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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

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| 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) |
| | May 26, 1987 |

# PREHEARING CONFERENCE ORDER
## (Rulings on Standing, Contentions, Schedules)

This proceeding involves the proposed expansion of the capacity of the spent fuel pool at the Vermont Yankee Nuclear Power Station, a boiling water reactor located in Vernon, Vermont, approximately five miles south of Brattleboro, Vermont. The early history of the proceeding is recounted in our Memorandum and Order (Schedules for Further Filings and for Prehearing Conference), LBP-87-7, 25 NRC ____ (February 27, 1987). As there set forth, three requests for a hearing and petitions for intervention have been filed--by the New England Coalition on Nuclear Pollution (NECNP), the State of Vermont (Vermont) and James M. Shannon, Attorney General of the Commonwealth of Massachusetts (Massachusetts).

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We scheduled a prehearing conference for April 21-22, 1987 in Brattleboro, Vermont, to consider the petitions before us.[1] Represented at the conference were the three petitioners, the Applicant[2] (Vermont Yankee Nuclear Power Corporation), and the NRC Staff. (The State of New Hampshire, which has thus far not filed any intervention petition, also sent a representative to the conference.)

Following is a description of the matters considered at the conference, and rulings stemming therefrom. For reasons set forth below, we are admitting two of the petitioners as parties to the proceeding (NECNP and Massachusetts) and are permitting the third (Vermont) to participate as an interested State (if it wishes to do so).

## I. STANDING

As set forth in LBP-87-7, two of the petitioners for intervention (Vermont and Massachusetts) had successfully demonstrated their standing to participate in the proceeding, whereas the other (NECNP) needed to file additional information in order to perfect its showing of standing

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1 A formal Notice of Prehearing Conference was issued on March 11, 1987 and published at 52 Fed. Reg. 8393 (March 17, 1987).

2 Vermont Yankee Nuclear Power Corp. is seeking an amendment to its operating license in this proceeding. Although it refers to itself as a licensee (presumably by virtue of its possession of an operating license), no modification of its license is being sought by any party or petitioner, except the foregoing amendment. In the posture of this proceeding, therefore, Vermont Yankee is more appropriately deemed an applicant for new authority rather than a licensee. We will thus refer to it as "Applicant."

(namely, authorization by at least one NECNP member living near the plant for NECNP to represent his or her interests in the proceeding). NECNP timely filed such information.[3] Neither the Applicant nor the NRC Staff objected to NECNP's showing of standing.[4] We find that NECNP has adequately demonstrated its standing to participate in this proceeding.

## II. <u>CONTENTIONS</u>

Under NRC rules, admission to a proceeding as an intervenor requires the submission of at least one valid contention, within the scope of issues set forth in the notice initiating the proceeding. 10 C.F.R. § 2.714(b); <u>Public Service Co. of Indiana, Inc</u>. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170 (1976). Such a contention must have its "bases * * * set forth with reasonable specificity" (10 C.F.R. § 2.714(b)). In setting forth the bases for contentions, however, a petitioner need not detail the evidence which will be offered to support each contention. <u>Mississippi Power & Light Co</u>. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 (1973). Furthermore, in reviewing a contention and its

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3 "New England Coalition on Nuclear Pollution's Response to Board Order of February 27, 1987: Statement of Contentions and Standing," dated March 30, 1987 (hereinafter "NECNP Contentions").

4 Tr. 9 (Applicant); "NRC Staff Response to Contentions of the State of Vermont, Commonwealth of Massachusetts and New England Coalition on Nuclear Pollution," dated April 13, 1987 (hereinafter "Staff Response"), at 16.

bases for adequacy, a Board must not reach the merits of a contention. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548 (1980); Grand Gulf, ALAB-130, supra. We need only determine "whether (1) the requisite specificity exists; (2) there has been an adequate delineation of the basis for the contention; and (3) the issue sought to be raised is cognizable in an individual licensing proceeding" (Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 216-17 (1974)). If those criteria are satisfied, the contention is admissible "irrespective of whether resort to extrinsic evidence might establish the contention to be insubstantial" (id. at 217).

All three petitioners submitted proposed contentions on a timely basis. NECNP submitted six such contentions,[5] Vermont submitted four,[6] and Massachusetts two.[7] The Applicant and Staff responded to the contentions,[8] each claiming that no contention of any petitioner was

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5 "NECNP Contentions," supra, n. 3. Although numbered as NECNP Contentions 1-5, we regard Contention 5 as including two contentions and are treating it as such.

6 "Introductory Statement and Contentions of the State of Vermont," dated March 30, 1987 (hereinafter "Vermont Contentions"). We view ¶ III of this document to include two contentions (III.A and III.B) and ¶¶ IV and V to include one each.

7 "Contentions of the Commonwealth of Massachusetts," dated March 30, 1987 (hereinafter "Massachusetts Contentions").

8 Licensee's Response to the Contention[s] of the State of Vermont, the Commonwealth of Massachusetts, and New England Coalition on
(Footnote Continued)

valid. NECNP filed a reply to the responses of the Applicant and Staff.[9]

Certain of the proposed contentions overlap in their coverage. As a result, at the conference we discussed the various contentions by subject matter, using the NECNP contentions as a point of departure (since they to a great degree envelope the other parties' contentions).[10]

A. Safety-based Contentions.

There are several categories of safety-based contentions (i.e., contentions based on requirements of the Atomic Energy Act and implementing regulations) submitted by one or more of the petitioners. All three of them have submitted "severe-accident" contentions--claiming in effect that the facility is not adequately designed to handle the consequences of certain greater-than-design-basis accidents.[11] NECNP

(Footnote Continued)
Nuclear Pollution, separate documents each dated April 9, 1987 (hereinafter "Applicant's Response to * * *"); Staff Response, supra, n. 4.

9 "New England Coalition on Nuclear Pollution's Response to Objections to Contentions," dated April 16, 1987 (hereinafter "NECNP Response").

10 Vermont and Massachusetts did not object to this approach (Tr. 13). We separately discussed the Vermont contentions (¶¶ III.A and III.B) which were different from any of NECNP's contentions.

11 NECNP Contentions 1 and 2; Vermont Contentions, ¶ V; Massachusetts Contention I(except to the extent that it asserts "risk" questions).

has submitted two contentions questioning the adequacy of the cooling system for the expanded-capacity spent fuel pool.[12] Vermont additionally has submitted two contentions the terms of which are directed at the potential "no significant hazards consideration" determination which NRC may be called upon to address.[13]

1. At the outset, we turn to Vermont's contentions directed at the "no significant hazards consideration" determination. As we understand it, Vermont has in mind the determination which the Commission may make under 10 C.F.R. § 50.91.

That determination is a procedural one stemming from the so-called Sholly amendments to § 189.a of the Atomic Energy Act, 42 U.S.C. § 2239(a). The determination is one which can only be made by the NRC Staff or the Commission. When such a finding has been made, the NRC may make effective a proposed license amendment prior to any hearing on the request. The determination itself, however, cannot be challenged in a licensing proceeding of this type:

> 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.

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12 NECNP Contentions 3 and 4.

13 Vermont Contentions, ¶¶ III.A and III.B.

10 C.F.R. § 50.58(b)(6) (1987); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4 (1986), reversed in part on other grounds, San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Commission, 799 F.2d 1268 (9th Cir. 1986).

