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LBP-88-26

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
	)	
	)	ASLBP No. 87-547-02-LA
(Vermont Yankee Nuclear Power Station)	)	October 11, 1988
	)	

MEMORANDUM AND ORDER
(Late-filed Environmental Contentions)

This proceeding involves the proposed expansion in the capacity of the spent fuel pool at the Vermont Yankee Nuclear Power Plant, in Vernon, Vermont. On August 15, 1988, following the issuance by the NRC Staff on July 25, 1988 of its Environmental Assessment (EA) of the project, the New England Coalition on Nuclear Pollution (NECNP), an Intervenor in this proceeding, and the Commonwealth of Massachusetts, currently participating as an interested State pursuant to 10 C.F.R. 2.715(c), jointly submitted for litigation three late-filed contentions. The State of Vermont favors their admission, whereas Vermont Yankee Nuclear Power Corp. (Applicant) and the NRC Staff each are opposed to admission of any of them. For reasons set forth below, we accept two of the contentions and deny the third.

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A. Background

In our initial Prehearing Conference Order, dated May 26, 1987, LBP-87-17, 25 NRC 838, we admitted three contentions: one safety and two environmental. The safety contention (Contention 1), sponsored by NECNP, concerned the spent fuel pool cooling system; the environmental contentions, sponsored jointly by NECNP and Massachusetts, concerned, respectively, NRC's consideration of the environmental aspects of severe accidents (Contention 2) and of alternatives to the proposed course of action (Contention 3). Upon appeal by the Applicant, the Appeal Board let stand (with minor modifications) our admission of Contention 1 but reversed our admission of the two environmental contentions, Contentions 2 and 3. ALAB-869, 26 NRC 13 (1987). Thereafter, it denied reconsideration of its ruling on Contention 2, the severe accident contention. ALAB-876, 26 NRC 277 (1987).

In LBP-87-17, we established a schedule for the submission of new contentions following issuance of various NRC Staff review documents. Following issuance of the Staff's EA, and within the schedule previously established by us, NECNP and Massachusetts jointly submitted three new environmental contentions, each purportedly based in part on material appearing in the EA. The State of Vermont, participating as an interested State, favored their

admission.[1] The Applicant and Staff each opposed admission of any of the new contentions.[2] The Intervenors filed a reply on September 14, 1988, and the Applicant and Staff filed responses to that reply, on September 21 and 30, 1988, respectively.[3]

The three newly-filed contentions--denominated by NECNP and Massachusetts as "Environmental Contentions" to avoid confusion with the three contentions which we earlier admitted--are deemed to be "late-filed" under the Commission's Rules of Practice inasmuch as they were submitted after the initial time period for the filing of contentions in this proceeding. No party disputes that, in those circumstances, the contentions must satisfy not only the usual standards for contentions, set forth in 10 C.F.R. 2.714(b), but also a balancing of the five factors set forth in 10 C.F.R. 2.714(a). We turn now to an examination of

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[1] Response of the State of Vermont to Joint Motion of NECNP and the Commonwealth of Massachusetts for Leave to File Late-filed Contentions, dated August 29, 1988.

[2] Licensee's Response to "Joint Motion of [NECNP] and the Commonwealth of Massachusetts for Leave to File Late-filed Contentions", dated August 29, 1988 (Applicant's Response); NRC Staff Response to Joint Motion of New England Coalition on Nuclear Pollution and the Commonwealth of Massachusetts for Leave to File Late-filed Contentions, dated September 6, 1988 (NRC Staff Response).

[3] We granted permission for NECNP and Massachusetts to file their joint reply and for the Applicant and Staff to respond to new information in that reply. Memorandum and Order, dated September 13, 1988 (unpublished).

these standards as applied to the new environmental contentions which are before us.

B. Environmental Contention 1

This contention alleges that the risk associated with a self-sustaining fire in the spent fuel pool, without hypothesizing a beyond-design-basis event, constitutes sufficient potential effect on the environment to require preparation of an environmental impact statement (EIS). The contention is similar to, although not identical with, former Contention 2, the admission of which was reversed by the Appeal Board.

