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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING BOARD

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

LICENSEE'S RESPONSE TO "JOINT REPLY OF [NECNP] AND THE COMMONWEALTH OF MASSACHUSETTS TO THE STAFF AND LICENSEE'S OBJECTIONS TO FILE LATE-FILED CONTENTIONS"

For itself and the Commonwealth of Massachusetts, NECNP has submitted a reply to the responses filed by the Licensee and by the Staff to its proposed late-filed contentions. By leave granted previously, the Licensee submits herewith its response.

Environmental Contention 1

1. It is now conceded by NECNP that one cannot premise an EIS-is-required contention on the basis of a beyond design basis accident scenario. This significant limitation on the scope of what is properly litigable in a license amendment proceeding cannot be evaded by the simplistic response of hypothesizing *no* accident. Rather, the proponent of the contention bears the burden of at least articulating a within-design-basis accident that could lead to the consequences it asserts require preparation of the EIS. NECNP cannot do this -- more importantly, it has not done this. That failure requires exclusion of this proposed contention.

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As NECNP states its case, this proposed contention "alleges that the risk associated with a self-sustaining fire in the spent fuel pool, without hypothesizing a beyond-design-basis event, constitutes . . . ." *Joint Reply* at 1-2. This fire, in turn, occurs because "when the plant is deinerted, hydrogen detonation and deflagration in the reactor building is a significant risk." *Id.* at 2-3.

NECNP proves too much in its assertion that it ha t hypothesized a beyond-design-basis accident: NECNP hasn't hypothesized a y accident. Nor has it offered any credible within-design-basis scenario by which the hydrogen in question might be generated. Nor has it offered any within-design-basis scenario by which the detonation of hydrogen in the reactor building might lead to the catastrophic failure of the spent fuel pool, which is a condition precedent of the cladding fire to which it refers.[1] As in *Diablo Canyon*,[2] a proffered contention so framed must be rejec because it "does not mention, let alone discuss, a single mechanism or scenario that might cause" the hypothetical "accident which involves substantial fuel damage." 26 NRC at 456. As the movants "[have] not even suggested a credible accident initiator," its proposed contention lacks the requisite basis for admission. *Id.* at 457.

In short, the movants have proposed a non-litigable contention premised on a beyond design basis accident. In their zeal to avoid this result, they defend the proffered contention on the basis of no hypothesized accident scenario, a ploy that necessarily fails the basis and specificity requirements. Either way, the proposed contention cannot be admitted.

2. NECNP now concedes that "the Appeal Board rejected NECNP's former Contention 2 on its merits, not on ripeness grounds." *Joint Reply* at

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[1]Though not mentioned in the *Joint Reply*, the basis tendered to this Board for this proposed contention is tied to a certain report issued by the Brookhaven National Laboratory. The entire focus of this report is beyond design basis accidents. See *Licensee's Response to 'Joint Motion of [NECNP] and the Commonwealth of Massachusetts for Leave to File Late-filed Contentions,'* 8/29/88, at 5-7 & nn. 7-9. Likewise, NUREG-1150, again cited by the *Joint Reply* deals with beyond design basis accidents. NUREG-1150 at xix.

[2]*Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449 (1987).

2. However, NECNP persists in its argument that former Contention 2 was "also non-ripe for the same reasons that former contention 3 was found by the Appeal Board to be non-ripe." *Id.*

NECNP has corrected only half of its prior error. The Appeal Board specifically held that former contention 2 was *not* premature:

> "First, although some environmental contentions must abide the issuance of the staff's environmental assessment . . . , that is not always the case. . . . Here, the staff has already indicated that it is preparing an environmental assessment, not an EIS. Tr. 91. Further, the risk scenario that provides the basis for contention 2 is unlikely to be affected by anything in that assessment, given the latter's brevity and purpose. . . . Thus, in these circumstances, there would have been no cause for intervenors to await the issuance of the environmental assessment before proffering this particular EIS contention."

ALAB-869, 26 NRC at 30. The significance of this prior history is twofold: First, the Appeal Board has already ruled that this contention is not admissible, and that ruling is not subject to re-argument and reconsideration before this Board.[3] Second, Environmental Contention 1, being without the scope of the invited resubmission, and being in no way dependent upon the publication of the EA, cannot be found to be timely.