For this reason, we agree with the Applicant and NRC Staff that, to the extent Vermont's Contentions III.A and III.B seek to affect the Staff's "no significant hazards consideration" determination under 10 C.F.R. § 50.91, they are beyond our jurisdiction and must be rejected on that ground.[14]

2. The "severe accident" contentions of NECNP, Vermont and Massachusetts all claim essentially that the consequences of severe accidents will be exacerbated by the expansion in capacity of the spent fuel pool. In none of these contentions (NECNP Contentions 1 and 2, Vermont Contentions, ¶ V, and Massachusetts Contention I) is it alleged that the planned expansion fails to meet the governing safety requirements of 10 C.F.R. Part 50 or applicable regulatory guidelines.

a. In its Contentions 1 and 2, NECNP claims that the exacerbated consequences pose an "undue risk to public health and safety," are contrary to the Commission's Policy Statement on Severe Accidents, and that the expansion should therefore be disapproved. It

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[14] To the extent these contentions may raise environmental questions, see pp. 38-40, infra.

bases its exacerbated-consequences claims on a combination of circumstances: (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; (2) the location of the pool in the reactor building, which is not designed to take severe accident loads; (3) the failure of the pool or its cooling systems to be designed to accommodate such severe accident loads; (4) the possibility of hydrogen leakage to the reactor building in such an accident, resulting in hydrogen deflagration and detonation; and (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.

In evaluating the litigability of these claims, we note first that the concept of "risk" to which NECNP refers falls under the purview of both the Atomic Energy Act and the National Environmental Policy Act (NEPA). By incorporating by reference these same claims into its Contention 5, NECNP has raised the NEPA aspects of risk, and we will discuss those aspects in connection with the EIS portion of Contention 5 (see pp. 24-29, infra). As NECNP states, Contention 1 clearly raises Atomic Energy Act claims based on the concept of "undue risk" appearing in 10 C.F.R. Part 50, Appendix A and by NRC's use of those terms to describe the Atomic Energy Act's statutory standard of "adequate protection to the health and safety of the public." 42 U.S.C.

§ 2232(a).[15] Moreover, as we shall see, the regulatory standards for accepting risk-based contentions differ significantly depending on the statutory foundation for the contention.

As for the opposition to Contention 1, we must first reject the Applicant's claim that the contention challenges only those aspects of the facility's design which were reviewed earlier and hence (according to the Applicant) are not subject to challenge in this proceeding. The contention raises questions as to the ability of the facility to withstand additional fission product and heat loads allegedly imposed by the sought amendment. As such, it falls within the ambit of this proceeding. For the same reason, we reject the Applicant's claim that the increased consequences relate only to the "no significant hazards consideration" determination over which we have no jurisdiction. As NECNP points out, while the contention may be relevant to the "no significant hazards consideration" determination, it is clearly also relevant to the "undue risk to public health and safety" questions which the amendment may create and we may consider.[16]

We also reject the Staff's claim that certain elements of NECNP's hypothesized accident raise generic issues that have no particular

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15 NECNP Response, n. 9, supra, at 1-2.

16 NECNP Response, n. 9, supra, at 3-4. Moreover, as set forth infra, pp. 39-40, under certain circumstances we may have authority to review a "no significant hazards consideration" finding by the Staff.

applicability to Vermont Yankee or to the proposed amendment. NECNP is setting forth a proposed accident scenario which includes enhanced consequences allegedly resulting from the increased storage capacity of the spent fuel pool. That this allegation falls within the scope of this proceeding is obvious; whether it has merit may not be considered by us at this stage of the proceeding.[17]

We find, however, that we must reject this contention for a different reason. The accident scenario which is sought to be considered is clearly a "beyond design basis accident."[18] There is no allegation (in this contention) that the proposed license amendment fails to meet one or more safety standards (regulation or other criteria). The Commission's Policy Statement on Severe Reactor Accidents, 50 Fed. Reg. 32138, 32144 (Aug. 8, 1985), explicitly removes plant-specific reviews of control or mitigation of severe accidents from the review of operating-license applications. The same policy "also applies to any hearing proceedings that might arise for an operating

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17 To the extent that the Staff is implying that a generic issue cannot be considered in this proceeding, that claim also must be rejected. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245, 248 (1978); Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977); cf. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 584-85; id., LBP-82-118, 16 NRC 2034, 2037-39 (1982).

18 As additional support for this contention, NECNP has pointed to the Brookhaven National Laboratory Draft Report on "Beyond Design-Basis Accidents in Spent Fuel Pools." NECNP Response, n. 9, supra, at 3, n. 1.

reactor"--such as the instant proceeding. As set forth by the Commission for these proceedings:

> Individual licensing proceedings are not appropriate forums for a broad examination of the Commission's regulatory policies relating to evaluation, control and mitigation of accidents more severe than the design basis (Class 9). * * * The Commission believes that considerations which go * * * to the possible need for safety measures to control or mitigate severe accidents in addition to those required for conformance with the Commission's safety regulations or conformance with the Clarification of TMI Action Plan Requirements, should not be addressed in case-related safety hearings.

50 Fed. Reg. at 32144-45 (footnote omitted).

Litigation of NECNP Contention 1 as a safety-based contention seeking denial of the proposed amendment as a means of controlling or mitigating the alleged enhanced consequences of a beyond-design-basis accident clearly is proscribed by the Policy Statement. (As a risk contention under NEPA, however, we reach a differenct conclusion.)[19] NECNP Contention 2, which seeks to examine whether the proposed amendment is consistent with the Policy Statement itself, may be a subject which the NRC Staff may examine under the Policy Statement. The portions of the Policy Statement cited by NECNP define activities which

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19 The Policy Statement permits us to examine the risk of the type of accident sought to be litigated by NECNP Contentions 1 and 2 as well as by Massachusetts Contention I. In accepting the EIS portion of NECNP Contention 5 (infra, pp.24-29), we are examining such risk.

the Staff may undertake.[20] But consideration by a Licensing Board in an adjudicatory proceeding is barred by the hearing provisions quoted above. For that reason, we must reject both NECNP Contentions 1 and 2.

b. In its Contention I, Massachusetts also seeks to litigate the alleged increase in consequences of a severe accident not dissimilar to the accident posed by NECNP. To the extent this contention seeks mitigative or control measures for severe accidents, it must be rejected for reasons comparable to those underlying our ruling on NECNP Contentions 1 and 2. (To the extent the contention raises risk issues, see our discussion of NECNP Contention 5, infra, pp. 24-29.)

c. For its part, Vermont Contentions, ¶ V, likewise seeks to litigate the enhanced consequences of a "severe" accident. But it fails to define, in other than the most general terms, which accidents it has in mind. The two accident sequences which it portrays are so general that a party could not properly respond. Accordingly, for lack of a particularized basis (as well as the proscriptions of the Policy Statement), we reject Vermont Contentions, ¶ V.

3. NECNP's Contentions 3 and 4 raise questions concerning the effect of the amendment on the facility's system for maintaining the temperature of the spent fuel pool water within certain specified limits. Contention 3 claims that the system as proposed "violates the single failure criterion." Contention 4 claims that the system would

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[20] NECNP Contentions, at 5-6.

