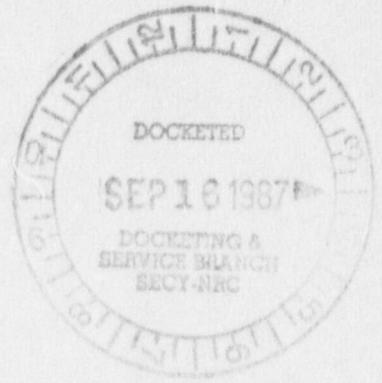


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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

_____)
In the Matter of:) Docket Nos. 50-275 and 50-323 -*DLA*
)
PACIFIC GAS & ELECTRIC COMPANY) SIERRA CLUB'S BRIEF IN
) SUPPORT OF APPEAL OF
(Diablo Canyon Nuclear Power) LICENSING BOARD'S SEPTEMBER
Plant, Units 1 and 2) 2, 1987 ORDER
_____)

I. INTRODUCTION

Sierra Club, Santa Lucia Chapter ("Sierra Club") appeals from the Atomic Safety and Licensing Board's ("Licensing Board") September 2, 1987¹ ruling in the above-referenced proceeding. This license amendment proceeding stems from PG&E's request for authorization to rerack the Diablo Canyon Units 1 and 2 spent

¹While the Memorandum and Order is dated September 2, 1987, it was served by mail on September 4, 1987. The Order is appealable under 10 CFR 2.714a because it denied Sierra Club a hearing on the Contention. The ten day time period for filing an appeal pursuant to 10 CFR 2.714a runs from the date of notice. See also, 10 CFR 2.710, adding five days to otherwise applicable time periods when service is provided by mail. This motion is therefore timely.

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fuel pools in a high density configuration that would increase the number of fuel assembly storage locations from 270 to 1324 for each unit. On June 16, 1987, at the beginning of the hearings scheduled to address previously admitted contentions, Sierra Club moved to admit a contention concerning the consequences of loss of cooling accidents for plants with spent fuel pools utilizing a high density configuration such as that proposed by PG&E for Diablo Canyon ("Contention").² The motion also requested that the Board dismiss the prior finding of no significant impact and order that an environmental impact statement ("EIS") be prepared for the modification of spent fuel facilities at Diablo Canyon. A basis for the motion was the January 1987 report entitled "Beyond Design Basis Accidents in Spent Fuel Pools (Generic Issue 82)" issued by Brookhaven National Laboratory ("BNL Report"),³ a copy of which had only recently been made available to Sierra Club.⁴ The Licensing

²The specific wording of the contention Sierra Club moved to have admitted is as follows:

The proposed action significantly increases the consequences of loss of cooling accidents in that a loss of water in the spent fuel pools could lead to spontaneous ignition of zircalloy cladding of the fuel elements in the high density configuration with significant releases of radiation.

³ This Brookhaven National Laboratory Report, "BNL" Report has previously been sent to all parties on the service list and was attached as Exhibit 1 to Sierra Club's Motion below.

⁴At the time Sierra Club made its original motion, the report was in draft form. The Licensing Board stated that, "[f]or purposes of this decision, the final report does not differ significantly from the draft report." Order, at 2, n.1.

Board directed Sierra Club to submit its motion in writing, and the NRC staff and PG&E both responded to the motion in written briefs.

The Licensing Board's September 2, 1987 Order ("Order") denied Sierra Club's motion to admit the Contention.⁵ The Order also stated that no additional environmental documentation would be required, thereby denying Sierra Club's request for an EIS. Both of these decisions were incorrect as a matter of law because Sierra Club made the necessary showing for admission of the Contention and also demonstrated that significant environmental impacts not previously addressed were likely to result from the proposed license modifications, thereby triggering the requirement that an EIS be prepared.

