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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'87 JUL 22 P2:19

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Gary J. Edles
Howard A. Wilber

July 21, 1987
(ALAB-869)

SERVED JUL 22 1987

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

Thomas G. Dignan, Jr., and Kathryn A. Selleck, Boston, Massachusetts, for applicant Vermont Yankee Nuclear Power Corporation.

Ellyn R. Weiss, Washington, D.C., for intervenor New England Coalition on Nuclear Pollution.

James M. Shannon and George B. Dean, Boston, Massachusetts, for intervenor Commonwealth of Massachusetts.

David J. Mullett, Montpelier, Vermont, for the State of Vermont.

Ann P. Hodgdon and Robert M. Weisman for the Nuclear Regulatory Commission staff.

## DECISION

Applicant Vermont Yankee Nuclear Power Corporation has appealed, pursuant to 10 C.F.R. § 2.714a(c), the Licensing Board's recent prehearing conference order granting the requests for hearing and petitions to intervene of the New England Coalition on Nuclear Pollution (NECNP) and the Commonwealth of Massachusetts, and admitting three contentions in this spent fuel pool expansion proceeding.



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See LBP-87-17, 25 NRC ___ (May 26, 1987).[1] Contention 1 concerns spent fuel pool cooling and contentions 2 and 3 raise environmental issues. The Commonwealth, NECNP, and Vermont (participating as an "interested State" under 10 C.F.R. § 2.715(c)) each oppose applicant's appeal and argue that the contentions are admissible. The NRC staff, which opposed the admission of all three contentions before the Licensing Board, now opposes applicant's appeal with regard to the spent fuel pool cooling contention (see infra note 7), but supports applicant insofar as it seeks the rejection of the environmental contentions.

For the reasons explained below, we affirm the Licensing Board's decision with respect to most of contention 1, but reverse its admission of contentions 2 and 3.

## I. Spent Fuel Pool Cooling (Contention 1)

NECNP's proposed contention 3 stated that applicant's proposed operating license amendment authorizing spent fuel pool expansion should be denied because it violates the

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[1] Under 10 C.F.R. § 2.714a(c), applicant may appeal the Licensing Board's order "on the question whether the petition[s] and/or the request[s] for a hearing should have been wholly denied."

single failure criterion.[2] The basis for the contention was NECNP's concern that, due to the added heat load to the pool following a normal spent fuel discharge, one train of the reactor's residual heat removal (RHR) system is to be used to supplement the spent fuel pool cooling system and to keep the pool water temperature within the design limit of 150°F. According to NECNP, applicant has not established that this method of pool cooling ensures that both the pool cooling system and the RHR system are single failure proof. In admitting this contention, the Licensing Board renumbered it "contention 1" and recast it as follows:

> 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

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[2] The Commission's regulations define "single failure" as

> an occurrence which results in the loss of capability of a component to perform its intended safety functions. Multiple failures resulting from a single occurrence are considered to be a single failure. Fluid and electric systems are considered to be designed against an assumed single failure if neither (1) a single failure of any active component (assuming passive components function properly) nor (2) a single failure of a passive component (assuming active components function properly), results in a loss of the capability of the system to perform its safety functions.

10 C.F.R. Part 50, Appendix A, "Definitions and Explanations" (footnote omitted). For a discussion of active and passive components, see infra note 12.

> 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.

LBP-87-17, 25 NRC at ___ (slip opinion at 44).[3] See generally id. at ___ (slip opinion at 12-20).

Applicant raises three objections to the Board's admission of contention 1. First, it argues that the doctrines of repose (res judicata and collateral estoppel) bar the litigation of this issue. Applicant notes that NECNP was a party to an earlier (1977) spent fuel pool expansion proceeding involving the Vermont Yankee facility. See LBP-77-54, 6 NRC 476 (1977), aff'd sub nom. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41 (1978), remanded on other grounds sub nom. Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979). Applicant argues that the issue of the use of the RHR system to augment spent fuel pool cooling was "available for litigation" at that time. Brief of Applicant (June 10, 1987) at 14. Citing the staff's 1977 safety evaluation,

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[3] The three contentions, as admitted and rewritten by the Licensing Board, are set out in Appendix A, along with the contentions from which they are derived. See infra pp. 36-43.

applicant asserts that everyone had notice of the cooling augmentation and that no limit was placed on the frequency with which the RHR system could be used for this purpose. Id. at 15-18. As applicant sees it,

> [t]he narrower question of how many times [it] should be allowed to call on the RHR System to augment spent fuel pool cooling is clearly encompassed in the issue of whether [it] should be allowed to do so at all. This being the case, the doctrines of repose apply.

Id. at 18.

We disagree. As the Licensing Board points out, the record of the 1977 proceeding clearly shows that, at that time, the RHR system was to be used only in an emergency as a backup or following a full core offload -- an event that may happen only a few times during the life of a plant. LBP-87-17, 25 NRC at ___ (slip opinion at 14-15). There is no mention of any more routine use of the RHR system to augment cooling of the spent fuel pool. See Letter from D.E. Vandenburgh (Vermont Yankee Vice President) to NRC (November 5, 1976), Enclosure 2 at 3, 6; NRC Safety Evaluation (June 10, 1977) at 4; NRC Safety Evaluation, Supplement No. 1 (June 20, 1977), at 1-2.

In contrast, the instant application contemplates more frequent, non-emergency use of the RHR system for pool cooling during every fuel offload (i.e., the one-third of the fuel routinely removed every 12 to 18 months). See Letter from R.W. Capstick (Vermont Yankee Licensing Engineer) to

NRC (November 24, 1986), Enclosure 1 [hereinafter "November 1986 Letter"], Responses to Questions 13, 17, 18.[4] As the staff explains, a normal one-third core discharge, where the pool is filled, is the worst case for removing the heat load in the pool.[5] According to the staff's calculations, using both trains of the spent fuel pool cooling system is inadequate to perform this function at the initial decay heat generation rate. As a result, one train of the RHR system (which has a much greater heat removal capability) would be necessary for at least 68 days. At that time, the decay heat rate will have dissipated such that one train of the spent fuel pool cooling system would be sufficient, with the remaining spent fuel pool train kept in reserve. During the 68-day period, however, the remaining RHR train would be needed to remove decay heat from the shutdown reactor.