"reduc[e] the safety margin and increas[e] the probability of a radioactive release from the pool." The pool cooling system, upon which both of these contentions focus, consists of the dedicated spent fuel pool cooling pumps augmented or superseded in specified instances by one train of the reactor's residual heat removal (RHR) system.

a. Citing the relevant portions of the Applicant's expansion application, together with the Applicant's responses to certain Staff questions, NECNP in Contention 3 maintains that the Applicant has not established that its proposed method of spent fuel pool cooling ensures that both the fuel pool cooling system and the RHR system are single failure proof.[21] The Applicant and Staff each would have us reject this contention as lacking a nexus to the present application and, accordingly, not within the ambit of issues properly before us.

The Applicant describes the augmented cooling system as "a question of original plant design."[22] The Applicant and Staff both claim that, under existing technical specifications, the reactor may utilize the RHR system to augment the fuel pool cooling system for all periods during which the Applicant seeks to use it. They assert that no further modification of the technical specifications is required for the current application. Absent any required change, they perceive the use of the

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21 NECNP Contentions, at 6-7.

22 Applicant Response to NECNP, at 3.

RHR system as not within the scope of the presently sought amendment.[23] In response, NECNP asserts that, at the very least, the RHR system will have to be used to a greater extent than previously and that the Applicant had previously sought authority to use the RHR system for pool cooling only for standby or backup purposes.[24]

Based on the material before us, we have found no review of or authorization for use of the RHR system for cooling of the spent fuel pool at the time of the original operating license authorization.[25] As far as we can ascertain, use of the RHR system to augment the spent fuel pool cooling system was first considered in conjunction with a 1977 application to increase the storage capacity of the spent fuel pool.[26] NECNP was, of course, a party to the 1977 license amendment proceeding. The question, therefore, is whether it should be barred at this time from raising an issue which, according to the Applicant, NECNP could have raised in the 1977 proceeding.

The record of the 1977 proceeding appears to support NECNP's position that, during that proceeding, the RHR system was considered only for backup purposes or in situations where a greater-than-usual amount of fuel was offloaded from the reactor--for example, a full-core

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23 Applicant Response to NECNP, at 3-4; Staff Response, at 18-19.

24 Tr. 54.

25 See Staff's SER, dated June 1, 1971, at 58 (§9.2).

26 The Applicant concedes as much (Tr. 62, 63).

offload. Thus, the 1977 expansion application states, with regard to the adequacy of the spent fuel pool cooling system to handle the heat load resulting from additional fuel assemblies:

> The heat load resulting from the presence of additional spent fuel assemblies is within the capacity of the existing cooling system.
>
> * * *
>
> In the event of the loss of primary spent fuel pool forced circulation cooling, the residual heat removal system can be cross connected to the spent fuel pool to provide the necessary cooling flow.[27]

Moreover, the Staff's analysis of spent fuel pool cooling in connection with the 1977 expansion discussed the use of the RHR system only in conjunction with "larger than normal batches of spent fuel"--more particularly, situations where a full core offload is necessary.[28]

According to the present application, the RHR cooling system would have to be used much more frequently than for full-core offload situations. In fact, the Applicant seemed to indicate that the RHR system not only would be used but in fact is being used for every fuel

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[27] Application letter from Vermont Yankee to NRC Staff, dated November 5, 1976, Enclosure 2 at 3, 6. We have found no other submission by the Applicant providing any further details concerning proposed usage of the RHR system for cooling the spent fuel pool.

[28] Staff SER, dated June 10, 1977, at 3-4; SER, Supp. 1, dated June 20, 1977, at 1-2.

offload.[29] There apparently are no technical specifications which define limits for the use of the RHR system for spent fuel pool cooling during periods when the reactor is in a cold shutdown mode. But did NECNP (which was a party to the 1977 proceeding involving the first capacity expansion of the spent fuel pool) have a fair opportunity to challenge the use of the RHR system for use other than for full core offload or other larger than normal offload situations?

NECNP claims it did not have such an opportunity,[30] and we are inclined to agree. Indeed, the public is entitled to be apprised in clear terms in the Staff's SER that a particular issue is being resolved in a given manner. See Gulf States Utilities Co., (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 774-75 (1977). The 1977 SER discussed the use of the RHR system only for extra-normal fuel offloads, such as full core offloads which are likely to occur only three or four times during the life of a reactor. As indicated by NECNP, the current application presents a question which is different in degree (if not in kind) from the 1977 issue.[31] Notwithstanding the current status of the technical specifications, NECNP has not previously had a fair chance to

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29 Tr. 59, 61.

30 Tr. 78.

31 Tr. 55.

challenge the proposed routine (yearly) use of the RHR system for cooling the spent fuel pool.[32]

During the prehearing conference, the Applicant also argued that the single failure criterion does not apply to the spent fuel pool cooling system.[33] It reasoned that Criterion 61, "Fuel storage and handling and radioactivity control," which governs spent fuel pools, does not refer to the single failure criterion, whereas other criteria--e.g. Criterion 38, referring to "Containment heat removal"--specifically incorporate the single failure criterion where applicable.[34]

NECNP did not cite any particular design criterion as being applicable but referred instead to the introductory portion of the General Design Criteria, which states that the definition of systems subject to the single failure criterion is still under development.[35] NECNP also claims that where no particular rule governs a subject, the applicable standard for judging the admissibility of contentions is whether "the matter poses a significant safety problem." Diablo Canyon,

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32 We are not raising any question as to whether the Staff in 1977 should have authorized use of the RHR system for other than full core offload situations. We are only determining whether a party such as NECNP should be barred by res judicata principles from raising the issue at this time.

33 Tr. 64, 67.

34 Tr. 58.

35 Tr. 57-58.

LBP-86-21, supra, 23 NRC at 852. As for the Staff, it asserts that Criterion 44, "Cooling water," is applicable to spent fuel pools but, at the present time, is applied by the Staff only to "active" components; it has under study whether to apply the single failure criterion to "passive" components.[36] In addition the Applicant acknowledged that the current Standard Review Plan (which is not a regulation) applies the single failure criterion to spent fuel pools.[37]

Given the differences in opinion as to whether the single failure criterion is or should be applicable, either through regulatory requirement or Staff guidance, we will not at this time rule out NECNP Contention 3 on legal grounds. Because NECNP did not have a fair chance to raise the issue at an earlier date, we will also not bar it on that basis. We accordingly will admit NECNP Contention 3, in the form set forth as Contention 1 in Attachment A to this Order.

We note that the contention raises questions as to the applicability of the single failure criterion both to the spent fuel pool cooling system and to the RHR system. The Applicant acknowledges that the criterion is applicable to the RHR system when the system is

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36 Tr. 68. The Applicant disagrees with the Staff as to the applicability of Criterion 44 to spent fuel pools (id.). The Applicant and Staff agree that Criteria 60, 62, 63 and 64 (as well as 61) govern spent fuel pools (Tr. 69) but none except 61 are relevant to NECNP's proposed contention.