II. ARGUMENT

A. A Sufficient Nexus Exists Between The BNL Report And Sierra Club's Contention

The Licensing Board's ruling recognizes that a "generic" issue properly forms the basis of a contention if a nexus is

⁵Sierra Club argued below that the Contention came within the ambit of other contentions it had raised earlier, and, in the alternative, that the Contention met the criteria for admission of a late-filed contention pursuant to 10 CFR 2.714(a)(1). Because the Licensing Board based its ruling on its decision that the Sierra Club has not shown: (1) that a sufficient nexus exists between its proposed Contention and the BNL Report; (2) that the Contention came within the penumbra of already admitted contentions; nor (3) that an EIS was required, the Licensing Board did not reach the question of whether Sierra Club had made a sufficient showing with respect to the requirements for a late-filed contention. Because Sierra Club believes that this Board should overturn the Licensing Board's decision, a showing is also made here regarding the requirements of 10 CFR 2.714(a)(1). See Section II C, *infra*.

established between the generic issue and the license application (or amendment) in question. Order, at 6. Gulf States Utilities Co., 6 NRC 760, 772 (ALAB-444, 1977). Sierra Club disagrees with the Licensing Board's ruling that it did not show an adequate nexus.

The BNL Report identifies the storage of recently discharged nuclear fuel in high density spent fuel storage racks as creating a significant increase in the risk of a catastrophic Zircaloy fire. BNL Report at S-6. The resulting increase in health risks is also much greater, especially in the case of a pressurized water reactor ("PWR"). Id. at S-6. The Report concludes that the risk potential of beyond design basis accidents in spent fuel pools is equivalent to present risk estimates for core melt accidents, while in some respects a spent fuel pool accident could be much worse than a reactor core melt accident.⁶ Id. at S-6.

Not all nuclear power plants utilize high density storage racks. Such racks are not presently in use at Diablo Canyon; PG&E seeks to install them through this license amendment. The fuel storage facilities proposed for Diablo Canyon would store

⁶The degree of risk found in this assessment is much greater than that previously associated with accidents in spent fuel pools. For instance, an earlier NRC document concluded that such risks were "extremely small in comparison with accidents associated with the reactor core." BNL Report at S-1, referring to Reactor Safety Study. This earlier study did not take into account the possibility of a Zircaloy fire in the event of a complete drainage of water from the pool. BNL Report at S-1. Thus, before the issuance of the BNL Report, the necessary specificity to support Sierra Club's Contention was not available.

freshly discharged fuel in high density racks that are the same type of racks analyzed in the BNL Report. Ferguson Affidavit, attached to Sierra Club's Motion to Include Issues Raised in Generic Issue 82, below as exh. 2. Two of the Report's authors specifically recommend against the storage of spent fuel in the manner PG&E seeks to institute at Diablo Canyon. BNL Report, Appendix B. These facts alone provide a nexus between the instant license amendment proceeding and the BNL Report.

In addition, there are other aspects of the BNL Report which connect it more specifically with Diablo Canyon. The Report provides evidence of a much greater health risk resulting from a spent fuel pool failure in the case of a pressurized water reactor, PWR, BNL Report at S-6; both the units at Diablo Canyon are PWRs.

Also, of the several accident-initiating events postulated in the Report, structural failure of the spent fuel pool due to seismic events is considered to be a dominant cause of such failures. Id. at S-4. Diablo Canyon has an unusually high risk of undergoing a severe seismic event due to its location close to an active fault zone. Given Diablo Canyon's location, the known likelihood of a seismic hazard materializing at the facility is expected to be greater than the same likelihood at an average, or "generic" plant. These factors combine to create a specific nexus between the BNL Report and the instant proceeding which can serve as a proper basis for admitting Sierra Club's contention.

Furthermore, the reasons given by the Licensing Board for

its decision regarding the nexus issue are inadequate. The September 2, 1987 ruling criticizes Sierra Club for not offering data comparing the PWR studied in the BNL Report and Diablo Canyon. Memorandum and Order, at 11. This basis for the ruling represents an impermissible attempt by the Licensing Board to decide the admissibility of a contention based on the underlying merits of the contention. Mississippi Power and Light Co., 6 AEC 423 (ALAB-130, 1973). The data referred to by the Licensing Board is the type of information a party may want to seek in discovery or may want to introduce at a hearing on the merits of a contention such as that here offered. However, the Contention put forth by Sierra Club was specific enough to be admitted.

The ruling below also stated that the BNL Report contains several "caveats," and then goes on to quote the Report as follows:

...These estimated risks (of health consequences) are comparable to the estimated risk posed by severe core damage accidents and appear to warrant further attention. However, the uncertainty in this estimate is larger (greater than a factor of 10) and plant specific features may change the results considerably.