In former Contention 2, the Intervenors asserted in effect that the risk of a particular accident was sufficient to require analysis by the Staff in an EIS. We summarized the particular accident in question in the following terms:

> (1) the greater likelihood of failure in the event of an accident of a GE Mark I BWR containment (as is used at Vermont Yankee) as contrasted with other designs;
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> (2) the location of the pool in the reactor building, which is not designed to take severe accident loads;
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> (3) the failure of the pool or its cooling systems to be designed to accommodate such severe accident loads;
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> (4) the possibility of hydrogen leakage to the reactor building in such an accident, resulting in hydrogen deflagration and detonation; and
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> (5) an increase in potential consequences of such an accident by the 40% increase in the amount of fuel stored, particularly because of the increased inventory of cesium and strontium.

LBP-87-17, supra, 25 NRC at 845. We went on to characterize the accident as a "beyond design basis accident," but held that it could be considered in a proceeding such as this under carefully circumscribed conditions. A further description of our rationale appears in the Separate Statement of Judge Bechhoefer, which is appended to this Memorandum and Order at pp. 22-27, infra.

The Appeal Board reversed our ruling on this contention on the basis that claims of increased risk from beyond-design-basis accidents are not litigable, as a matter of law under the National Environmental Policy Act (NEPA), 42 U.S.C. 4332, and as a matter of discretion under NRC's 1980 NEPA Policy Statement, 45 Fed. Reg. 40101. ALAB-869, 26 NRC at 31, n. 28; ALAB-876, 26 NRC at 285. In doing so, it noted that, on appeal, NECNP had argued that a "beyond-design-basis accident" was not a precondition for the postulated self-sustaining fire in the spent fuel pool. The Appeal Board rejected that argument on the ground that, in admitting the contention, we had not been faced with such a claim. ALAB-876, 26 NRC at 284.

Such a claim is now before us. But the accident in question appears to be the same one as the Appeal Board ruled could not be considered, as a matter of law: a self-sustaining zirconium fire in the spent-fuel pool, caused in part by a partial fuel melt and hydrogen release to the reactor building (where the Vermont Yankee spent fuel

pool is located). The Intervenors have posited a situation (and have furnished a basis) upon which a likelihood of hydrogen release in the reactor could be founded. But they have not explained how, in an accident considered within the design basis for this reactor, this hydrogen could both detonate and lead to the consequences in the spent fuel pool envisaged by the contention.

The Applicant opposes this contention on essentially two grounds. First, it asserts that the hypothesized accident is no different from that previously proposed by the Intervenors, that its identification thus did not depend on anything in the EA and, accordingly, that it must be rejected both because it is non-litigable as a matter of law and because it is untimely.[4] Alternately, the Applicant asserts that no basis has been identified for the assertion that a self-sustaining zirconium fire in the spent fuel pool could result from the release of hydrogen identified by the Intervenors and, accordingly, the contention lacks the requisite basis.[5] The Staff argues only that the accident in question is a greater-than-design-basis accident substantially similar to that rejected by the Appeal Board

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[4] Applicant's Response, dated August 29, 1988, at 7-9.

[5] Applicant's Response to Joint Reply, dated September 21, 1988, at 1-3.

and, therefore, the contention must be rejected as a matter of law.[6]

We agree that the accident in question is essentially similar to that which was the subject of the former Contention 2. Under the law of the case, which the Appeal Board spelled out in ALAB-869 and ALAB-876, the proffered contention is non-litigable as a matter of law. Although it can be argued whether or not the Appeal Board reached the correct answer on the contention in question--see Judge Bechhoefer's Separate Statement for a further explanation of our ruling in LBP-87-17 which was reversed by the Appeal Board--we each have no doubt that we are currently bound by the law of the case and that, in these circumstances, the contention must be rejected as a matter of law.

We add that, if a less than design basis accident is intended to be offered as the foundation for a self-sustaining zirconium fire in the fuel pool, we agree with the Applicant that no adequate bases have been furnished to demonstrate how such a fire could arise. See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 456-57 (1987). If so construed, the contention has to be rejected for lack of an adequate basis. 10 C.F.R. 2.714(b).

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[6] NRC Staff Response, dated September 6, 1988, at 6-8.

C. Environmental Contention 2

1. This contention asserts that the EA fails to consider adequately the consequences and risks posed by the proposed amendment of "worker exposure to radiation." This risk is allegedly sufficient to warrant preparation and issuance of an EIS.