37 Tr. 69. The Staff is using the current Standard Review Plan to review the instant application (Tr. 74).

being used as part of the ECCS system but not during periods when the reactor is in cold shutdown (during which the RHR system could and would be used for spent fuel pool cooling).[38] NECNP claims, however, that the RHR system may be needed for decay heat removal even when the reactor is in cold shutdown; and under those circumstances, were one train of the RHR system being used for spent fuel pool cooling, the required redundancy would not be achieved.[39] A recently issued Licensing Board opinion (in another proceeding) acknowledged a paucity of information concerning accidents which may be initiated during periods of reactor shutdown. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-12, 25 NRC ____ (April 22, 1987) (slip op., pp. 16, 18, 30). We would expect that the need for a redundant RHR system for decay heat removal purposes during periods of cold shutdown would be explored as part of this contention.

In addition, the Applicant noted that the RHR system could be used for spent fuel pool cooling for limited periods of time during which the reactor is in full operation.[40] We read the contention as broad enough to encompass the applicability of the single failure criterion during such periods.

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38 Tr. 59-60, 61.

39 NECNP Response, at 6-7; Tr. 77.

40 Applicant's Response to NECNP, at 3-4, n. 1; Tr. 72-73, 79-81, 83-86.

Finally, the contention as submitted questioned RHR system usage as proposed to keep pool water at a bulk temperature of 150°F. That temperature was used in the 1977 evaluation of the pool, and it was carried over into the current application. The Staff's current Standard Review Plan, however, which was adopted in 1981, provides that pool water temperature be kept to 140°F, except in the event of "abnormal heat load." SRP (NUREG-0800), Rev. July 1981, § 9.1.3, ¶ III.1.d and h. In litigating this contention, we propose to consider the applicable temperature to be 140°F, unless the Applicant can demonstrate why some other temperature should be controlling.

b. As for NECNP Contention 4, the other cooling-system contention, it relies on the same basis as Contention 3 but claims, instead, that the system as proposed lessens the margin of safety currently available. Margins of safety, however, are not prescribed by regulation or guidelines. They are primarily relevant to the "no significant hazards consideration" finding which, as we have stated earlier, is not within our jurisdiction to review. If a system meets applicable public health and safety criteria or guidelines, it perforce will have an adequate safety margin for licensing purposes. (That question, of course, is part of Contention 3, which we have accepted.) Accordingly, for jurisdictional reasons, we reject NECNP Contention 4.

We note, however, that if the Staff were to determine under 10 C.F.R. § 51.22(c)(9) that an EA need not be prepared for the proposed amendment because of the lack of significant hazards consideration (see <u>infra</u>, n. 41), a reduction in safety margin might be relevant and would

be litigable under 10 C.F.R. § 51.104(b). A proposed contention such as NECNP Contention 4 might then become litigable, and we would consider doing so subject to appropriate standards. See ¶ II.B.6 of the Order, infra, pp. 39-40.

B. Environmental Contentions.

Each of the three petitioners has submitted at least one environmental contention. In general, they focus upon NRC's failure to have prepared an Environmental Impact Statement (EIS) and/or an Environmental Assessment (EA). NRC concededly has not at this time prepared either an EIS or EA--indeed, the Staff reports that an EA is being prepared but will not be issued until July 1, 1987 at the earliest (Tr. 91-92).[41]

1. The broadest of the environmental contentions is NECNP Contention 5, which asserts generally that the NRC has not complied with the provisions of the National Environmental Policy Act (NEPA) or of its own rules in 10 C.F.R. Part 51 (which implement NRC's compliance with the requirements of NEPA). As bases, NECNP cites (a) the failure of NRC to prepare an EIS reflecting the environmental impact of the proposal and discussing alternatives, and (b) the failure of NRC to prepare, as a

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41 The Staff also indicated, however, that this application may not require an EA, since it may be categorically excluded by 10 C.F.R. § 51.22(c)(9). See Tr. 110. We will discuss the ramifications of this position, infra, pp. 39-40.

minimum, an EA. (As noted earlier, at n. 5, we regard NECNP Contention 5 as constituting two separate contentions.) In this connection, NECNP describes the areas of specific concern to it as the increased health risks (as set forth in its health-and-safety contentions) and the consideration of alternatives--particularly dry cask storage and independent pool storage, both of which allegedly provide safety advantages over the proposed expansion in capacity of the spent fuel pool.

Vermont also seeks an EIS. Its sole basis is the alleged lack of availability of long-term waste disposal facilities and the resulting open-ended storage at the Vermont Yankee site (Vermont Contentions, ¶ IV). For its part, Massachusetts Contention II complains of a failure to consider alternatives such as a dry spent fuel storage facility (i.e., dry cask storage) or an in-ground spent fuel pool--essentially the same alternatives which NECNP seeks to have examined. As a basis, Massachusetts cites the possibility of a severe accident, as defined in its contention on that subject, and asserts that an EA has not been prepared by the Staff. Although Massachusetts does not specifically seek an EIS, the accident it hypothesizes as a basis for an EA (set forth in Massachusetts Contention I) is essentially the same as that hypothesized by NECNP as grounds for issuance of an EIS. Moreover, Massachusetts has indicated that it is seeking an EA only if an EIS is not to be prepared (Tr. 126). Therefore, we will discuss the similar accident claims of Massachusetts and NECNP in our discussion of the EIS portion of NECNP Contention 5.

2. The Applicant and Staff each find all of these proposed contentions unacceptable. They first observe that there is no per se requirement that an EIS be prepared in a case such as this (citing 10 C.F.R. § 51.20) and that the NRC determines whether to do so on a case-by-case basis (citing Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 12 (1986)). The Staff has not yet made such a determination in this case. The Applicant and Staff go on to assert that, in order to challenge a determination not to prepare an EIS, a petitioner must allege some specific deficiency in the environmental evaluation, not just a generalized disagreement with the Staff's conclusion (citing Diablo Canyon, CLI-86-12, supra), and that NECNP and Vermont have advanced only generalized conclusory statements as their bases for why an EIS should be prepared. As for Vermont, the Applicant adds that the basis advanced is outside the scope of matters which we are authorized to consider, pursuant to 10 C.F.R. § 51.23.

With respect to the EA contentions of NECNP and Massachusetts, the Applicant takes the position that, since the EA has not yet been issued, a petitioner cannot advance a contention which purports to challenge an EA. It views the EA allegations as an effort to have us direct the Staff with respect to a matter committed to the Staff's jurisdiction and hence beyond our authority. Moreover, with regard to NECNP's EA contention, the Applicant regards it as the equivalent of a "bookmark article" in a Town Meeting Warrant, a practice it deems to be not an accepted practice in NRC proceedings (citing Duke Power Co. (Catawba

Nuclear station, Units 1 and 2, ALAB-687, 16 NRC 460, 466-67 (1982), reversed in part on other grounds, CLI-83-19, 17 NRC 1041 (1983)). In response to our inquiry, the Applicant also expressed reservations whether a petitioner may formulate environmental contentions based on the Applicant's submissions, since there is no regulatory requirement in a case such as this for an applicant to submit any such information (Tr. 93, 108).

The Staff takes a somewhat different approach to NECNP's and Massachusetts' EA contentions. It states that, at this stage of the proceeding, these contentions should be directed to perceived deficiencies in the Applicant's environmental report and not to the Staff's yet-to-be-issued document (citing Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, supra, 17 NRC at 1049). It adds that any challenge to the Staff's EA advanced after issuance of the EA would have to be considered as late-filed, under the criteria in 10 C.F.R. § 2.714(a) (citing Catawba, CLI-83-19, supra, 17 NRC at 1045, 1048). In response to our inquiry, however, the Staff recognized that an environmental report need not be filed in a case such as this (Tr. 92-93) and also, for that reason, questioned whether a petitioner could formulate an environmental contention based on information submitted by the Applicant (Tr. 114).