Preventive and mitigative measures have been evaluated qualitatively. It is suggested that for plants with similar risk potential to the two surrogate plants, the one measure which is likely to be effective in reducing risk is utilization of low density storage racks for recently discharged fuel. However, before such preventive measures are implemented a complete plant specific risk assessment for pool related accidents should be performed including a structured fragility analysis of the pool itself.

Order at 8 (quoting BNL Report, p. iii but adding emphasis).

The important point with respect to the quoted material⁷ is that, with full knowledge of these statements, two of the authors still recommend that spent fuel not be stored in high density racks until it has been stored for two or more years in the old style, low-density racks. BNL Report, Appendix B. The fact that the authors call for a plant specific risk assessment is not surprising, given the nature of the Report. If the Contention were admitted, other parties could certainly point to this language to argue the merits of the Contention. However, since two of the authors recommended against the storage of freshly discharged fuel into high density racks as proposed at Diablo Canyon in spite of the other cautions as to the accuracy of their work and the need for site-specific data, their "caveats" do not provide a basis for excluding the Contention. By citing the unusually strong recommendation against the use of high density racks contained in the Report, the Sierra Club has established a sufficient nexus between the Report and the present licensing amendments.

The Sierra Club is certainly aware that Generic Issue 82 has not yet been reduced to a regulation in Title 10 of the Code of Federal Regulations. See Order at 8. However, the Board's statement that "the BNL Report is but the latest in this ongoing

⁷As for the first underlined portion of this quote, it has already been pointed out that the Report's identification of seismic-hazard uncertainty as one of the two main causes of the uncertainty of health risks provides part of the specific nexus between the Report and this proceeding, given Diablo Canyon's location.

series of studies" seriously misses the significance of the Report. The Report, for the first time, has quantified the hazards associated with the cladding fire danger at plants like Diablo Canyon and has made specific recommendations to mitigate those hazards. It clearly establishes the nexus between the generic potential for Zircaloy fires and the danger to existing PWRs posed by this problem. Although the NRC has yet to adopt a specific regulation to deal with this issue, it has clearly been established by the authors of the Report that Zircaloy fires represent a real and present danger to the public health and safety at plants using high density spent fuel racks. By calling attention to these facts, the Sierra Club has fulfilled the nexus requirements of Gulf States.

The Board claims that "the Sierra Club's proposed contention assumes a total loss of coolant in the Diablo Canyon spent fuel pools without specifying any accident scenario that would cause that loss." Order at 10. The Contention deals only with complete water loss since that is the scenario evaluated by the BNL Report. The hazards relating to partially drained pools have yet to be addressed, although there is some evidence that they may be significant. BNL Report, at 2-15.

The Report, on page 2-29, clearly identifies seven scenarios for water loss in PWRs. At the present time, the Sierra Club has insufficient data to identify which of these scenarios may be most significant for Diablo Canyon. Any attempt to do so would be premature, pending hearing on the details of

the problem as it relates to the Diablo Canyon facility. However, the scenarios studied for the surrogate PWR in the Report are clearly potential scenarios for failure at Diablo Canyon. That is, after all, the value of the "surrogate". Therefore the Report, as cited by the Sierra Club, adequately establishes the required nexus.

The Board's quote of the Report regarding previous water loss incidents, Order at 10, is irrelevant and seems to demonstrate lack of understanding of the probabilistic risk assessment (PRA) procedure. In addition, the Board's technical discussion of the Ginna and Diablo Canyon plants ignores the BNL analysis altogether. Order at 10 and 11.

In its PRA for the Ginna PWR surrogate plant, the BNL authors made use of an appropriate "fragility curve" representing the strength of a spent fuel structure. However, the curve was based on the strength of the reactor building at the Oyster Creek plant and a shear wall at the Zion plant. BNL Report, at 2-9. Data for Ginna was unavailable. Thus the Board's arguments regarding the ages of Ginna and Diablo Canyon completely miss the mark. In addition, these arguments represent a further attempt by the Board to judge the merits of the Contention, rather than its admissibility.

The Board cites a number of qualifying statements in the Report, which it claims "warn(s) against drawing specific conclusions as to individual reactors...". Order at 11. However, some of these qualifications deal with the features of

PRAs in general. Indeed, the PRA is intended to provide some measure of quantification for precisely those situations in which there are large uncertainties. The PRA is thought to be the state of the art in safety analysis, even though it must rely on simplifying assumptions, estimates of event frequencies and hazards, and data from generic facilities.

