, it should at the same time issue a Protective Order directing THE PARTIES to limit their questions of such FEMA employees to FEMA's March 14 testimony and the basis for that testimony. The parties should be prohibited from asking any questions of FEMA

employees who are subpoenaed concerning FEMA's decision to file the March 14 testimony. This result is dictated by the case law described in the preceding portion of this Memorandum.

IV. If the Board Decides to Honor the Intervenors' Subpoena Request, It Should Issue a Subpoena to a Single FEMA Representative.

The Intervenors have applied for subpoenas for virtually every FEMA employee who was involved in the preparation of FEMA's Seabrook testimony, from the Director of FEMA, through FEMA's Acting General Counsel, to the supervisory and staff level of the agency. The Intervenors seek testimony from all of these FEMA employees in the hope that one of them might provide testimony helpful to the Intervenors.

This type of a fishing expedition should not be permitted. Rule 403 of the Federal Rules of Evidence gives the Board the authority to exclude even relevant evidence for a variety of reasons, one of which is "needless presentation of cumulative testimony." In addition, 10 CFR 2.757 authorizes the Board to limit the number of witnesses whose testimony may be cumulative. FEMA respectfully requests that if the Board should decide to honor the Applications For Subpoenas, the Board should issue only one subpoena to a FEMA employee who is able to testify about the FEMA deliberations which preceded the filing of FEMA's March 14, 1988, testimony in this proceeding.

Respectfully submitted,

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