3. Turning first to the proposed contentions seeking preparation by NRC of an EIS, governing rules appear to permit litigation of an issue of this type (10 C.F.R. § 51.104(a) or (b)). Similar contentions have been accepted in a number of spent-fuel-pool expansion cases,

although (insofar as we can determine) there is no such case where an EIS has been found to be required. See, e.g., Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 264-68 (1979); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-77-51, 6 NRC 265, 267-74 (1977), modified on other grounds, ALAB-455, 7 NRC 41 (1978).

However, there is no categorical exclusion to considering contentions seeking an EIS in spent fuel pool expansion cases (see 10 C.F.R § 51.22 (c)). Indeed, the Commission has stressed that this determination is open for case-by case consideration. Diablo Canyon, CLI-86-12, supra, 24 NRC at 12. Moreover, to raise a contention of this type, a petitioner must allege some specific deficiency in the Staff's environmental review (where that has been performed) or a specific demonstration of sufficient impacts to warrant preparation of an EIS (id.). Thus, if a petitioner advances adequate reasons in a particular case why there may be sufficient environmental impact resulting from a proposed action to warrant an EIS, the contention may be accepted, irrespective of the validity of those reasons.

The reasons advanced by Vermont cannot serve as a basis for a valid contention. They seek to examine the possibilities or effects of the Vermont Yankee site being used as a long-term or open-ended storage facility. However, we are precluded by regulation from entertaining or considering a contention embodying those concerns in a proceeding such as this. See 10 C.F.R. §§ 2.758(a), 51.23 and 51.95(b). For that reason, we reject Vermont's Contention IV.

On the other hand, NECNP's major reason for seeking an EIS is to discuss a particular accident scenario: the same accident scenario the safety aspects of which it sought to examine in its Contention 1.[42] (Massachusetts seeks to explore the environmental impacts of a similar accident in its Contention I.) In support of this scenario, NECNP relies on several studies or draft studies--in particular, NUREG-1150, draft dated February 1987; Brookhaven Report A-3825R, draft dated October 1986; NUREG/CR-4624; and NUREG-1250, draft dated February 1987.

At the outset, we must reject the Applicant's claim that NECNP has presented "nothing more than generalized statements to the effect that the proposed rerack is a 'major federal action significantly affecting the quality of the human environment' and would increase the risk to the public health and safety." [43] The scenario described above (which is incorporated by NECNP through reference to its safety contentions) is considerably more than that and is sufficient to constitute a basis set forth with reasonable specificity.[44] Assuming the basis is not objectionable for some other reason, it is sufficient to undergird an acceptable contention.

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42 NECNP Contentions, at 2-3, 8-9. See p. 8, supra, for a further description of this accident scenario.

43 Licensee's Response to Contentions of NECNP, at 5

44 See, e.g., Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 693-95 (1985).

The Staff also claims that this contention has not been set forth with adequate basis and specificity. We reject that claim for the same reason as we rejected the Applicant's claim. However, by reference to its arguments on Vermont's severe accident contention (which we are designating as Vermont Contention V), the Staff also raises the question whether a contention of this type is consistent with the Commission's Policy Statement on Severe Accidents.

We earlier held that the Policy Statement precluded us from examining measures to control or mitigate the proffered accident, which is an accident more severe than the design basis accident for this facility. The Staff would also read the Policy Statement as barring the examination of this accident under NEPA, citing the Appeal Board's statement in Limerick, ALAB-819, supra, 22 NRC at 696 n. 10, that consideration of such accidents need not be undertaken under NEPA, as "NEPA could not logically require more than the safety provisions of the Atomic Energy Act."

We do not read the litigation bar of the Policy Statement to extend as broadly as the Staff suggests. We construe it to apply only to the consideration of control or mitigative measures to counter the effects of such an accident.[45] It does not extend to the NEPA-mandated

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[45] The Appeal Board's statement in Limerick, ALAB-819, quoted above, related to a contention which sought to explore certain "design alternatives to mitigate severe accidents." 22 NRC at 692 (emphasis supplied).

consideration of the risks of such an accident. In the explicit language of the Policy Statement:

> The Commission has announced a policy regarding Class 9 environmental reviews and hearings in its Statement of Interim Policy on "Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969" (45 FR 40101, June 13, 1980) and expects to continue this policy. The environmental issues deal essentially with the estimation and description of the risk of severe accidents.

50 Fed. Reg. 32138, 32144-45 (August 8, 1985) (emphasis supplied). The Commission stressed that only "considerations which go beyond that to the possible need for safety measures to control or mitigate severe accidents in addition to those required for conformance with the Commission's safety regulations * * * should not be addressed in case-related safety hearings." *Id.* at 32145 (emphasis supplied).

This language clearly leaves open, to a limited degree, the examination of the risks of a beyond-design-basis accident. NECNP clearly wishes to explore such risks[46] (even though its contention probably goes further than that). We will admit the EIS portion of its proposed Contention 5 to the extent it asserts that the particular accident scenario set forth (see, *infra*, p. 8) represents an impact serious enough to warrant an EIS to discuss its risk. The discussion of risk would be undertaken as provided by the Commission's Interim Policy Statement on "Nuclear Power Plant Accident Considerations Under the

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[46] Tr. 43-44.

National Environmental Policy Act of 1969," 45 Fed. Reg. 40101 (June 13, 1980). The contention is set forth as Contention 2 in Attachment A to this Order. (Because of the similarity of the accident scenario posed by Massachusetts Contention I, we will consider Massachusetts to be a joint sponsor of this contention.)

4. a. In seeking to introduce their EA contentions (both of which by their terms seek a Staff analysis of two specified alternatives), NECNP and Massachusetts find themselves in a procedural quagmire (at least under the analyses presented to us by the Applicant and Staff). On the one hand, the petitioners are advised that it is premature for them at this time to raise challenges to an EA which has not yet been issued. Such a challenge is deemed to fall within the scope of non-specific contentions condemned by the Appeal Board in Catawba, ALAB-687, supra. Any such challenge must await the issuance of the EA and would then be considered (if at all) under the late-filed criteria of 10 C.F.R. § 2.714(a).

On the other hand, the petitioners are told that they cannot challenge the adequacy of the Applicant's treatment of alternatives, since NRC imposes no regulatory requirement on an applicant in a case such as this to submit an analysis of alternatives. The only obligation to consider alternatives (if there be any) is said to lie with the Staff.

We must further note that, if we were to reject all contentions at this time, as the Applicant and Staff urge, we would have to dismiss the petitioners and terminate the proceeding. We would lose our

jurisdication to consider late-filed contentions.[47] Thus, the statement that petitioners could challenge the EA by virtue of a late-filed contention means that, to do so, they would have to petition the Commission (or at least the Appeal Board, if it still retained jurisdiction) to institute a new proceeding or reopen the record--both tasks much more difficult even than filing a late-filed contention. Although we are accepting other contentions at this time, we must consider the EA contentions as if we had not done so, since the Applicant and Staff oppose all contentions and could exercise their appeal rights if we accepted any of them.