While it is certainly true that the numerical values derived as risks for the Cinna plant may be considerably different for the Diablo Canyon plant, this fact is irrelevant to the question of admissibility of the Sierra Club's Contention. However much the Board may belittle the merits of the Contention, the Report has clearly identified a significant safety issue for the reracking at Diablo Canyon.

B. An EIS Is Required For This License Amendment

The National Environmental Policy Act ("NEPA") requires all federal agencies to prepare an EIS analyzing possible environmental effects before undertaking any major federal action that may significantly affect the environment. 42 U.S.C. § 4332(2)(c). Sierra Club's motion included a request that the Licensing Board direct preparation of an EIS concerning the possibility of and impact of Zircaloy cladding fires at the Diablo Canyon facility. This portion of the motion was also based on the BNL Report, which provided previously unavailable evidence of significant impacts on the human environment.⁸

⁸See n.6, supra. The NRC NEPA compliance has consisted of generating a generic EIS in 1979 which was not, among other things, based on a high density rack configuration of the type

The Licensing Board rejected Sierra Club's NEPA claim, stating that its determination that no nexus had been shown between the ENL Report and the Diablo Canyon spent fuel pools also led it to conclude that no EIS was required. Order at 14. The Licensing Board relies on the recently-issued case of Vermont Yankee Nuclear Power Corp, 26 NRC ___ (ALAB-869, issued July 21, 1987), apparently reading that case to mean that Sierra Club's request for an EIS must fail because it is based on a "beyond design basis" accident scenario. Order at 13-14.

Sierra Club believes that it has shown a sufficient nexus between the BNL Report and the Diablo Canyon license amendment procedure, as elaborated above.⁹ This nexus is created by: 1) the fact that exactly the same type of fuel storage racks are at issue; 2) the increased risk identified in the BNL Report for PWRs (which Diablo Canyon Units 1 and 2 are); and 3) the increased seismic hazard risk evident for any plant located near a major fault zone and the relation of this fact to the Report's conclusions.

In addition, the Licensing Board misapplies the Vermont Yankee decision. In that case, the Appeals Board merely ruled that the specific accident scenario at issue there was too remote and speculative to trigger the requirement that an EIS be performed. The opinion reconfirms the agency's long-standing

now proposed. This document was then relied on in both the May 29, 1986 Environmental Assessment ("EA") and the May 30, 1986 Finding of No Significant Impact ("FONSI").

⁹See, supra, pp. 3 to 7.

policy of considering the need to prepare an EIS on a case-by-case basis. Vermont Yankee, at 23, 26, citing Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 1 and 2), 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). Therefore, Vermont Yankee does not dictate the result in the instant case, where Sierra Club has shown specific factors linking the BNL Report to the Diablo Canyon spent fuel reracking proposal that make the likelihood of a Zircaloy cladding fire at the Diablo Canyon plant more than a "remote and speculative" event.

Furthermore, even if the Licensing Board were correct in its reading of the Vermont Yankee case, it would be impermissible as a matter of NEPA law simply to exclude all accidents labelled "beyond design basis" from the requirement that an EIS be prepared on the grounds that such accidents are, by definition, "remote and speculative" events.

NEPA does relieve agencies of the duty to consider "remote and speculative" events; the determination of what constitutes a "remote and speculative" event is governed by a rule of reason. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972). However, the governing Council on Environmental Quality, ("CEQ") regulations and relevant case law make clear that an event is not remote and speculative merely because there is a low probability that it will occur. All "reasonably foreseeable" significant adverse impacts must be analyzed,

including "impacts which have catastrophic consequences, even if their probability of occurrence is low." 40 CFR § 1502.22 (1986). In San Luis Obispo Mothers For Peace v. NRC, 751 F.2d 1287, 1303 (D.C. Cir. 1984), aff'd en banc, 789 F.2d 26 (1986), cert. denied, _____ U.S. _____, 107 S.Ct. 330 (1986), the D.C. Circuit stated:

[w]here uncertainty exists as to either probability or consequences, however, a worst case analysis is mandatory if the agency decides to proceed with its proposed action. Most notably (and most controversially), the regulation requires such an analysis even where the probability of an impact is assumed to be very small.