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[4] Applicant does not dispute this. Indeed, it apparently has been relying on RHR augmentation of spent fuel pool cooling for routine offloads for some time. See Tr. 35, 59, 61. We leave to the staff to decide whether applicant has thereby violated the terms of its existing license or any Commission regulations. The staff has already requested and apparently obtained a proposed change in applicant's technical specifications to address this existing situation. See Letter from Warren P. Murphy (Vermont Yankee Vice President and Manager of Operations) to NRC (June 11, 1987); NRC Staff's Brief (June 25, 1987) at 5, 9.

[5] During a full core offload, although the pool heat load would be greater, no fuel would remain in the reactor vessel and thus the RHR system would be more readily available to cool the pool.

Although the staff acknowledges that limited use of the RHR system is currently authorized, the increased heat load associated with the requested amendment (approximately 10 to 15 percent)[6] exacerbates the situation and has "focused the Staff's attention on the need to explicitly assure the availability of supplemental cooling capacity for the spent fuel pool." NRC Staff's Brief, supra note 4, Appendix C (Affidavit of John N. Ridgely) [hereinafter "Ridgely Affidavit"] at 1-3.[7] Thus, not only does NECNP believe that a grant of the requested amendment will mean a different and greater use of the RHR system for fuel pool cooling than was contemplated and authorized by the 1977 license amendment, but the NRC staff does as well. Moreover, it is the additional circumstance in which the RHR system will be used

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[6] The applicant seeks permission to increase Vermont Yankee's spent fuel pool capacity from 2000 to 2870 fuel assemblies by reracking -- i.e., replacing the present spent fuel racks with new racks that allow closer spacing of the fuel assemblies.

[7] The staff accounts for its change in position on contention 1 (see supra p. 2) by explaining that its "review of the amendment application was not complete" at the time of the Licensing Board's consideration of the contention. Ridgely Affidavit at 3. When the staff's review of a matter is not complete, it should say so and advise the board and parties of when it reasonably expects to complete that review. Taking an initially unequivocal position on a largely unreviewed matter -- as the staff did here (see NRC Staff Response to Contentions (April 13, 1987) at 18-19; Tr. 67-71, 75-76) -- is unfair to a licensing board and the other parties and is simply unacceptable.

-- not just the frequency of its use -- that is pertinent here to the increased heat load attributable to the proposed expanded pool capacity. See NRC Staff's Brief at 11. Applicant is therefore incorrect in its view that there was a fair opportunity in 1977 to litigate the issue of RHR augmentation of pool cooling for other than an emergency or full core offload condition and that this issue was subsumed in those addressed previously.[8] Consequently, the doctrines of repose simply do not apply. See Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536-37 (1986) ("[t]he issue to be precluded . . . must be the same as that involved in the prior proceeding and . . . must have been actually raised, litigated, and adjudged. Additionally, the issue must have been material and relevant to the disposition of the first action, so that its resolution was necessary to the outcome of the earlier proceeding").

Applicant next argues that the single failure criterion, on which contention 1 is premised, does not apply

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[8] In this regard, we are inclined to agree with the view expressed by NECNP at the prehearing conference (Tr. 78) that, had it attempted in 1977 to litigate the use of the RHR system for spent fuel cooling in other than an emergency or full core offload situation, the applicant would have vigorously and successfully opposed such a contention as beyond the scope of the license amendment then at issue.

to spent fuel pools. According to applicant, General Design Criterion (GDC) 61 is the only GDC clearly applicable to spent fuel pools and relevant to NECNP's contention, and it does not impose the single failure criterion.[9] Applicant acknowledges that, under the current Standard Review Plan for spent fuel pool cooling, the staff applies GDC 44 as well. See NUREG-0800, "Standard Review Plan," § 9.1.3 (Rev. 1 - July 1981) [hereinafter "SRP"], at 9.1.3-4 to 9.1.3-5, 9.1.3-10.[10] GDC 44 requires the safety function of a cooling water system to be accomplished assuming a single failure.[11] Applicant, however, contends that, because GDC

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[9] GDC 61 states, as pertinent:

> Fuel storage and handling and radioactivity control. The fuel storage and handling, radioactive waste, and other systems which may contain radioactivity shall be designed to assure adequate safety under normal and postulated accident conditions. These systems shall be designed . . . with a residual heat removal capability having reliability and testability that reflects the importance to safety of decay heat and other residual heat removal . . . .

10 C.F.R. Part 50, Appendix A, Criterion 61.

[10] Applicant points out, however, that SRPs are not "regulations." Brief of Applicant at 20. See infra note 13.

[11] GDC 44 states:

> Cooling water. A system to transfer heat from structures, systems, and components

(Footnote Continued)

61 specifically applies to spent fuel pools and GDC 44 only pertains generally to "Fluid Systems," the former governs here, to the exclusion of the latter. But even if GDC 44 does apply to spent fuel pools, applicant continues, NECNP's contention concerns only the failure of "passive components," and the Commission's regulations do not now apply GDC 44 to such components. Brief of Applicant at 19-20.[12]

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(Footnote Continued)

> important to safety, to an ultimate heat sink shall be provided. The system safety function shall be to transfer the combined heat load of these structures, systems, and components under normal operating and accident conditions.
>
> Suitable redundancy in components and features, and suitable interconnections, leak detection, and isolation capabilities shall be provided to assure that for onsite electric power system operation (assuming offsite power is not available) and for offsite electric power system operation (assuming onsite power is not available) the system safety function can be accomplished, assuming a single failure.