Under this analysis, both procedurally and environmentally speaking, the petitioners find themselves caught between a rock and a hard place. They are told that they cannot challenge the adequacy of the Applicant's environmental information, because there is no regulatory requirement that an applicant submit any such information. But they also cannot challenge the as-yet-unissued EA, because it is premature to do so. Further, they also cannot challenge the EA when it is issued (or the Staff's determination that an EA is not required) because (if the Applicant and Staff were to succeed in all their arguments) the proceeding would be terminated and we would no longer have jurisdiction to consider late-filed contentions. The very act of the Staff's delaying issuance of an EA (or a determination that an EA is

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47 See Tr. 121.

not necessary)--whether or not justified--could operate to deprive a petitioner of a hearing on environmental issues, irrespective of the potential merit of a petitioner's position on such issues.

The Applicant (supported by the Staff) urges this result as a necessary consequence of the various Catawba rulings. We do not agree. Such a reading of those rulings, in our view, constitutes the type of "crabbed interpretation of NEPA" and its implementing regulations which we thought had long ago been laid to rest. See Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Commission, 449 F.2d 1109, 1117 (1971).[48]

Fortunately, the Catawba rulings need not be read so proscriptively. In the first place, the Catawba rulings were in the context of an operating license proceeding with multiple contentions already at issue. The only question was the showing needed to accept a late-filed contention, not the situation where a late-filed contention would be ruled out jurisdictionally. In that context, the Appeal Board ruled that a valid contention could not be submitted challenging a Staff document not yet issued, and the Commission appears to support that ruling. CLI-83-19, supra, 17 NRC at 1049.

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48 Under the Applicant's reading, the disparate treatment in cases of this type of Atomic Energy Act issues (for which an application must be filed) and NEPA issues (where no information need be filed)--and the differing procedural consequences stemming therefrom--represents a situation as egregious as the procedural disparities condemned by the Calvert Cliffs' court. See 449 F.2d at 1118-19, 1127-28.

Beyond that, the Appeal Board in Catawba had permitted a less-than-usual showing to support a late-filed contention following issuance of one of the Staff review documents. The Commission reversed that narrow aspect of the Appeal Board's ruling, holding that the usual standards for considering late-filed contentions, as spelled out in 10 C.F.R. § 2.714(a), would have to be followed. In so holding, the Commission stressed that

> application of the five factors in 10 CFR 2.714(a)(1) only increases the showing required for the admission of a late contention, and does not act to automatically or unreasonably cut off hearing rights.

Id., 17 NRC at 1047 (emphasis supplied).

The Commission also rejected the claim that use of the five factors would allow applicants and the NRC Staff "to manipulate the availability of licensing-related documents to deprive intervenors of their rights to a hearing." It explained:

> The situation under consideration here results from the Commission's generic establishment of schedules and, thus, is not susceptible to manipulation by the parties to a proceeding. If undue delay should occur, it can be as easily dealt with in a balancing test as by a per se rule.

Id.

Finally, with respect to environmental issues, the Commission recognized that the adequacy of NRC's environmental review is an appropriate issue for litigation. Although the adequacy of such review could not be determined before the issuance of the Staff documents, the

Commission emphasized that environmental concerns reflected in an applicant's environmental report should be raised as early as possible and should not await issuance of the Staff documents. Id. at 1049. It concluded:

> intervenors are expected to raise issues as early as possible. To the extent that this leads to contentions that are superseded by the subsequent issuance of licensing-related documents, those changes can be dealt with by either modifying or disposing of the superseded contentions.

Id. at 1050.

b. The EA contentions of NECNP and Massachusetts each seek the consideration of two specified alternatives--dry cask storage and independent pool storage. The Applicant, in its application documents, rejected each of these alt[illegible]ives as not being available in the time frame within which it allegedly needed additional fuel storage capacity, specif[illegible]ally because no such facilities had "previously been fully licensed" by NRC.[49] The Applicant indicates that, "in general" the unlicensed options had "not been demonstrated on other than a theoretical or prototype basis, adding to the uncertainty concerning the schedule for design and construction."[50] The Applicant's application

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49 Letter from Applicant to NRC, dated April 25, 1986, at 3, and attached Replacement Report, at 5-6.

50 Id., letter at 3; Replacement Report at 6.

documents do not discuss the environmental aspects of either of the two suggested alternatives (or, for that matter, any other alternative).

An agency's evaluation of alternatives is governed by two sections of NEPA, §§ 102(2)(C) and 102(2)(E), 42 U.S.C. §§ 4332(2)(C) and 4332(2)(E). The former section is applicable only when an EIS is required; the latter applies whether or not an EIS is prepared. These sections are implemented within NRC by 10 C.F.R. §§ 51.45(b)(3), 51.53, 51.71, and 51.91(a) (for the discussion of alternatives in an EIS, as required by § 102(2)(C) of NEPA), and 10 C.F.R. § 51.30(a)(1)(ii) and (iii) (for the discussion of alternatives in an EA, as required by § 102(2)(E) of NEPA).

In addition, although an applicant need not submit an environmental report for a spent fuel pool capacity expansion application (see 10 C.F.R. §§ 51.45, 51.50, 51.53, 51.54, 51.60, 51.61, 51.62 and 51.68), the Staff may require an applicant for a license amendment to submit "such information * * * as may be useful in aiding the Commission in complying with section 102(2) of NEPA" (10 C.F.R. § 51.41). By letter to licensees dated April 14, 1978, which transmitted NRC guidance on spent fuel pool modifications (entitled "Review and Acceptance of Spent Fuel Storage and Handling Applications"), the NRC outlined the type of information (including environmental information) needed by the Staff to review spent fuel pool modification applications, together with acceptance criteria to be used by the Staff in authorizing such

modifications.[51] Environmental information is outlined on pp. II-1 and V-1 through V-4. The Applicant here has referenced at least some portions of this guidance document in submitting its application.[52]

Notwithstanding its approval and use by the Staff, and the reliance upon it by this Applicant, the NRC guidance document does not constitute a formal regulatory requirement. Neither, however, does information provided by the Applicant in response to such guidance constitute an entirely gratuitous submission. For it is clear that the Staff envisages using such information in its review of applications such as this, and might well request it if not voluntarily supplied by the Applicant.[53]

Given this situation, it is not surprising that NECNP and Massachusetts focused their EA contentions on the failure of the Staff to analyze alternatives, rather than on an alleged failure of the Applicant to analyze alternatives adequately. The Applicant need not submit an environmental report, although it may be asked by the Staff to

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51 The April 14, 1978 letter was supplemented by a letter dated January 18, 1979, but the supplement did not deal with environmental information.

52 Application letter, n. 49, supra, at 6, 7, Replacement Report at 1.

53 See April 14, 1978 Staff letter to licensees: "Providing the information needed to evaluate the matters covered by this document would likely avoid the necessaity for NRC questions * * *."

provide environmental information.[54] The Staff has the sole regulatory burden of reviewing and analyzing alternatives in a case such as this, and its analysis clearly is a proper subject for litigation. Only because of the Staff's delay in issuing an EA would contentions worded as are NECNP's and Massachusetts' EA contentions become questionable.