Although the Court held that the requirement did not apply in that case because the EIS at issue there was filed significantly before the effective date of the requirement,¹⁰ the Court recognized the obligation of agencies to analyze impacts even when the probability of an occurrence is slight. This decision is in keeping with rulings by other Circuits on this issue.¹¹ Save Our Ecosystems v. Clark, 747 F.2d 1240 (9th Cir. 1984) (spraying of herbicides enjoined until worst case analysis of impacts completed) and; Sierra Club v. Sigler, 695 F.2d 957, 971-974 (5th Cir. 1983)(agency's duty to analyze hypothesis of a

¹⁰This time bar does not apply in the instant case because no EIS has ever been done on the reracking of the Diablo Canyon spent fuel pools. The BNL Report makes clear that the high density configuration reracking involves risks which have never been taken into account before. BNL Report at S-1.

¹¹While these cases were filed before the nomenclature of "worst case" has been deleted from the relevant CEQ rules, the requirement that low probability events which may have catastrophic consequences be analyzed remains. 40 C.F.R. § 12502.22 (1986).

massive oil spill not excused by mere fact such a spill was remote or unlikely).

No factual basis yet exists which can be used to establish the probability of a Zircaloy cladding fire resulting in a radioactive release from Diablo Canyon. The agency cannot rely on a policy statement as a stand-in for the development of a factual record on the question of how "remote and speculative" an event is. There is no basis under NEPA for ruling out consideration of events which may affect the need to prepare an EIS merely by labelling them "beyond design basis." ¹²

Last year, the Sierra Club (and Mothers for Peace) appealed this proceeding to the Ninth Circuit, where they argued, inter alia, that the NRC had violated NEPA. The Court decided the case on other grounds but did state:

With respect to petitioners' NEPA claims, however, we note that the site specific environmental assessment was based on a seven year old generic environmental assessment and that no worst case analysis, 40 C.F.R. § 1502.22, appears to have been conducted. We strongly suggest that any doubt concerning the need to supplement the NEPA documents be resolved in favor of additional documentation.

San Luis Obispo Mothers for Peace v. NRC, 799 F.2d 1268, 1271 (9th Cir. 1986). The Sierra Club has specifically requested that

¹²It is unclear what a "design basis accident" would be in the present proceeding. The Diablo Canyon spent fuel pools were designed on the basis of 270 fuel assembly locations. PG&E proposes to increase the number of these location by almost five times the original design basis, without changing the pool size, the spent fuel cooling equipment, or other related systems. Thus, the proposed amendment results in a spent fuel storage system which is beyond the original design basis of the plant. Yet this alone cannot remove the change from the mandates of NEPA.

the NRC consider the risks and consequences of a Zircaloy cladding fire at Diablo Canyon based on the BNL Report and the specific license amendment proposed for Diablo Canyon. Any ruling by this Board must be consistent with federal law, as contained in the Act itself, the accompanying regulations, and relevant case law. This body of law, including the regulations and cases dealing with low probability risks and scientific uncertainty, require that an EIS be done for the Diablo Canyon reracking, as requested by Sierra Club.

C. The Requirements For Admission As A Late-Filed Contention Have Been Met

The Sierra Club has established that the contention applies to the facility at issue and should be admitted. Sierra Club also meets the requirements for filing a late-filed contention, as set forth in 10 CFR §2.714(a)(1). This section requires the balancing of considerations, including good cause for failure to file on time, other means to protect the intervenor's interest, assistance in developing a sound record, and whether the proceeding will be broadened or delayed.

First, Sierra Club had good cause for filing when it did in that it had not previously received a copy of the Report. On March 27, 1987, the NRC staff issued Board Notification 87-05 ("Board Notification") regarding the BNL Report. The Board Notification was not accompanied by the Report itself. The Board Notification contained the misleading statement that the "the draft report does not pertain directly to currently ongoing licensing efforts for spent fuel pool expansion amendment

requests by utilities including hearings." See Board Notification, attached to BNL Report. Neither the Sierra Club, its' counsel, nor several other parties on the Diablo Canyon Service list received copies of the Report until a party on the service list, Nancy Culver, requested that the NRC send her a copy after reading about the Report in a local newspaper.¹³ See Affidavits of Dr. Richard Ferguson, Nancy Culver, and Sandra Silver, as well as the declaration of Edwin F. Lowry, attached to Sierra Club's Motion below.