As the bases for this contention, the Intervenors first incorporate by reference their bases for Environmental Contention 1. Then they assert that the EA "does not provide an adequate scientific basis to assess occupational risk." Specifically, "[t]he environmental assessment does not state the number of workers who will be exposed as a result of the proposed amendment."[7] They further allege that the EA postulates a 33-person-rem dose goal but fails to provide data to support this hypothesis. Finally, the Intervenors assert that, in postulating the 33-person-rem dose, the EA ignores potential doses from a number of different categories of events. With their reply, the Intervenors provided certain specific information concerning fuel handling accidents (for which they cite the SER for the reracking permitted by License Amendment 104) and inadvertent drainages of spent fuel pools (for which they

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[7] Proposed Contentions, at 3-4.

cite NRC Information Notice No. 88-65, dated August 18, 1988).

The Applicant and Staff each claim that the contention lacks a basis and lacks specificity. In addition, the Applicant claims that the incorporation by reference of the bases of the severe-accident contention can have no more validity for this contention than with respect to the severe-accident contention, which we have rejected as non-litigable under the authority governing this proceeding. The Applicant also asserts that, since the EA "considered" occupational exposure, no more can be required. Finally, the Applicant would have us balance the factors dealing with late-filed contentions against the admission of this contention.

2. This contention includes several distinct claims. Basically, it asserts that the treatment of occupational exposure in the EA is inadequate for a number of reasons. It would remedy those deficiencies by the preparation and issuance of an EIS. But presumably, if it did not succeed in attaining that result, it would nevertheless seek revision of the EA through the medium of our Initial Decision in this proceeding. See 10 C.F.R. 51.34(b), 51.102(c), 51.104(b).

In evaluating this contention against the bases provided, it is clear that, as the Applicant claims, the severe-accident portion of the basis can be no more

successful in founding a basis for this contention than for Environmental Contention 1. Whether in an EIS or an EA, we must abide by the conclusions of ALAB-869 and ALAB-876 that "beyond design basis accidents" of the type alleged cannot be considered in a license-amendment proceeding of this type.

Beyond that, however, we disagree with the Applicant and Staff that an adequate basis has not been set forth. The allegation that the EA fails to record individual worker exposures is not only patently true but potentially meritorious, per se. (The Applicant's argument that any consideration by an EA of a subject is in itself adequate counters the regulation that these matters are litigable (10 C.F.R. 51.104(b)) and, indeed, is barely more than frivolous.) Furthermore, many of the events referred to are too diffuse and non-specific to be acceptable as bases for this contention; they fail to provide a foundation for any assertion of excess occupational exposure. However, the references to fuel handling accidents and inadvertent pool drainages do not suffer from this deficiency. The arguments against their validity provided by the Applicant and Staff go to their merits, not their acceptability as bases. That is a process in which we cannot engage at this stage of the proceeding. Houston Lighting and Power Co. (Allens Creek

Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).[8]

In sum, we find this contention to be acceptable, but limited to the three bases we have referenced: (1) the failure of the EA to describe individual worker exposures (particularly in terms of the number of workers receiving additional exposures through this amendment, the maximum exposures to be received by individual workers, and the number of workers who likely would receive various levels of exposures); (2) the failure to consider the occupational exposure (if any) resulting from fuel handling accidents; and (3) the failure to consider occupational exposure (if any) resulting from inadvertent drainages of the pool which might reasonably be expected to occur.

3. To accept any contention at this stage of the proceeding, we must balance the lateness factors set forth in 10 C.F.R. 2.714(a).[9] The Staff would balance these

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[8] We note, however, that NRC Information Notice 88-65 states (at 2): "Drainage of SFPs can cause potentially high radiation doses and damage to fuel elements . . ." and that three such inadvertent drainages were reported as occurring within a period of approximately nine months. Evaluation of the import of this information must, of course, await consideration on the merits of Environmental Contention 2.