Environmental Contention 2

The reason why this contention is not admissible is that it lacks the basis and specificity required by the Commission's Rules of Practice. NECNP simply hasn't responded to the arguments previously made, for it still has alleged no basis for challenging the Staff's estimate of 33 person-rem, and, more importantly, for challenging the Staff's conclusion the proposed action isn't environmentally significant enough to warrant the preparation of an EIS. Prescinding entirely from whether an *EIS* must contain raw data and intermediate calculations from which values used in drawing conclusions were derived, NECNP has cited -- and can cite -- no authority for the proposition that such detail need be contained on the face of an EA. NECNP's view of

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[3]NECNP in the *Joint Reply* nowhere addresses the problem, previously pointed out by the Licensee, that the scenario on which proposed Environmental Contention 1 is premised is identical to the scenario on which former Contention 2, ruled non-litigable as a matter of law by the Appeal Board, was based. See *Licensee's Response to 'Joint Motion of [NECNP] and the Commonwealth of Massachusetts for Leave to File Late-filed Contentions,'* 8/29/88, at 4 n.6.

the formality required of an EA is utterly inconsistent with the purpose of an EA, namely to assess the need for (not to substitute in substantial measure for) an EIS.[4]

Environmental Contention 3

NEPA contains two sources of a requirement to study and consider alternatives. One (§ 102(2)(C)(ii)) dictates one of the required constituents of an EIS and requires an assessment of alternatives that may produce the same benefit at less environmental cost. The other (§ 102(2)(E)) applies without regard to whether an EIS is required and requires a consideration of alternatives that might avoid the depletion of scarce resources.

Environmental Contention 3 seeks to force Staff consideration of an alternative that supposedly will avoid alleged environmental costs. It does not, however, arrive at this result by asserting the necessity of EIS preparation. Rather, it is based upon the legal proposition that, notwithstanding the words of the statute, and notwithstanding the construction of the statute, the alternatives assessment required by the two different sections of the statute is the same.

This legal proposition should be rejected.

First, it is contrary to the plain meaning of the words of Congress. The § 102(2)(E) assessment is only required where the proposed action "involves unresolved conflicts concerning alternatives uses of available resources." To require the same assessment in the absence of such a conflict is to write a statute that Congress has yet to enact.

Second, the construction that NECNP would place on the statute, besides straining plain English beyond its tolerance, would necessarily render § 102(2)(C)(ii) mere surplusage: if § 102(2)(E) requires the "environmentally preferable" alternatives assessment in all cases, what is the point in writing another section of the statute, on the very same page, requiring such an assessment if an EIS is prepared? It is black letter law that a construction of a statute that renders a portion mere surplusage is to be avoided if there

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[4]The function of an EA "is to determine whether there is enough likelihood of significant environmental consequences to justify the time and expense of preparing an environmental impact statement." *River Road Alliance v. Corps of Engineers*, 764 F.2d 445, 449 (7th Cir. 1985). Accord: *City of Aurora v. Hunt*, 749 F.2d 1457, 1467 (10 Cir. 1984).

is any other construction that is reasonable.[5] Here another construction is not only reasonable, it has the added virtue of being consistent with the words the Congress has employed with manifest care.

Third, NECNP relies upon a decision of the Court of Appeals for the Second Circuit, *Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88 (2d Cir. 1975). What NECNP omits to note is that the case on which it relies was ultimately reversed by the Supreme Court of the United States. The complete citation is *Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88 (2d Cir. 1975), *on remand*, 445 F. Supp. 204 (S.D.N.Y. 1978), *rev'd sub nom. Karlen v. Harris*, 590 F.2d 39 (2d Cir. 1978), *rev'd sub nom. Stryck*[illegible] *Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980).

Simultaneously, NECNP urges this Board to reject a case squarely on point -- that is to say, a case squarely holding that the type of alternatives assessment asserted to be required here is not required in the absence of the requirement to prepare an EIS -- by asserting that the case involved only § 102(2)(C) and not § 102(2)(E) and, indeed, suggesting that this cognate portion of the statute was merely overlooked by two sets of counsel and a federal judge. *Joint Reply* at 8. In point of fact, the court in that case cited § 102(2)(C) because only that statute requires an "environmentally preferable" alternatives assessment (and didn't apply). No need of referring to § 102(2)(E) arises unless one has first concluded, erroneously, that § 102(2)(E) requires the same thing.

Environmental Contention 3 seeks to create a new obligation neither enacted by Congress nor promulgated by the Commission. Such a proposed contention must be rejected.

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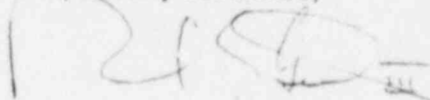
[5] *E.g.*, *Sutherland Statutory Construction* § 46.06: "A statute should be construed to that effect will be given to all its provision, so that no part will be . . . superfluous . . . ."

Conclusion

For the foregoing reasons, together with those set forth in "Licensee's Response to 'Joint Motion of [NECNP] and the Commonwealth of Massachusetts for Leave to File Late-filed Contentions,'" the three proposed late-filed contentions should be excluded.

Respectfully submitted,



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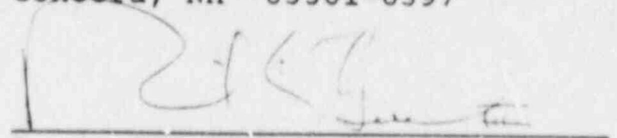

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