It is unreasonable to expect the Sierra Club to have raised Generic Issue 82 in the current proceeding on the basis of the Board Notification alone, since the notification denies the pertinence of the issue.¹⁴ The Sierra Club brought the matter before the Licensing Board within one week of receiving the Report. Declaration of E.F. Lowry, attached to Motion below. This constitutes timely notice.

Second, the Sierra Club has no means of protecting its interests regarding the cladding fires hazards at Diablo Canyon other than to raise the issue in the current proceeding. The NRC has argued that the resolution of Generic Issue 82 should be left

¹³ It should be noted that the San Luis Obispo County Telegram-Tribune, not a party to the case, also on the service list, did not receive a copy of the Report either.

¹⁴ Prior to the Board Notification regarding the Report, no mention had been made of the potential for fuel cladding fires in any of the documents relating to the Diablo Canyon reracking. The absence of any mention in these documents formed the backdrop in which the Board Notification was read and interpreted.

to "further reviews associated with the licensing of the spent fuel pool amendment at Diablo Canyon." Diablo Hearing Transcript, June 16, 1987, p. 158, line 6. It should be pointed out that the Staff already issued a finding of no significant impact more than a year ago without mentioning the issue of fuel cladding fires. Nor has the Staff given any indication as to when or how it intends to resolve the issue.

Third, the Sierra Club is assisting in making whole the public record on this issue. As the only remaining intervenor, the Sierra Club has raised substantive issues regarding the proposed reracking which would not otherwise have been made part of the public record, thus furthering the development of a sound record on the safety of the proposed action.

Fourth, the proceeding will not be substantially delayed or broadened by addressing this crucial Contention. The hazards of cladding fires in high density racks should have been discussed by the licensee in the in the NRC NEPA documents compiled in May of 1986.¹⁵ Any delay, then, can be attributed to those responsible for reviewing the reracking proposal. Since the current proceeding relates to the safety of the proposed high density spent fuel storage reracking, the inclusion of cladding fire

¹⁵Generic Safety Issue 82 had been identified and prioritized in 1983. The NRC is obligated under 40 C.F.R. 1502.22 to report on the status of incomplete but relevant information. Despite this mandate no mention is made of the potential for cladding fires in any of three pertinent documents: the Environmental Assessment, the Generic Environmental Impact Statement, and the finding of no significant impact for the proposed reracking.

hazards in such a system will not broaden the issue in any significant way.

On balance, the Sierra Club has fulfilled its responsibilities under 10 CFR § 2.714.¹⁶

III. CONCLUSION

The Sierra Club has shown that its Contention contained the requisite specificity to be admitted to this proceeding, and that it meets the criteria for a late-filed contention. Sierra Club has also shown that an EIS is required for the proposed reracking at Diablo Canyon. This Board should direct that Sierra Club's motion should be granted in full, for all of the reasons herein stated.

Dated: September 16, 1987

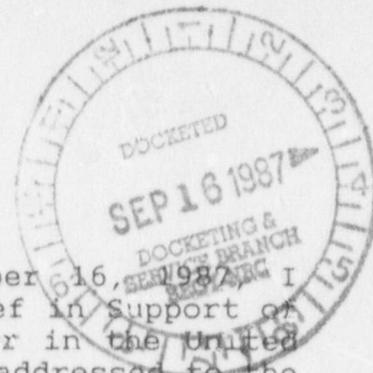
Respectfully submitted,

LAW OFFICE OF DIAN M. GRUENEICH

By Marcia Preston
Marcia Preston

¹⁶Alternately, in its original contentions Sierra Club stated that the reports available to the public failed to consider the "effects of the possible loss of pool cooling capacity on the spent fuel assemblies." Sierra Club Contention I(A)(3), ALSBP No 86-523-03-LA Order June 27, 1986. This contention was not admitted by the Board for lack of specificity, but clearly relates to the hazards such as cladding fires in high density racks. The Brookhaven Report now supplies the specificity which the Board found lacking earlier and which the Club had no way of knowing at the time the contention was written.

PROOF OF SERVICE



I, Deborah M. Hunt, declare that on September 16, 1987, I deposited copies of the attached Sierra Club's Brief in Support of Appeal of Licensing Board's September 2, 1987 Order in the United States mail with postage thereon fully prepaid and addressed to the parties listed below:

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I am, and was at the time of the service of the attached paper, over the age of 18 and not a party to the proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

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