10 C.F.R. Part 50, Appendix A, Criterion 44.

[12] An active component requires mechanical movement to perform its safety function, whereas a passive component does not. Leakage from a valve stem is an example of a passive component failure. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1164 n.355 (1984). The Commission's regulations state:

> The conditions under which a single failure of a passive component in a fluid system

(Footnote Continued)

Observing that a spent fuel pool cooling system is a "Fluid System," the staff argues that both GDC 61 and 44 apply here, and that the latter just "places more stringent design criteria on the spent fuel pool cooling system." NRC Staff's Brief at 12. The staff believes these two criteria are therefore consistent, rather than mutually exclusive, as applicant contends. Ibid. NECNP similarly argues that more than one criterion may apply. Brief of the New England Coalition on Nuclear Pollution (July 1, 1987) [hereinafter "NECNP Brief"] at 5.

The Licensing Board took note of "the differences of opinion as to whether the single failure criterion is or should be applicable, either through regulatory requirement or Staff guidance" and determined that it could therefore not rule out NECNP's contention on legal grounds. LBP-87-17, 25 NRC at ___ (slip opinion at 18). In our view, the Board took the proper course. We agree with NECNP that, in the circumstances here, the applicability of the single failure criterion is a "merits, not a threshold, issue." NECNP Brief at 6. See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590,

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(Footnote Continued)
should be considered in designing the system against a single failure are under development.

10 C.F.R. Part 50, Appendix A n.2.

11 NRC 542, 547-49 (1980) (at contention admission stage, boards should determine only if the contention has basis and specificity, as required by 10 C.F.R. § 2.714(b), and should not reach the merits). See also Brief of the Commonwealth (June 25, 1987) at 4. The merits nature of the dispute at this stage is evident in the disagreement between applicant, on the one hand, and the staff and NECNP, on the other, as to which GDC(s) may apply. Moreover, the status of the SRP as guidance, rather than a regulatory requirement,[13] and the staff's developing position on the applicability of the single failure criterion to passive components of a fluid system (see supra note 12) provide added support for the admission of the contention now and the resolution of its merits later, following at least discovery and possibly hearing.[14]

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[13] GDCs and other regulations embody minimum requirements. SRP provisions, "regulatory guides," and the like offer staff guidance on how regulatory requirements can be met. Applicants, however, may demonstrate that other means not specified in the staff guidance will accomplish the same goals. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562, 567 n.7, 568 n.10 (1983).

[14] In addition, contention 1 asserts that, because one train of the RHR will be needed to augment the spent fuel pool cooling system, applicant has also failed to demonstrate compliance with the single failure criterion as it applies to the use of the RHR for reactor core cooling. The Licensing Board thus expects the parties to explore "the need for a redundant RHR system for decay heat removal purposes during periods of cold shutdown . . . as part of

(Footnote Continued)

Applicant's final argument with regard to contention 1 is that the Licensing Board has sua sponte injected a new issue into the contention (a temperature limit of 140°F), without complying with the appropriate Commission rules. Brief of Applicant at 20-21. On this score, we agree with applicant.

NECNP's original contention 3 referred to Vermont Yankee's existing design limits for pool water of 150°F. See Appendix A, infra p. 36. The Licensing Board noted that, although that temperature (150°F) was used in the 1977 evaluation of the pool, the current SRP, "which was adopted in 1981, provides that pool water temperature be kept to 140°F, except in the event of 'abnormal heat load.'" LBP-87-17, 25 NRC at ___ (slip opinion at 20). The Board thus decided that 140°F is the applicable temperature, "unless the Applicant can demonstrate why some other temperature should be controlling." Ibid.

What the proper temperature limit for the pool should be is an issue unto itself.[15] NECNP or another intervenor

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(Footnote Continued)
this contention." LBP-87-17, 25 NRC at ___ (slip opinion at 19). Apart from the more general argument that litigation of the use of the RHR system is barred by the doctrines of repose -- an argument we have rejected -- applicant does not now challenge this aspect of contention 1.

[15] The staff argues that the "temperature difference . . . does not go to the substance of [the contention], but
(Footnote Continued)

might well have attempted to raise this as an issue but did not. The Licensing Board has thus sua sponte added this otherwise uncontested issue to the proceeding. The Commission's regulations permit boards in operating license proceedings to examine and decide "[m]atters not put into controversy by the parties," but only after a determination that "a serious safety, environmental, or common defense and security matter exists." 10 C.F.R. § 2.760a. Whether this regulation authorizes a board to raise such an issue sua sponte in an operating license amendment proceeding is not clear. See, e.g., 44 Fed. Reg. 67,088 (1979); Consolidated Edison Co. of New York (Indian Point Nuclear Generating Unit 3), CLI-74-28, 8 AEC 7 (1974).[16] In any event, a board

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(Footnote Continued)
affects how that contention should be evaluated." NRC Staff's Brief at 7. It thus believes that the contention as rewritten by the Board "fairly characterizes NECNP's Contention 3." Id. at 8. The focus of the original contention, however, was on whether the single failure criterion is violated; that version simply assumed that the temperature limit for the pool was 150°, and it did not contend that it should be lower. See Appendix A, infra p. 36. We therefore disagree with the staff that the Board did not add anything of substance to the contention. We also disagree with the staff's notion that the method of evaluating a contention and the issue it raises -- i.e., the determination of what regulatory standard should apply -- is not a matter of substance. Indeed, separate contentions that challenge the application of a particular regulatory standard or guide are often admitted to a proceeding and thus cannot be said to be lacking in substance.