In its Catawba ruling, the Commission emphasized that a major foundation of its holding was to commence the consideration of particular issues as soon as possible, using the Applicant's information as grounds for contentions. Thereafter, when the Staff's review was completed, contentions could be modified or disposed of, as appropriate (subject to proper standards). Notwithstanding the lack of any formal requirement in a case such as this for an applicant to submit an environmental report, it would appear to be consistent with Catawba to accord the Staff's April 14, 1978 guidance with some regulatory significance and to entertain contentions on the sufficiency of an applicant's environmental submissions under those guidelines (or, as applicable, the lack of any such submission). Such contentions have been accepted in cases such as this. See, e.g., Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 869 (1986) (Mothers for Peace Contention 1). And, as the Commission observed, such contentions can later be modified,

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[54] Beyond the information encompassed by the April 14, 1978 guidance letter, the Staff has thus far not sought any information on alternatives in this case (Tr. 95).

as appropriate, but at an early date can serve to permit the commencement of proceedings.

NECNP's and Massachusetts' EA contentions do not, by their terms, focus on the Applicant's analysis of alternatives. But they clearly are aimed at the substance of the Applicant's analysis, since they criticize the lack of any environmental evaluation of alternatives and claim that the alternatives provide safety advantages. NECNP even sets forth facts undercutting the Applicant's claim of lack of availability of one of the alternatives (dry cask storage).[55] And, at the prehearing conference, it became apparent that the time frame in which the availability of alternatives should properly be analyzed may be far lengthier than is reflected in the application documents.[56]

Given the clear intent of these contentions, we perceive the wording used by NECNP and Massachusetts as imprecise, attributable to the absence of an environmental report requirement coupled with the overlay of the Catawba procedural requirements for contentions. The substance of NECNP's and Massachusetts' claims is that the analysis of alternatives thus far is deficient. Contentions of this sort have been accepted with far less specificity and basis than are provided by NECNP and Massachusetts. See Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 425-26 (1973).

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55 NECNP Contentions, at 10.

56 Tr. 9-12.

Moreover, as the Appeal Board has observed, "[i]t is neither Congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly observed. Sounder practice is to decide issues on their merits, not to avoid them on technicalities." Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979).

For the foregoing reasons, we are accepting the EA contentions of NECNP and Massachusetts in substance but are rewriting them to constitute a challenge to the adequacy of the Applicant's submission. Given their similarity, we are also combining NECNP's and Massachusetts' contentions and are limiting the approved contention to the two alternatives specifically mentioned therein. This contention is set forth as Contention 3 in Attachment A to this Order.

5. In ¶ III.B of its Contentions, Vermont asserts an impact of the proposed amendment on its ability to handle low-level waste, as to which it assumes certain responsibilities in 1993. Although as worded the contention appears to be directed at the "no significant hazards consideration" determination under 10 C.F.R. § 50.91 (and hence beyond our jurisdiction, except to the extent it might be considered under 10 C.F.R. § 51.104(b)),[57] we inquired what basis Vermont had for its concerns. It could not particularize how Vermont's obligations would be changed, although it sought to examine the environmental impact that

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57 See supra, pp. 6-7.

might result (Tr. 139-144, 147). The Staff volunteered that removal of the old racks themselves would perhaps increase the amount of low-level waste (Tr. 146) but added that such removal would occur long before 1993 (Tr. 152, 153).

That being so, we find no basis for this contention and additionally reject it on that ground.

6. We earlier pointed out that we lack jurisdiction to entertain claims concerning the "no significant hazards consideration" determination which the Staff may make pursuant to 10 C.F.R. § 50.91. We also noted that the Staff indicated (Tr. 110) that it may determine that it need not prepare an EA on that same basis--i.e., that an EA is categorically excluded for an action which involves no significant hazards consideration. 10 C.F.R. § 51.22(c)(9).

If the Staff should determine that an EA is categorically excluded for that reason, however, such a determination would be subject to litigation pursuant to 10 C.F.R. § 51.104(b). If the Staff were to make such a determination, we would be prepared to consider, albeit on a late-filed basis, contentions which challenge such a determination.

In that connection, we note that Vermont Contentions, ¶¶ III.A and III.B, would not qualify on other grounds--III.A as inconsistent with 10 C.F.R. § 51.23, III.B for lack of basis. But NECNP Contentions 1 and 4, to the extent they may be read as challenges to a "no serious hazards consideration" finding, might well be litigable on the basis of a challenge to a determination under 10 C.F.R. § 51.22(c)(9), if they were

not litigable on some other basis. Absent any Staff action, we express no opinion at this time on this question.

## III. STIPULATION BETWEEN PARTIES

As part of the resolution of issues in the 1977 fuel pool expansion application, the parties entered a stipulation of certain facts. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-77-54, supra, Appendix A (slip opinion) (August 30, 1977).[58] The Applicant, NRC Staff, NECNP and the State of Vermont were, inter alia, parties to that stipulation. Reflecting Vermont's reference to this stipulation as part of the material supporting its contentions, we asked parties and petitioners to address the effects of the stipulation (if any) at the prehearing conference. Memorandum dated April 14, 1987 (unpublished).

Based on the views of all of the parties and petitioners (Tr. 154-68), we conclude that the stipulation does not bar the Applicant (either n an estoppel or a "clean hands doctrine" basis) from seeking the current expansion. We also conclude that the stipulation does not by its terms impose any additional obligation on the Applicant to explore alternatives. We note, however, that the stipulation does suggest a need to explore alternatives, but that current regulatory

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[58] Although the body of LBP-77-54 was published at 6 NRC 436 (1977), Appendix A was not published (id. at 449).

guidelines also reflect that need. Our admission of NECNP Contention 5 (both portions) and Massachusetts Contention II reflects those guidelines.

## IV. SCHEDULES

Under the hybrid hearing procedures which are to govern this proceeding, a period of discovery follows the admission of contentions. Except in exceptional circumstances, such period shall not exceed 90 days. 10 C.F.R. § 2.1111. With respect to the three admitted contentions, we are providing approximately 60 days' discovery, with additional discovery provided for new contentions (if any) or with respect to the effect of yet-to-be-issued Staff documents on existing contentions. Following discovery, parties are to submit to us "all the facts, data, and arguments which are known to the party at such time" and on which the party proposes to rely with respect to a contention. We are to consider such material at an oral argument prior to determining whether any issues shall go to hearing. 10 C.F.R. §§ 2.1113 and 2.1115.

We hereby establish the following schedule:

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| 1. Formal discovery commences: | within 5 days of service of this Order (approximately June 1, 1987) |
| 2. Formal discovery closes (i.e., answers to interrogatories received, second round questions asked and answered, document production completed, etc.) | August 3, 1987 (or within 45 days of our acceptance of new contentions based on Staff review documents, or within 45 days of the issuance of such documents, whichever is later) |

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| 3. Filing date for new contentions based on Staff review documents | Within 14 days of service of the particular review document |
| 4. Filing date for oral argument material (tentative) | September 8, 1987 |
| 5. Oral argument (tentative) | Late September or early October 1987 |

Although we are not at this time consolidating any of the parties, we recognize the multiple sponsorship of several of the admitted contentions. We expect the parties to coordinate their discovery efforts so that duplicative requests are not filed.

V. ORDER

For the foregoing reasons, it is, this 26th day of May, 1987

ORDERED

1. NECNP Contentions 3 and 5 (both portions), and Massachusetts Contentions I (to the extent it raises risk questions) and II are hereby accepted, rewritten as described in the Attachment to this Order;

2. NECNP Contentions 1, 2 and 4, Massachusetts Contention I (except to the extent it raises risk questions), and all of Vermont's contentions are hereby rejected.

3. The requests for a hearing and petitions for intervention of NECNP and Massachusetts are hereby granted. NECNP and Massachusetts are admitted as parties to this proceeding, pursuant to 10 C.F.R. § 2.714. Massachusetts is also admitted as an interested State, pursuant to 10 C.F.R. § 2.715(c). Vermont's request pursuant to 10 C.F.R. § 2.714 is

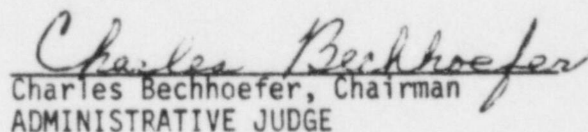
denied. If Vermont wishes to participate as an interested State, it should so advise us and we will permit it to do so.

4. A Notice of Hearing, in the form set forth in Attachment B to this Order, will be published in the Federal Register.

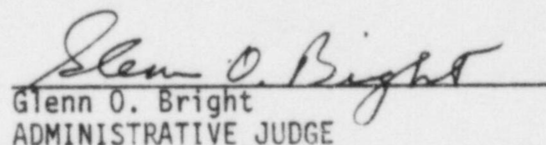
5. Petitions for reconsideration will be considered on the same terms as if 10 C.F.R. § 2.751a were applicable to this proceeding.

6. This Order is subject to review by the Atomic Safety and Licensing Appeal Board under the terms of 10 C.F.R. § 2.714a. A notice of appeal with accompanying supporting brief must be filed within ten (10) days after service of this Order. Please note that any appeals must satisfy the criteria set forth in 10 C.F.R. § 2.714a(b) or (c), as applicable.

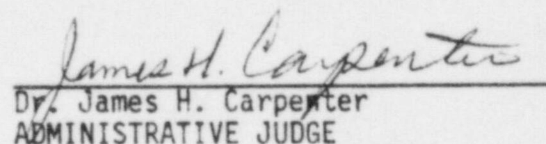
THE ATOMIC SAFETY AND
LICENSING BOARD



Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE



Glenn O. Bright
ADMINISTRATIVE JUDGE



Dr. James H. Carpenter
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 26th day of May, 1987.

ATTACHMENT A

CONTENTIONS

Contention 1
(Derivation: NECNP Contention 3)

The spent fuel pool expansion amendment should be denied because, through the necessity to use one train of the reactor's residual heat removal system (RHR) in addition to the spent fuel cooling system in order to maintain the pool water within the regulatory limits of 140°F, the single failure criterion as set forth in the General Design Criteria, and particularly Criterion 44, will be violated. The Applicant has not established that its proposed method of spent fuel pool cooling ensures that both the fuel pool cooling system and the reactor cooling system are single failure proof.

Contention 2
(Derivation: NECNP Contention 5, Massachusetts Contention I)

The proposed amendment would create a situation in which consequences and risks of a hypothesized accident (hydrogen detonation in the reactor building) would be greater than those previously evaluated in connection with the Vermont Yankee reactor. This risk is sufficient to constitute the proposed amendment as a "major federal action significantly affecting the quality of the human environment" and requiring preparation and issuance of an Environmental Impact Statement prior to approval of the amendment.

Contention 3
(Derivation: NECNP Contention 5, Massachusetts Contention II)

The Applicant has failed to submit an adequate analysis of alternatives to the proposed action, as required by §§ 102(2)(C) and 102(2)(E) of the National Environmental Policy Act, 42 U.S.C. §§ 4332(C) and 4332(E), and implementing NRC regulations or guidelines. Specifically, the Applicant has failed to analyze adequately the alternatives of (1) dry cask storage and (2) independent pool storage. Both of these alternatives are available options and provide obvious safety advantages over the instant proposal.

ATTACHMENT B

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

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|---|---|
| In the Matter of<br><br>VERMONT YANKEE NUCLEAR<br>POWER CORPORATION<br><br>(Vermont Yankee Nuclear<br>Power Station) | Docket No. 50-271-OLA<br><br>(ASLBP No. 87-547-02-LA)<br><br>May 26, 1987 |

NOTICE OF HEARING

On December 31, 1986, the Nuclear Regulatory Commission published in the Federal Register an amended notice of opportunity for hearing with respect to a proposed operating-license amendment which would permit an expansion in the storage capacity of the spent fuel pool of the Vermont Yankee Nuclear Power Station, located in Vernon, Vermont, approximately five miles south of Brattleboro, Vermont (51 Fed. Reg. 47324). Three requests for a hearing and petitions for leave to intervene were received. On February 13, 1987, an Atomic Safety and Licensing Board was established to rule upon these requests/petitions

and to preside over the proceeding in the event that a hearing were ordered.

After holding a prehearing conference, the Atomic Safety and Licensing Board issued a Prehearing Conference Order (LBP-87-17) on May 26, 1987, granting the requests for a hearing and petitions for leave to intervene filed by the New England Coalition on Nuclear Pollution (NECNP) and by James M. Shannon, Attorney General of the Commonwealth of Massachusetts (Massachusetts). The Order denied the request of the State of Vermont but permitted Vermont to participate as an interested State pursuant to 10 C.F.R. § 2.715(c) if it wishes to do so.

Please take notice that a hearing will be conducted in this proceeding. Consistent with the notice of opportunity for hearing referenced above, this hearing will be conducted under the hybrid hearing procedures set forth in 10 C.F.R. Part 2, Subpart K (§2.1101 et seq). The Atomic Safety and Licensing Board designated to preside over the proceeding consists of Glenn O. Bright, Dr. James H. Carpenter, and Charles Bechhoefer, who will serve as Chairman of the Board.

During the course of the proceeding, the Board will conduct an oral argument, as provided by 10 C.F.R. §§ 2.109 and 2.1113, and may hold one or more prehearing conferences pursuant to 10 C.F.R. § 2.752. The public is invited to attend the oral argument, all prehearing conferences, and any evidentiary hearing which may be held pursuant to 10 C.F.R. § 2.1115. The Board will establish the schedules for any such sessions at a later date, through notices to be published in the Federal

Register and/or made available to the public at the Public Document Rooms.

Supplementing the opportunity afforded at the first prehearing conference, during some or all of these sessions, and in accordance with 10 C.F.R. § 2.715(a), any person, not a party to the proceeding, will be permitted to make a limited appearance statement either orally or in writing, setting forth his or her position on the issues. These statements do not constitute testimony or evidence but may assist the Board and/or parties in the definition of issues being considered. The number of persons making oral statements and the time allotted for each statement may be limited depending upon the time available at various sessions. Written statements may be submitted at any time. Persons desiring to make a limited appearance are requested to inform the Office of the Secretary, Docketing and Service Branch, U.S. Nuclear Regulatory Commission, 1717 H. Street, N.W. Washington, D.C. 20555. A copy of any statement or request should also be served on the Chairman of the Atomic Safety and Licensing Board.

Documents relating to this proceeding are on file at the Local Public Document Room, located at the Brooks Memorial Library, 224 Main Street, Brattleboro, Vermont 05301, as well as at the Commission's Public Document Room, 1717 H Street, N.W., Washington, D.C. 20555.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 26th day of May, 1987.