[9] These factors are: (i) Good cause, if any, for failure to file on time; (ii) The availability of other means whereby the petitioner's interest will be protected; (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound

(Footnote Continued)

factors in favor of admission of this contention (although it opposes admission on other grounds).[10] The Applicant concedes that, if this contention is regarded as a challenge to the EA (as we have construed it), then it does not dispute that there is good cause for the delay in submission. But on the basis of a balancing of all the factors, it nevertheless urges that we not accept the contention.[11]

The Applicant would reach negative conclusions on factors (iii) and (v). In particular, it asserts that "history supplies overwhelming evidence that the probability that an EIS would be required is nil, and the probability that rejection of the proposed license amendment would be required on environmental grounds is even less." Those arguments, however, are irrelevant. In the first place, the contention as we perceive it seeks either an EIS or, if not warranted, a revised EA. Second, the Commission has directed that the need for an EIS in a case such as this be evaluated on a case-by-case basis. ALAB-869, supra, 26 NRC at 30; Pacific Gas and Electric Co. (Diablo Canyon Nuclear

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(Footnote Continued)
record; (iv) The extent to which the petitioner's interest will be represented by existing parties; and (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

[10] Staff Response, at 10-13.

[11] Applicant's Response, at 13, n. 21.

wer Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 12, rev'd on other grounds sub nom. San Luis Obispo Mothers for Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986). Finally, the Applicant's approach would substitute its own judgment for the informed environmental review mandated by the NRC regulations. We decline to follow that path.

Balancing the five factors, no one contests that the first, second and fourth balance in favor of admission of the contention. The third, concerning the Intervenors' ability to help develop an adequate record, was not addressed by the Intervenors. By their very act of pointing to certain aspects of the EA which are apparently deficient, however, and by providing documentary materials supporting certain of their claims, the Intervenors have already contributed to the development of the record. We view this third factor as either neutral or slightly in favor of admission. The fifth (potential expansion of issues and delay) is negative but not to a degree which would outbalance the others. In short, we agree with the Staff (as well as the Intervenors) that this contention should not be rejected on timeliness grounds.

D. Environmental Contention 3

1. The third environmental contention claims that NRC, in its EA, has failed to give adequate consideration to the alternative of dry cask storage, as required by Section

102(2)(E) of NEPA, 42 U.S.C. 4332(E) and implementing NRC regulations. It is similar to Contention 3, which we earlier admitted but which the Appeal Board dismissed as premature, on the ground that it could not be considered prior to issuance of the EA. (Former Contention 3 included one additional alternative, which is not now being raised.)

As bases for the current contention, the Intervenors (in addition to incorporating by reference the bases for Environmental Contentions 1 and 2) criticize the EA for lack of any discussion of the environmental impacts of dry cask storage and for rejecting that alternative solely on the ground that the design, construction and NRC review of such storage facility could not be completed in sufficient time to meet the Applicant's need for further capacity. The Intervenors add that this operational inconvenience to the Applicant is not a valid ground for rejecting an environmentally-preferable alternative in a situation where, as here, the urgency is attributable in part to the Staff's failure to issue an EA in a timely fashion. (Indeed, the Intervenors sought to raise this contention almost two years ago and were precluded from doing so by the Applicant's and Staff's objections to their contention, which we had admitted.) The Intervenors also fault the EA for including only a bare conclusion as to the feasibility of dry cask storage and for not explaining why dry cask storage could

not be available in sufficient time to meet the Applicant's needs.

The Applicant and Staff both oppose this contention. They each claim, in essence, that there is no requirement that an EA discuss which alternatives are preferable. The Applicant adds that neither the contention nor its basis makes any mention of "unresolved conflicts concerning alternative uses of available resources", the standard under which alternatives are evaluated under Section 102(2)(E) of NEPA. The Applicant and Staff also assert the adequacy of the discussion of alternatives in the EA. They each compare the type of discussion of alternatives called for in an EIS (mandated by Section 102(2)(C) of NEPA) and assert that, in order to obtain the type of discussion of alternatives which they seek, the Intervenors must first establish a need for an EIS (which they assertedly have not done).

2. NEPA, of course, has two differing requirements for the discussion of alternatives. Section 102(2)(C) requires a detailed discussion, but only where an EIS is also required (i.e., where there are significant environmental impacts resulting from a proposed action). On the other hand, Section 102(2)(E), upon which the Intervenors rely here, requires a consideration of alternatives in all cases in which there are "unresolved conflicts concerning alternative use of available resources," irrespective of whether or not an EIS is

otherwise required.[12] NRC's implementing regulation in 10 C.F.R. 51.30(a)(ii) explicitly requires an EA to discuss "alternatives as required by Section 102(2)(E) of NEPA."