[16] Applicant does not argue, however, that boards do not have sua sponte authority in amendment proceedings. See Brief of Applicant at 20-21.

invoking its section 2.760a sua sponte authority must set forth such a determination "in a separate order which makes the requisite findings and briefly states the reasons for raising the issue." Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614, 615 (1981). The Commission itself then reviews the determination and decides if the sua sponte issue should remain in the proceeding. See id., CLI-81-36, 14 NRC 1111 (1981). See also Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-81-54, 14 NRC 918, 922-23 & n.4 (1981).

The Licensing Board here has failed to comply with these Commission requirements.[17] We therefore strike the Board's reference in contention 1 to the "regulatory limits of 140°F" and substitute "design limits of 150°F" from NECNP's original contention 3.[18] Otherwise, we affirm the Board's admission of the contention, as rewritten.

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[17] We thus reject NECNP's brief argument that it was "surely well within the Board's discretion to make the instant [temperature] change." NECNP Brief at 6.

[18] Our determination in this regard, however, is without prejudice to any effort the Licensing Board might undertake to comply with the Commission's sua sponte rules.

We note, however, that the Board assumed incorrectly that the staff's SRP did not adopt 140°F as the temperature limit for spent fuel pools until the 1981 revision of § 9.1.3. See LBP-87-17, 25 NRC at ___ (slip opinion at 20);

(Footnote Continued)

II. Environmental Issues (Contentions 2 and 3)

Before addressing the parties' substantive arguments concerning the Licensing Board's admission of contentions 2 and 3, a procedural question commands our attention. The staff suggests that, once we have found one contention admissible, consideration of the others is "not contemplated by 10 C.F.R. § 2.714a." It nonetheless urges us, "[i]n the interest of judicial economy," to consider and reverse the Board's admission of contentions 2 and 3. NRC Staff's Brief at 19. Neither the applicant nor the intervenors express any views on this matter.

We agree with the staff that the situation presented here is not explicitly contemplated by section 2.714a. That provision contains a limited exception to the general rule prohibiting interlocutory appeals. A petitioner may appeal a board ruling that denies the entirety of its petition to intervene or for a hearing. 10 C.F.R. § 2.714a(b). So too, a party other than such petitioner (usually an applicant)

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(Footnote Continued)
Tr. 73-74. In fact, the SRP in effect at the time of the 1977 pool expansion proceeding also provided for a pool temperature of 140°F. See NUREG-75/087, SRP, § 9.1.3, at 9.1.3-5. It is therefore not evident to us why or when Vermont Yankee's technical specification of 150°F was approved. Indeed, the confusion continues. See, e.g., November 1986 Letter, Question 17 and Response. We therefore expect that, irrespective of whether the Licensing Board again attempts to raise this issue sua sponte, the staff will fulfill its responsibility and resolve this discrepancy. See Tr. 74.

may appeal a board ruling granting intervention or a hearing, on the issue of whether such request "should have been wholly denied." 10 C.F.R. § 2.714a(c) (emphasis added). Thus, an argument could be made that, in a section 2.714a(c) appeal, once one admissible contention of a particular petitioner is found, the remainder of the appeal can be dismissed.

In this case, at least as to applicant's objections to the admission of NECNP's contentions, we might well conclude our review now, having found most of contention 1 admissible. Applicant's complaints, however, are also directed to the admission of the Commonwealth's contentions I and II. Although in admitting these contentions the Licensing Board combined both of them with portions of NECNP contention 5 and renumbered them as contentions 2 and 3, we believe that applicant is nonetheless entitled to our further consideration of its claim that the Commonwealth's petition "should have been wholly denied." We will therefore also review the Licensing Board's decision insofar as it concerns the admission of contentions 2 and 3.

Even if the unusual procedural posture of this case did not dictate our review of the other contentions, however, the terms and spirit of section 2.714a, as interpreted by our cases over the years, are flexible enough to allow

appeal boards discretion in this regard.[19] The focus of 10 C.F.R. § 2.714a(c) is on when and whether an order is "appealable" -- an inquiry that takes place at the time the appeal is filed. Hence, our cases refer to the appellant's "claim" or "complaint." See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC ___, ___ (March 2, 1987) (slip opinion at 11); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464 (1982), rev'd in part, CLI-83-19, 17 NRC 1041 (1983). Nor does the language of section 2.714a suggest that an order that is appealable at the time an appeal is filed necessarily loses its appealability once an admissible contention is found.[20] Instead, past cases simply reflect appeal boards' exercise of discretion concerning the need and desirability of reviewing other contentions, once one admissible contention is found. Compare Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424, 426 n.9 (1973) (once board found that petitioner had at least one admissible contention, there was no "need" to examine any others) with Duquesne

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[19] The "legislative history" of the section, however, sheds no light on this matter. See 37 Fed. Reg. 28,710 (1972); 43 Fed. Reg. 17,798 (1978).

[20] Otherwise, the outcome of a case could be determined by the order in which an appeal board considers the contentions being challenged.

Light Co. (Beaver Valley Power Station, Unit No. 1), ALAB-109, 6 AEC 243, 244 & n.3 (1973) (in applicant's appeal from licensing board admission of three contentions, appeal board found two contentions admissible and expressed no view as to the third). Cf. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 373 (1973) (in intervenor's section 2.714a(b) appeal from a licensing board rejection of his five contentions, appeal board examined and found admissible all five contentions).[21]

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[21] In Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC ___, ___ (June 30, 1987) (slip opinion at 2-3), the board majority affirmed the Licensing Board's admission of a contention in amended form. The majority also found that, as a consequence of intervenors' thus having one admissible contention, an earlier set of appeals from the admission of the contention as originally proffered "no longer [lay] under 10 C.F.R. § 2.714a(c)." That case, however, involved the peculiar (if not unique) circumstances of (1) appeals (by applicants and the staff) from the admission of a contention, followed seriatim by (2) indefinite deferral of these appeals pending receipt of Commission guidance on the proper scope of such contention, (3) intervenors' amendment of the original contention in an effort to comply with the subsequent Commission guidance, (4) Licensing Board admission of the amended contention, and (5) a second set of appeals challenging the admission of the amended contention. The dissent also noted that the original contention was subsumed within the amended version. Id. at ___ n.1 (slip opinion at 53 n.1). In the circumstances, we thus believe that the majority opinion in Comanche Peak can be viewed as yet another example of an appeal board's exercise of discretion with regard to the scope of its consideration of a section 2.714a(c) appeal.

As we show below, this proceeding provides a particularly appropriate opportunity for the exercise of our discretion to examine both of the remaining contentions admitted by the Licensing Board and challenged by applicant on appeal. That is, each contention is inherently inadmissible. See generally Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21, modified on other grounds, CLI-74-32, 8 AEC 217 (1974) (one purpose of basis and specificity requirements for contentions is to assure hearing process is not improperly invoked and issues raised are appropriate for litigation in the particular proceeding).

A. Contention 2

In its contention 5, NECNP complained broadly that the NRC has not complied with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321, and the Commission's own environmental regulations, 10 C.F.R. Part 51. The basis for the contention essentially had two parts.[22] As pertinent here, the first part referred to an accident scenario set forth primarily in NECNP contention 1 and

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[22] The Licensing Board accordingly divided NECNP contention 5 into two segments, one of which was admitted as "contention 2" and the other as "contention 3." The portion of NECNP contention 5 that is now contention 3 is discussed infra pp. 29-34.

supported by references to several NRC staff studies. See New England Coalition on Nuclear Pollution's Response to Board Order of February 27, 1987: Statement of Contentions and Standing (March 30, 1987) at 8-9, 2-4.[23] The Licensing Board summarized the accident as a combination of the following 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.

LBP-87-17, 25 NRC at ___ (slip opinion at 8). The Board also noted that such a scenario is considered "clearly a 'beyond design basis accident.'" Id. at ___ (slip opinion at 10). In the first part of its basis for contention 5, NECNP claimed that, because of the substantially increased risk to the public health and safety attributable to this scenario, the proposed license amendment is a major federal action significantly affecting the quality of the

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[23] NECNP contention 1, which the Licensing Board rejected, is not involved in this appeal. See LBP-87-17, 25 NRC at ___ (slip opinion at 7-12).

environment, for which NEPA and 10 C.F.R. § 51.20 require an environmental impact statement (EIS). Commonwealth contention I did not specifically refer to NEPA or the need for an EIS, but it set forth a similar accident scenario. See Appendix A, infra pp. 37-40.

The Licensing Board combined the EIS portion of NECNP contention 5 with Commonwealth contention I and redrafted and admitted them as contention 2:

> 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.

LBP-87-17, 25 NRC at ___ (slip opinion at 44). The Board initially determined that litigation of this type of contention is permitted under the Commission's regulations (see 10 C.F.R. § 51.104), although it also noted that there have been no spent fuel pool expansion cases for which an EIS has been required. Id. at ___ (slip opinion at 24-25).[24] The Board cited Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2),

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[24] Section 51.104 provides generally that matters within the scope of NEPA may be raised in NRC hearings.

CLI-86-12, 24 NRC 1, 12, rev'd on other grounds sub nom., San Luis Obispo Mothers for Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986), in which the Commission stated that the need for an EIS in a spent fuel pool proceeding must be determined on a case-by-case basis. The Board also stressed the Commission's requirement that a petitioner who seeks an EIS must allege some specific deficiency in the environmental evaluation or demonstrate sufficient impacts to warrant an EIS. LBP-87-17, 25 NRC at ___ (slip opinion at 25). The Board then concluded that the accident scenario described by NECNP and the Commonwealth provided the requisite specificity for an EIS contention demanded by Diablo Canyon. Id. at ___ (slip opinion at 26).

In addition, the Licensing Board rejected the staff's argument that the Commission's "Policy Statement on Severe Reactor Accidents Regarding Future Designs and Existing Plants," 50 Fed. Reg. 32,138, 32,144-45 (1985), bars litigation of this contention. The Board construed that policy as prohibiting only the consideration of control or mitigation measures to counter the effects of a severe (i.e., beyond design-basis) accident. In the Board's view, this prohibition "does not extend to the NEPA-mandated consideration of the risks of such an accident." LBP-87-17, 25 NRC at ___ (emphasis in original) (slip opinion at 27-28). The Board thus admitted the contention insofar as "it asserts that the particular accident scenario set forth

. . . represents an impact serious enough to warrant an EIS to discuss its risk." Id. at ___ (slip opinion at 28). According to the Board, that discussion of risk would be pursuant to the Commission's Interim Policy on "Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969," 45 Fed. Reg. 40,101 (1980) [hereinafter "NEPA Policy Statement"]. LBP-87-17, 25 NRC at ___ (slip opinion at 28-29).

Applicant presents three basic arguments why the Licensing Board erred in admitting contention 2. First, it asserts that an "environmental assessment" is essentially a jurisdictional prerequisite for a contention that claims an EIS is required.[25] Because the staff has not yet issued its assessment, applicant argues that the contention is premature, and the Board's admission of it is thus conditional -- a practice prohibited by Catawba, ALAB-687, 16 NRC at 466-67. Second, applicant argues that the Commission's environmental regulations exclude the license amendment here at issue from those actions requiring the preparation of an EIS. Applicant asserts that this

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[25] An environmental assessment is a concise statement usually prepared to "[a]id the Commission's compliance with NEPA when no environmental impact statement is necessary." 10 C.F.R. § 51.14(a).

amendment "involves no significant hazards consideration" and therefore falls within the categorical exclusion provided in 10 C.F.R. § 51.22(c)(9). Third, applicant argues that there is no nexus between the contention and the proposed amendment. The expansion of the spent fuel pool will effect no alteration in the containment or the pool cooling system; the only change will be an increase in the fuel assembly inventory. To the extent that that increases the potential consequences (and thus the risk) of an accident, that is true in every spent fuel pool expansion case. The Commission, however, has not placed such cases in the "EIS required" category (see 10 C.F.R. § 51.20). According to applicant, this indicates that the potential of increased risk from increased fuel inventory is not an appropriate basis for finding a major federal action significantly affecting the quality of the human environment, so as to require the preparation of an EIS. Brief of Applicant at 21-26.