Contrary to the Applicant's position, the discussions of alternatives mandated by Sections 102(2)(C) and (E), respectively, are not mutually exclusive. Section 102(2)(E) applies in all cases in which the underlying conditions are satisfied but, where an EIS is required, the Section 102(2)(E) discussion may be subsumed within the Section 102(2)(C) EIS discussion. Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289, 296 (8th Cir. 1972), cert. den., 412 U.S. 931 (1973);[13] see also Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-80-2, 11 NRC 44, 73 (1980), vacated on other grounds, ALAB-638, 13 NRC 374 (1981).

The Staff also claims that the alternative use of resources at issue under Section 102(2)(E) is no different from that at issue at the operating license stage of review and, because the EA here is supplementary to the EIS

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[12] The NRC Staff is incorrect when it asserts that "Section 102(2)(E) concerns EIS's, not EA's" (Staff Response, at 9). See River Road Alliance, Inc. v. Corps of Engineers, 764 F.2d 445, 452 (7th Cir. 1985), cert. den., 475 U.S. 1055 (1986).

[13] At the time of the EDF decision, current Section 102(2)(E) of NEPA was designated as Section 102(2)(D). The provisions are otherwise identical.

prepared at the operating license stage, the EA need not discuss any alternative use of resources. For their part, the Intervenors assert that none of the issues governing the spent fuel pool expansion were treated in the operating license EIS, inasmuch as the fuel pool at that time contemplated storage of only 1/5 the number of assemblies under consideration here, and those for only a few months at a time.

Where the objective of an action "can be achieved in one of two or more ways that will have differing impacts on the environment," the 102(2)(E) requirement comes into play. Trinity Episcopal School Corp. v. Romney, 523 F.2d 88, 93 (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 on other grounds sub nom. Stryker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980);[14] see also Hanley v. Kleindienst, 471 F. 2d 823, 834-35 (2d Cir. 1972); State of North Carolina v. Hudson, 665 F. Supp. 428, 444-46 (E.D.N.C. 1987). We agree with the Intervenors that the resources at issue here (including but not limited

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[14] The Supreme Court reversal, relied on by the Applicant, was predicated upon the Circuit Court's intrusion into an agency decision which, after the initial remand to consider alternatives, was based on a sound record. That reasoning would not be applicable here, where we represent one step in NRC's process for reaching a final agency decision.

to the resources potentially affected by the additional occupational exposure referenced in the bases for Environmental Contention 2) are different from those at issue earlier, sufficient to trigger the 102(2)(E) discussion sought by the Intervenors. An unresolved conflict concerning the alternative use of available resources is at issue here. Indeed, in its EA, the Staff concluded (at 4) that "the expansion capacity of the existing pool is a resource that should be used"--manifestly a different view of the appropriate use of resources than advocated by the Intervenors. Moreover, at least in the situation here (where strong differences of opinion clearly exist), the Applicant's insistence on an explicit reference to an unresolved conflict concerning use of resources represents a pleading nicety with no foundation under the NRC Rules of Practice.[15]

We conclude that Environmental Contention 3 is not barred on legal grounds, includes a sufficiently specific

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[15] We agree with the Intervenors that the case of Borough of Morrisville v. Delaware River Basin Commission, 399 F. Supp. 469, 479 and n. 8 (E.D. Pa. 1975), aff'd.(without opinion), 532 F.2d 745 (3d Cir. 1976), cited by the Applicant, may properly be construed to concern only the discussion of alternatives in an EIS, notwithstanding the inclusion of language with broader implications (although never explicitly extending to the requirements of Section 102(2)(E)).

basis,[16] and should be admitted as an issue in controversy irrespective of its eventual merit (subject to the timeliness considerations set forth below).

3. As in the case of Environmental Contention 2, the Staff would balance the lateness factors in favor of admitting the contention.[17] The Applicant does not contest that the Intervenors have "good cause" for the untimely filing but would nonetheless balance the lateness factors against admission, primarily on the ground that admission of the contention would prolong and complicate the proceedings and that "[a]pproval or disapproval of a re-racking-based spent fuel expansion is simply not going to turn on environmental considerations."[18] As in the case of Environmental Contention 2, however, this generic conclusion is one hypothesized by the Applicant but not adopted by the Commission. As long as NEPA requirements govern a proceeding such as this, we are unwilling to assume in advance--prior to hearing or even to discovery--that NEPA factors cannot contribute to NRC's proper resolution of potential environmental issues.

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[16] For reasons stated earlier, we are not relying on the bases for Environmental Contention 1 (concerning severe accidents) which are incorporated by reference.

[17] NRC Response, at 10-13.

[18] Applicant's Response, at 15, n. 25.

As in the case of Environmental Contention 2, we find factors (i), (ii) and (iv) to balance in favor of admission, (iii) to be neutral or slightly in favor of admission, and (iv) to disfavor admission of the contention, although not strongly so. As suggested by the Staff, we balance the factors in favor of admission.

E. Discovery

Discovery on the two contentions which we are here admitting is governed by the schedule we established in LBP-87-17: it will extend for 45 days from the date of service of this Memorandum and Order. LBP-87-17, supra, 25 NRC at 862. During that time period, answers to interrogatories must be received, second round questions asked and answered, and document production must be completed. As a target, we anticipate that oral argument material on these contentions could be filed during January, 1989, and that oral argument could take place in February, 1989.

F. Order

For the reasons stated, it is, this 11th day of October, 1988

ORDERED:

1. Environmental Contention 1 is hereby rejected as an issue in controversy in this proceeding.

2. Environmental Contentions 2 and 3 are hereby admitted as issues in controversy in this proceeding.

3. Discovery on Environmental Contentions 2 and 3 will be governed by the schedule outlined in Section E of this Memorandum and Order.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland,
this 11th day of October, 1988.

Judge Carpenter joins in this Memorandum and Order but was not available to review the final draft.

SEPARATE STATEMENT OF JUDGE BECHHOEFER

I fully agree with the Board's unanimous opinion that Environmental Contention 1 is barred from litigation, as a matter of law, by virtue of the law of the case, as set forth in ALAB-869 and ALAB-876. I also agree that, if the contention were to be construed, as the Intervenors now suggest, as hypothesizing an accident within the design basis, then no scenario has been identified which would lead to a self-sustaining zirconium fire in the fuel pool and, hence, no basis has been set forth.

What I disagree with is the conclusion in ALAB-869 and ALAB-876 that the original Contention 2 is not litigable, either as a matter of law or of Commission discretion. I believe that both original Contention 2 and the essentially similar Environmental Contention 1 are litigable, at least as a matter of discretion, under applicable Commission Policy Statements. To that end, perhaps the Board's decision in LBP-87-17, 25 NRC 838 (1987), needs further clarification.

In LBP-87-17, we treated the accident hypothesized by former Contention 2 as a "beyond design basis accident" the risk of which (in particular, the probability of specified consequences) was being challenged. 25 NRC at 846. ALAB-869 and ALAB-876 treated the accident similarly. ALAB-869, supra, 26 NRC at 30-31. In my view, the accident

was and is clearly beyond the design basis under which the Vermont Yankee facility was licensed (back in 1972).

It is well settled, of course, that, as the Appeal Board pointed out in both ALAB-869 and ALAB-876, NEPA does not require consideration of events that are remote and speculative. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1301 (D.C. Cir., 1984), aff'd. en banc, 789 F.2d 26, cert. den., ___ U.S. ___, 93 L.Ed.2d 302 (1986). To characterize the accident in this manner, however, "only frames the question; it does not supply the answer." Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 553 n. 3 (1980) (concurring opinion of Mr. Farrar, joined by Chairman Rosenthal).

The contention before us attempts to supply an answer; it raises questions about the remoteness of certain consequences said to result from the accident in question. It cites bases which at least theoretically could modify the perceived risk of the hypothesized accident. Thus, what was undoubtedly--and properly, in view of then-extant knowledge--not even considered as falling within the class of design basis accidents in 1972 might be so classified today, assuming the Intervenors were successful in establishing that the frequency of occurrence and consequences were comparable to others being considered today as design basis accidents. The analysis adopted by

the Appeal Board, however, would require the NRC, at least insofar as its adjudicatory processes are concerned, to bury its head in the sand and assume (notwithstanding the proffer of evidence which might lead to other conclusions) that an accident scenario the risk of which was once regarded as remote or speculative must always be so regarded.