We are not persuaded by any of applicant's arguments. First, although some environmental contentions must abide the issuance of the staff's environmental assessment (see infra pp. 32-34), that is not always the case. Catawba, CLI-83-19, 17 NRC at 1049. Here, the staff has already indicated that it is prepar ng an environmental assessment, not an EIS. Tr. 91. Further, the risk scenario that provides the basis for contention 2 is unlikely to be

affected by anything in that assessment, given the latter's brevity and purpose. See supra note 25. Thus, in these circumstances, there would have been no cause for intervenors to await the issuance of the environmental assessment before proffering this particular EIS contention. It is therefore neither premature nor conditional. The short answer to applicant's second argument is that the Commission has not yet made a "no significant hazards" determination in this case. Only if and when it does so, would the categorical exclusion in 10 C.F.R. § 51.22(c)(9) apply here so as to preclude an EIS. Lastly, applicant's syllogistic nexus argument is at odds with the case-by-case determination of the need for an EIS required by the Commission's Diablo Canyon decision, 24 NRC at 12.

The staff's argument, however, comes closer to the reason contention 2 must be rejected as a matter of law. The staff complains that the contention is premised on "a comparative assessment of risks involving spent fuel pools for a chain of unlikely events." NRC Staff's Brief at 14. The staff points out that the environmental consequences of the accident scenario in the contention have never been evaluated, nor were they required to be, for the Vermont Yankee facility. Id. at 14-15 (citing the Commission's NEPA Policy Statement and San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd en banc, 789 F.2d 26 (1986), cert. denied, ___ U.S. ___, 107 S. Ct. 330

(1986)). The staff asserts that it thus would be anomalous to require for a license amendment an EIS addressing remote and highly improbable consequences, when there was no such requirement for the operating license itself. Id. at 15.

The staff could have taken its point one step farther. As the D.C. Circuit held in San Luis Obispo, 751 F.2d at 1301, NEPA does not require NRC consideration of severe, beyond design-basis accidents because they are, by definition, highly improbable -- i.e., remote and speculative -- events.[26] See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 697, 698 (1985), aff'd in part and review declined, CLI-86-5, 23 NRC 125 (1986); Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 62-63 n.29 (1981), aff'd sub nom. Township of Lower Alloways Creek v. Public Service Electric and Gas Co., 687 F.2d 732 (3d Cir. 1982). The scenario that provides the basis for intervenors' claims of increased risk in contention 2 is just such an accident. See LBP-87-17, 25 NRC at ___, ___, ___ (slip opinion at 8, 10, 26). Thus, the Licensing Board erred in its belief that NEPA "mandate[s]"

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[26] The court refers to such accidents as "Class Nine" -- the terminology previously used by the Commission to describe severe accidents of very low probability, involving significant deterioration of the fuel and breach of containment.

consideration of the risks of the accident hypothesized here. Id. at ___ (slip opinion at 27-28).

To the extent that the Commission ever considers the environmental impact and risks of a beyond design-basis accident, it does so as an exercise of discretion under its 1980 NEPA Policy Statement. San Luis Obispo, 751 F.2d at 1301. The Licensing Board, however, erred in assuming that that policy statement applies to this proceeding. See LBP-87-17, 25 NRC at ___ (slip opinion at 28-29). Nothing in the language of the statement indicates that it was intended to apply to a license amendment proceeding. More important, by its terms, the policy applies to those cases where there has already been a determination that a major federal action significantly affecting the environment is involved and hence an EIS is necessary; it therefore directs what should be included in the EIS (i.e., consideration of the environmental impacts of a severe accident), not whether the EIS is required in the first place. See 45 Fed. Reg. at 40,101-04.[27] Thus, before the NEPA Policy Statement is even invoked, there must be some basis for requiring an EIS other than a claim of increased risk from a beyond design-basis accident scenario. In contrast, intervenors' claim here is

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[27] The Commonwealth recognizes this distinction between the adequacy of the contents of an EIS and the need to prepare one. See Brief of the Commonwealth at 10-11.

just that: i.e., the proposed action (expansion of the spent fuel pool) will significantly affect the environment, thereby requiring an EIS, because of the risks of the beyond design-basis accident scenario they have described.

In sum, intervenors cannot use a beyond design-basis accident scenario to "bootstrap" their way to an admissible contention that asserts an EIS is required to examine the environmental risks of such an accident. Neither the Commission's NEPA Policy Statement nor the statute itself provides a legally cognizable basis for contention 2.[28] We therefore reject it.

B. Contention 3

As previously discussed, NECNP contention 5 stated generally that the NRC had not complied with NEPA and its own environmental regulations. See supra p. 20. The second part of the basis for that contention asserted that, at a minimum, the staff must prepare an environmental assessment (see supra note 25) and must consider alternatives to the proposed spent fuel pool expansion -- specifically, dry cask storage and independent pool storage. NECNP also noted that

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[28] We stress that we are not ruling out all contentions in spent fuel pool proceedings that claim an EIS is required. Only contentions that are premised on claims of increased risk from beyond design-basis accident scenarios are not litigable -- as a matter of law under NEPA, and as a matter of discretion under the NRC's NEPA Policy Statement.

it "expects to change this contention at such time that NEPA-related documents are issued by NRC." Appendix A, infra pp. 41-42. Commonwealth contention II likewise complained about the lack of an environmental assessment and the NRC's failure to consider the alternatives of dry spent fuel storage and "an in-ground spent fuel pool" (i.e., an independent storage facility). Appendix A, infra pp. 42-43.

The Licensing Board struggled with these contentions. It noted applicant's and the staff's arguments that the contentions are premature and would have to await the issuance of the staff's environmental assessment; admission now would be conditional and thus barred by Catawba, ALAB-687. The Board recognized that NEPA obliges the agency, rather than applicant, to analyze alternatives to the proposed action, and that the adequacy of the staff's review is subject to litigation. But the Board worried that delay in the issuance of the staff's environmental assessment could effectively deprive petitioners (NECNP and the Commonwealth) of their hearing rights. In this regard, the Board observed that, if it rejected all of the petitioners' contentions now, it would have to dismiss petitioners and terminate the proceeding.[29] Petitioners'

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[29] The Board's observation is curious, inasmuch as it had already admitted contentions 1 and 2.

only recourse once the environmental assessment was issued would be to seek, in essence, a reopening of the proceeding -- a task more difficult than filing a late contention. The Board went on to note that, although the Commission's regulations do not require applicant to submit environmental documents in connection with its license amendment application, applicant nevertheless provided some such information in response to the staff's informal requests and guidance. Thus, after scrutinizing the decisions of both the Commission and us in Catawba, CLI-83-19 and ALAB-687, the Licensing Board decided to admit the environmental assessment contentions now -- changing their focus, however, from the staff's to the applicant's consideration of alternatives. LBP-87-17, 25 NRC at ___ (slip opinion at 29-38). They were combined into contention 3, which states:

> 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(2)(C) and 4332(2)(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.

Id. at __ (slip opinion at 45).

The applicant's objection to contention 3 is brief and to the point: the focus of environmental contentions should be the adequacy of the staff's analysis, not the

applicant's. The contention, as rewritten by the Board, is thus inadmissible on its face and must be rejected. Brief of Applicant at 27 (citing Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-479, 7 NRC 774, 793-94 (1978)). We agree generally with applicant that environmental contentions should be directed to whether the NRC staff has fulfilled its obligations under NEPA. But as explained below, some admissible environmental contentions may properly focus on an applicant's environmental analysis. The contention at issue here, however, is not one of them and therefore we agree that it must be rejected.

Contention 3, as originally proposed by NECNP and the Commonwealth, correctly related to the staff's environmental assessment and consideration of alternatives. That assessment, however, has not yet been issued. NECNP itself noted the "preliminar[y]" nature of its contention and stated that it expects to change it when the staff's NEPA evaluation is issued (see Appendix A, infra p. 41) -- making it precisely the type of baseless, conditional contention prohibited by Catawba, ALAB-687, 16 NRC at 466-67.

In an effort to rehabilitate the contention or to cure this infirmity, the Licensing Board shifted the focus to applicant's environmental analysis. The Board reasoned that the environmental information already provided to the staff by applicant -- albeit not required by the regulations -- was enough to justify this change in focus and to avoid

deferral of the contention pending issuance of the staff's environmental document.[30] To be sure, as the Commission held in Catawba, CLI-83-19, 17 NRC at 1049, and we recognize supra pp. 25-26, some environmental contentions can be formulated and admitted before issuance of the relevant staff document -- namely, those unlikely to be affected by the staff's forthcoming analysis (like contention 2), and those based on information required to be provided in an applicant's "environmental report" (ER). Contention 3 fits into neither category. The heart of the contention (at least as intervenors initially intended) goes to the adequacy of the staff's consideration of alternatives. See Tr. 100, 107. As for the information already supplied by applicant, it in no way resembles the substantial data and analyses required in an ER and to which the Commission referred in its Catawba decision. See Letter from Warren P.

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[30] The Board also stated that contentions focusing on an applicant's consideration of alternatives have been admitted in other spent fuel pool expansion proceedings, citing Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 869 (1986). See also Brief of the Commonwealth at 15. In that case, however, the staff had already issued its environmental assessment about one month before the Licensing Board's order (see 51 Fed. Reg. 19,430 (1986)), and, in addition, no party objected to the admission of the contention. LBP-86-21, 23 NRC at 869. In any event, that Licensing Board decision has not been reviewed on appeal and thus does not have precedential effect as to issues of law. Duke Power Co. (Cherokee Nuclear Station, Units 1, 2, and 3), ALAB-482, 7 NRC 979, 981 n.4 (1978).

Murphy (Vermont Yankee Vice President and Manager of Operations) to NRC (April 25, 1986) at 2-3, Enclosure (Replacement Report) at 4-6.[31]

Thus, the Board's attempt to transform an otherwise baseless, premature contention into one that is admissible has failed. As NECNP's own contention 5 contemplated, intervenors must await the issuance of the staff's environmental assessment and, then if dissatisfied with its consideration of alternatives, formulate promptly an appropriate contention in accordance with the Commission's regulations for late-filed contentions, 10 C.F.R. § 2.714(a)(1).[32] Cf. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 330-31 (1981) (Licensing Board should have awaited issuance of staff environmental assessment of spent fuel pool expansion proposal before determining that it was inadequate).

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Insofar as the Licensing Board's decision (LBP-87-17, 25 NRC ___) admits contention 1, it is affirmed, subject to

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[31] An ER is required for a construction permit and operating license, but not for a license amendment application. 10 C.F.R. §§ 51.50, 51.53. The information that must be included in an ER is described in 10 C.F.R. §§ 51.45, 51.51, 51.52.

[32] The assessment is expected soon. Tr. 91.

the substitution of the phrase "design limits of 150°F" for "regulatory limits of 140°F"; otherwise the decision is reversed, with respect to contentions 2 and 3. Because the Commonwealth of Massachusetts has failed to submit at least one admissible contention, it is dismissed as an intervenor in this proceeding (see 10 C.F.R. § 2.714(b)); the Commonwealth, however, is already authorized to participate as an interested State pursuant to 10 C.F.R. § 2.715(c). See Licensing Board Memorandum and Order of February 27, 1987 (unpublished) at 2, 3.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

Appendix A follows.

# APPENDIX A

| Contentions as Admitted | Derivation* |
|---|---|
| Contention 1<br><br>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. | NECNP Contention 3<br><br>The spent fuel pool expansion amendment should be denied because it violates the single failure criterion.<br><br>Basis: Should this amendment be approved, it would be necessary under certain conditions to use one train of the reactor's residual heat removal system (RHR) in addition to the spent fuel pool cooling system in order to maintain the pool water within the design limits of 150°F. (See Vermont Yankee Spent Fuel Storage Rack Replacement Report, April, 1986, at 56-59 and Response to Request for Additional Information-Proposed Change No. 133, Spent Fuel Pool Expansion, November 24, 1986, responses to questions 16 and 17). The heat load in the pool after a normal fuel discharge is roughly 50% greater than the design capacity of both trains of the spent fuel cooling system. While Applicants assert that the two pumps in one RHR train are single active failure |

* New England Coalition on Nuclear Pollution's Response to Board Order of February 27, 1987: Statement of Contentions and Standing (March 30, 1987) at 6-7, 8-10; Contentions of the Commonwealth of Massachusetts (March 30, 1987) at 1-3.

| Contentions as Admitted | Derivation |
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| | proof, they have not demonstrated that there is no single failure in the RHR system components and power supplies that would not disable the single train of RHR.<br><br>Moreover, under conditions where one RHR train is needed for spent fuel pool cooling, there is only one train available for decay heat removal from the core. Applicants have not established that this leaves a single failure proof method of cooling the core.<br><br>In summary, Applicants have not established that their 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<br><br>The proposed amendment would create a situation in which consequences and risks of a hypothesized accident | NECNP Contention 5<br><br>The NRC has not complied with the provisions of the National Environmental Policy Act nor of its own rules |

| Contentions as Admitted | Derivation |
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| (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. | in 10 C.F.R. Part 51.<br><br>Basis (in pertinent part): The bases for Contentions 1-4 are reasserted herein. The National Environmental Policy Act requires the preparation of an environmental impact statement detailing, inter alia, the environmental impact of the proposal and considering alternatives, for any "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). The proposed amendment, which would substantially increase the risk to public health and safety associated with operation of the Vermont Yankee plant, is such an action. NRC has not prepared an environmental statement, as required by law and by 10 C.F.R. 51.20. |
| | Commonwealth Contention I |
| | The Commonwealth contends that the license amendment proposed by Vermont Yankee Nuclear Power Corporation ("Licensee") is inconsistent with the |

| Contentions as Admitted | Derivation |
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| | protection of the public health and safety and the environment.<br><br>Basis:<br><br>1. Probalistic [sic] risk studies of boiling water reactors indicate that the expected frequency of severe accidents at such reactors is non-negligible.<br><br>2. In the event of a severe accident, a significant quantity of hydrogen gas could be generated and such gas could, through containment leakage or failure, be released into the reactor building.<br><br>3. The hydrogen gas which could be released into the reactor building as a result of a severe accident would likely burn or detonate and would thereby generate pressure which would threaten the structural integrity of the containment building. |

| Contentions as Admitted | Derivation |
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| | 4. The spent fuel pool of the Vermont Yankee Nuclear Power Station is so located that in the event of a severe accident resulting in hydrogen gas being released into the reactor building, it is possible that either: (a) spent fuel cooling systems will be damaged and rendered inoperable with restricted access to the building preventing their repair; or (b) the structural integrity of the spent fuel pool will be breached. |
| | 5. Inadequate cooling of fuel in the spent fuel pool or a breach in the structural integrity of the spent fuel pool can result in a radiological release. |
| | 6. Allowance of the proposed license amendment would increase the amount of spent fuel stored in the spent fuel pool and, thereby, increase the magnitude of the possible radiological release that could occur in the event of a severe accident. |

| Contentions as Admitted | Derivation |
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| Contention 3 | NECNP Contention 5 |
| 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(2)(C) and 4332(2)(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. | The NRC has not complied with the provisions of the National Environmental Policy Act nor of its own rules in 10 C.F.R. Part 51.<br><br>Basis in pertinent part: NRC rules (10 C.F.R. 51.21) require the preparation of an environmental assessment for all licensing and regulatory actions except those identified as requiring an impact statement (Listed in 10 C.F.R. 51.20(b) or categorically excluded in § 51.22(c)). This proposed amendment is listed in neither section and thus requires at a minimum the preparation of an environmental assessment. That document has not been prepared.<br><br>While NECNP expects to change this contention at such time that NEPA - related documents are issued by NRC, it can state preliminarily that two areas of specific concern to it are the consideration of alternatives to the proposed action and consideration of the increased risk to public health and |

| Contentions as Admitted | Derivation |
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| | safety. In particular, serious consideration should be given to the alternatives of dry cask storage and independent pool storage, both of which provide obvious safety advantages over the instant proposal. On July 2, 1986, the NRC licensed an independent spent fuel storage installation using dry casks for the two Surry plants in Virginia. |
| Commonwealth Contention II | |
| The Commonwealth contends that the NRC has failed to comply with its own rules and, as a result, has failed to consider alternatives to the proposed action such as the construction of a dry spent fuel storage facility or an in-ground spent fuel pool. | |
| Basis: | |
| 1. The basis for Contention I is incorporated herein. | |
| 2. NRC regulations (10 C.F.R. § 51.21) mandate that an environmental assessment be prepared for all | |

| Contentions as Admitted | Derivation |
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| | licensing and regulatory actions except those which require an environmental impact statement pursuant to 10 C.F.R. § 51.20(b) or which are categorically excluded in § 51.22(c). |
| 3. | No environmental assessment has been prepared and the proposed amendment is not an action identified in either 10 C.F.R. § 51.20(b) or § 51.22(c). |