To avoid any misconceptions, I am not advocating any backfitting, should the risk of what was once regarded as a "beyond design basis accident" be found to be not properly so classified at this point in time. Nor am I expressing any opinion whatsoever on whether the information in the bases cited by the Intervenors--in particular, NUREG-1150 and NUREG/CR-4982--would so raise the risk of the accident in question that (as claimed by the proffered contention) an EIS would be required. It is improper in evaluating the admissibility of a contention to reach any conclusion whatsoever on the validity of the bases relied upon. Allens Creek, ALAB-590, supra, 11 NRC 542. All I am saying is that NEPA, when coupled with the Commission's adjudicatory system, is at least an environmental full-disclosure law which permits the Intervenors to assert that NRC's decision-makers (and the public) should be informed of the risk (i.e., probabilities and consequences) of the proffered accident.

My primary disagreement with the Appeal Board's rulings in ALAB-869 and ALAB-876 is its holding that the NRC had

precluded consideration as a matter of discretion of contentions such as former Contention 2, through NRC's Interim Policy Statement on "Nuclear Power Plant Accident Conditions Under the National Environmental Policy Act of 1969", 45 Fed. Reg. 40,101 (June 13, 1980) (hereinafter "NEPA Policy Statement"). The Appeal Board determined that, as a matter of Commission discretion, the NEPA Policy Statement permits discussion of beyond design basis accidents only in proceedings for construction permits or operating licenses, and not in license amendment proceedings such as this one.

I would agree that, if looked at in isolation, the discretionary authority provided by the NEPA Policy Statement does not extend to proceedings such as this one. Nor did this Board rely on that policy statement for authority to hear the contention when we accepted former Contention 2 for litigation. As set forth in LBP-87-17, we relied instead on the Commission's subsequently issued "Policy Statement on Severe Reactor Accidents Regarding Future Designs and Existing Plants," 50 Fed. Reg. 32,138, 32,144-45 (August 8, 1985) (hereinafter "Severe Accident Policy Statement"). We ruled that the risk of the proffered accident could be examined under the Severe Accident Policy Statement, using the methodology set forth in the NEPA Policy Statement.

The Severe Accident Policy Statement, in the Board's view, as expressed in LBP-87-17, permits examination of the risk of "beyond design basis accidents," using the methodology for examination specified in the NEPA Policy Statement. The NEPA Policy Statement is incorporated by reference into the Severe Accident Policy Statement, but only to specify the methodology for reviewing the risk of "beyond design basis accidents" and not for defining the proceedings in which the examination of risks would be permitted.

The Severe Accident Policy Statement itself defines the proceedings to which it is applicable and in which the risk of severe accidents may be examined. The portion of that Policy Statement which explicitly incorporates the NEPA Policy Statement deals primarily with operating license applications for plants currently under construction--a class clearly covered by the terms of the NEPA Policy Statement. But the Severe Accident Policy Statement further provides (50 Fed. Reg. at 32,144, emphasis added) that "[t]his item also applies to any hearing proceedings that might arise for an operating reactor"--precisely the type of proceeding with which we are here confronted. Insofar as applicability is concerned, therefore, the later-issued Severe Accident Policy Statement supersedes the limited scope of the NEPA Policy Statement.

In sum, by incorporating the methodology of the NEPA Policy Statement, the Severe Accident Policy Statement did not also incorporate the limitations on applicability of the NEPA statement. The Severe Accident Policy Statement includes its own statement of applicability and, as demonstrated above, it applies to this proceeding. It permits examination in this proceeding of the risk of accidents such as that postulated by the Intervenors, assuming an appropriate contention founded upon the requisite basis (as is the case here).

If I were writing on a clean slate, I would accept either former Contention 2 or Environmental Contention 1 (construed as asserting a "beyond design basis accident"), under the authority of the Severe Accident Policy Statement. However, because the law of the case is to the contrary, I agree with my colleagues that we must reject Environmental Contention 1 as a matter of law.

Charles Bechhoefer

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE