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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

SUPPLEMENTAL BRIEF OF THE LICENSEE, VERMONT YANKEE NUCLEAR POWER CORPORATION

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In the Matter of	)	
VERMONT YANKEE NUCLEAR POWER CORPORATION	)	Docket No. 50-271-OLA-2
(Vermont Yankee Nuclear Power Station)	)	(Spent Fuel Pool Expansion)

SUPPLEMENTAL BRIEF OF THE LICENSEE,
VERMONT YANKEE NUCLEAR POWER CORPORATION

I.

In 1986, the Licensee, Vermont Yankee Nuclear Power Corporation ("Vermont Yankee") submitted a request for an operating license amendment. The requested amendment will increase the maximum allowable inventory of the Vermont Yankee Nuclear Power Station ("VYNPS") spent fuel pool from 2,000 spent fuel assemblies to 2,870. No other change is proposed; in particular, no change in the plant's design basis, on which the operating license was issued, or in the design-basis accidents the ability to deal with which has been previously established, is proposed or will be effected.

Intervenors have nonetheless pressed the admission of an environmental contention to the effect that, in the event of one or more possible beyond design-basis reactor accidents, the consequences in the spent fuel pool would be greater

given the expanded inventory than they would have been (in the pool) with the existing inventory. The contention concluded that the operating license amendment thus represented a "major federal action significantly affecting the environment" for which the preparation of an environmental impact statement was required prior to approval. For its "basis," the contention was premised on a then-draft report of the Brookhaven National Laboratory (the "BNL Report") that analyzed the theoretically possible in-pool consequences of a number of out-of-the-pool beyond design-basis accidents. The BNL Report raised certain concerns that have since been demonstrated not to apply to VYNPS.[1]

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[1]As a result of a suggestion made in the BNL Report, site-specific analyses of the same questions were subsequently performed for VYNPS and another reactor by Livermore Laboratories. ("Seismic Failure and Cask Drop Analyses of the Spent Fuel Pools at Two Representative Nuclear Power Plants," NUREG/CR-5176, Livermore Laboratories, January, 1989 (acknowledged by NECNP at 10 n.12 of its Brief to be a follow-up to the BNL Report) (hereinafter the "Livermore Report").) The result of this work is that, for VYNPS, the dominant risk (namely from an earthquake larger than the design-basis earthquake) is minimal. Livermore Report at xiii. The conclusions of the Livermore work is that, for VYNPS at least, the concerns raised by the BNL Report are not applicable. Id. at xiii, 8-2 & 8-3 ("Therefore, seismic risk contribution from spent fuel pool structural failures is negligibly small.") (Emphasis added.) Thus, whatever "basis" the BNL Report might once have lent to the proposed contention is no longer available and "Commission law is clear that where a contention is based on a factual underpinning in a document which has been essentially repudiated by the source of that document, the contention may be dismissed unless the intervenor offers another independent source." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC ___, CCH Nuc. Reg. Rptr. par. 31,088 at page 32,655 (March 6, 1989), citing Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 136 (1987). The publication of

This Appeal Board previously held the proposed contention to be inadmissible as a matter of law. Specifically, this Appeal Board held that, under settled law, the governing statute[2] neither requires the preparation of an EIS on account of, or the discussion in an EIS of, the risks associated with beyond design basis accidents:

> " . . . 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. . . . The scenario that provides the basis for intervenors' claims of increased risk in contention 2 is just such an accident. . . . Thus, the Licensing Board erred in its belief that NEPA 'mandate[s]' consideration of the risks of the accident hypothesized here."

ALAB-869, 26 NRC at 30-31 (citations omitted). This Board then held that, while the Commission has discretion to prepare an EIS in cases where not required by NEPA, the Commission had determined not to exercise that discretion in this class of cases (i.e., license amendment proceedings in which an EIS was not otherwise required). Id. at 31. Finally, this Appeal Board went on to hold that, insofar as the Intervenors might be contending that the hypothesized consequences could result from a within design-basis accident, the contention was inadmissible because there was

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the Livermore Report, and its effective repudiation of the BNL concerns for VYNPS, therefore presents an additional reason why the proposed contention should not be admitted.

[2]National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq. (hereinafter "NEPA").

nothing contained in the statement of basis that constituted a credible scenario by which a within design-basis accident could lead to the necessary predicate, namely a complete loss of water in the pool.[3]

It bears noting that this Board's disposition of the contention depended upon a Commission "policy statement" only for the proposition that Commission discretionary consideration of the environmental implications of beyond design-basis accidents does not extend as far as the intervenors contend. It is equally important to note that in this respect of the intervenors' argument, the intervenors were not asking this Appeal Board to abandon or ignore the policy statement, but rather to adhere to it (as they interpreted it). On the other hand, this Appeal Board's holdings concerning the reach of the NEPA statute were independent of any "policy statement," see the authorities cited in ALAB-869, 26 NRC at 30-31, and in the "Brief of the Intervenor, Vermont Yankee Nuclear Power Corporation" (hereinafter "Vermont Yankee Brief") at 14, as was the ruling on the scope of the contention.

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[3]The BNL Report made clear several times that all of the accident sequences considered by it were beyond design-basis accident sequences. Consequently, the BNL Report formed no basis for any contention regarding within design-basis accidents. Nothing else contained in the "Statement of Basis" supporting the contention filled this gap. Nor, even when the contention was resubmitted, did the intervenors attempt to fill this gap.

Following ALAB-869 and ALAB-872, the same contention was submitted yet a third time to the Licensing Board, which, notwithstanding this Board's authoritative dispositions of it, elected in LBP-89-6 to admit the contention upon the strength of a subsequently rendered decision[4] that supposedly vitiated both the substantive value and the procedurally preclusive effect of this Board's prior decisions. Before this Appeal Board, the NECNP asks this Appeal Board to affirm what the Licensing Board has done on two bases: first, by argument based on Sierra Club, and second by argument based on another decision -- Limerick Ecology Action, Inc. v. NRC, ___ F.2d ___ (3d Cir., February 28, 1989) -- available neither to the Licensing Board nor at the time the Vermont Yankee brief was submitted.

On April 7, 1989, this Appeal Board requested Vermont Yankee and the NRC Staff to submit supplemental briefs on the Limerick case, and Vermont Yankee now does so.

II.

Limerick is not a license amendment case. Limerick, slip opinion at 6. It therefore does not deal with the situation, such as presented here, where a plant has already been licensed, where its design basis has already been fixed, where is right to operate in the absence of any NEPA-based analysis of the consequences of a beyond design-basis

[4]Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988).

accident has already been confirmed by agency action no longer open to review or reconsideration, and where the only legitimate contentions are those anchored to some change supposedly effected by the proposed license amendment. Nor is Limerick a case in which the Commission declined to consider the risk of environmental impacts attributable to severe accidents in an EIS (already required for other reasons).[5] Thus the Limerick decision never addresses the question presented here, namely, whether NEPA requires the preparation on account of beyond design-basis accident concerns of an EIS where the EIS is not required for other reasons and the Commission has not exercised its discretion to prepare one anyhow.

The Limerick decision holds that the Commission may not use the procedural device of a "policy statement" to effect rules where the rule is used to preclude the litigation of something that, absent the rule, would be admissible as of right for litigation.[6]

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[5]The FES in the Limerick proceeding was prepared under the auspices of the Commission's NEPA Policy Statement. An EIS was required because it was an operating license proceeding, and in the FES was "contained an extensive review of the risk of severe accidents at Limerick, include the results of a PRA performed for Limerick." Limerick, slip opinion at 26. This analysis concluded that beyond design-basis accidents posed a negligible risk of environmental impact, thus obviating any need (or purpose) in an exploration of impact-avoiding alternatives.

[6]Though ignored by NECNP, Limerick also held that regulations of the Council on Environmental Quality are "not binding on an agency that has not expressly adopted them." Slip opinion at 12, citing Township of Lower Alloways Creek

III.

There are essentially three reasons why Limerick does not change the disposition that this Appeal Board is required to make of LBP-89-6, namely reversal simpliciter. First, the finality of ALAB-869 and ALAB-876 no less renders them beyond the scope of appropriate Appeal Board reconsideration than if Limerick had not been decided. Second, this Appeal Board remains bound by the Commission's policy statements unless and until the Commission determines that it should be otherwise, which we do not understand the Commission to have done. Third, as this Appeal Board's prior rejections of the contention were based on the limits of the NEPA statute, the same result is required even if the policy statements discussed in ALAB-869 and ALAB-876 had never been published.

A. As is discussed in the Vermont Yankee Brief at 11-13, the admissibility of the contention pressed by the Intervenors was a question disposed of by prior decisions of this Appeal Board, over which the Commission declined review and which are now equally beyond the jurisdiction of this Appeal

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v. Public Service Electric & Gas Co., 687 F.2d 732, 740 n.16 (1982). More importantly, this Appeal Board has expressly held in this very case that "the Commission does not consider itself legally bound by substantive CEQ regulations." Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 284 n.5 (1987). Consequently, NECNP's attempt to force reliance upon the CEQ regulations without so much as mentioning this Board's prior rejection of the same argument, NECNP Brief at 12-13 & n.15, is unavailing.

Board to reconsider as they were beyond the jurisdiction of the Licensing Board to ignore. Even if the Limerick is read to require the Commission to alter its practice, we respectfully submit that such alteration can only be effected by the Commission.[7]

B. Wholly apart from procedural considerations, the rule that contentions asserting the need for an EIS on account of beyond design-basis accident concerns will not be admitted is firmly established as a matter of substantive Commission jurisprudence, including the Commission's NEPA Policy Statement. See authorities cited in Vermont Yankee

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[7]In support of Appeal Board jurisdiction to reconsider ALAB-869 and ALAB-876 at this late stage, NECNP offers two arguments. First, it contends that "law of the case directs a court's discretion; it does not limit the tribunal's power." NECNP Brief at 17-18. That may be so but it is irrelevant, for the jurisdictional want derives not from the doctrine of "law of the case" but from the finality that ALAB-869 and ALAB-876 have now achieved. Second, NECNP argues that this Appeal Board, in effect, intended to render only a tentative decision, specifically inviting the Licensing Board (that, incidentally, was overruled by ALAB-869 and ALAB-876) to reconsider the question and reach a different result if it so chose. NECNP Brief at 18-20. Nothing in either the portions of these decisions cited by NECNP or otherwise supports such a strange result. Rather, in ALAB-876, 26 NRC at 284 n.6, the Appeal Board addressed the remedies that might be open to the intervenors to cure their failure to have supplied any basis for believing that the accident predicate to the contention could occur within the design basis. If this be the hook on which the intervenors hang their hat, then it must be remembered that they did not cure this defect in their resubmission and the Licensing Board in LBP-89-6 denied the admission of any within design-basis contention. In ALAB-869, 26 NRC at 34, this Appeal Board referred only to the potential for late-filed contentions on the adequacy of the EA, specifically excluding the question of the beyond design-basis accident contention that the Appeal Board held was not premature. ALAB-869, 26 NRC at 30.

Brief at 14. To accept the argument now pressed by the Intervenors requires that this jurisprudence be jettisoned. As the Commission has yet, insofar as we are aware, to revoke its policy statements, we respectfully submit that only the Commission can grant the relief the intervenors seek. At least in a case not directly controlled by the Limerick Court's mandate, the Commission's policy statements control.[8]

C. The Limerick decision is based on the proposition that, while the Commission may discharge its statutory NEPA obligations by considering an issue "generically" via a rule-making, it may not do the same thing via a "policy statement." Assuming this proposition to be legally correct,[9] it is without application in this case, where the only "policy statement" relevant to the exclusion of the contention at

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[8]On April 12, 1989, the Commission formally requested that the Limerick Court reconsider its decision, on the ground that assessment of alternatives to remote environmental risks is not required by law and represents a wasteful use of limited agency resources. Whilst one may not predict the outcome of such a motion, its submission at least indicates that the Commission has not been persuaded that the Limerick result is legally sound, wise as a matter of policy, or otherwise worthy of adoption by the Commission in other cases.

[9]The Limerick Court's imperative that only a regulation will suffice may be less absolute than appears at first blush. Limerick, slip opinion at 38 n.19. Moreover, the implications of this ruling in proceedings other than the VYNPS operating license amendment transcend its impact in this case. Accordingly, we assume for purposes of this brief that Limerick is correct in holding that the Commission may only effect substantive dispositions of portions of its statutory NEPA responsibilities by formal regulation, as opposed to by the issuance of a carefully considered (and publicly noticed and published for comment) "policy statement."

issue was a policy statement of inclusion -- that is to say, a policy statement that, as a matter of the Commission's discretion, self-imposes a limited undertaking to make environmental impact assessments beyond the extent required by NEPA. Even if one assumed that neither the NEPA Policy Statement nor the Severe Accident Policy Statement had ever been issued, ALAB-869 and ALAB-876 would still have reached the result they did.

The Commission has issued two policy statements on severe accidents. One, the so-called "NEPA Policy Statement,"[10] dictates when the Commission will exercise its discretion to discuss in an EIS required for other reasons concerns relating to beyond design-basis accidents -- the Commission already having been upheld in its determination that discussion of beyond design-basis accidents is not required by the statute.[11] The second, the so-called "Severe Accident Policy Statement,"[12] details the Commission's prospective intentions regarding the radiological health and

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[10]"Statement of Interim Policy, Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969," 45 Fed. Reg. 40101 (1980).

[11]E.g., Carolina Environmental Study Group v. United States, 510 F.2d 796, 798-800 (D.C. Cir. 1975).

[12]"Policy Statement on Severe Reactor Accidents Regarding Future Designs and Existing Plants," 50 Fed. Reg. 32,138 (1985).

safety implications of beyond design-basis accidents.[13] Nothing in the Severe Accident Policy Statement did or purports to amend or vacate the NEPA Policy Statement,[14] which, in turn, is (insofar as it purports to "bar" EIS preparation or consideration of issues) is simply a continuation of pre-Policy Statement, judicially approved, Commission practice. Most importantly, in determining to include a discussion of beyond design-basis accidents in future EIS's (if required for other reasons), the Commission at no time abandoned its earlier conclusion that the potential for beyond design-basis accidents was sufficiently remote as neither to implicate the public health and safety (for Atomic Energy Act purposes) nor to be other than "remote and

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[13]Contrary to what may have appeared to the Limerick Court, there is nothing contradictory in the Commission both concluding that the risks of severe accidents are remote and at the same time exploring the availability of cost-effective means of reducing that risk even further. Such a pursuit of defense in depth, inherent in the Commission's regulatory structure, is indicative of the seriousness with which the Commission has always taken its public health and safety charge under the Atomic Energy Act. Freighting such an approach with added burdens (of no practical value) under NEPA, as the Limerick Court may be unintentionally doing, serves neither the purposes of the Congress that wrote NEPA nor the Congress that wrote the Atomic Energy Act.

[14]Except possibly to exclude from EIS discussions of severe accidents undertaken as a matter of Commission discretion in future cases a detailed discussion of accident mitigation alternatives. However, such an exclusion in fact follows from the determination that such risks are remote, not from any fiat promulgated by the Policy Statement. Alternatives to items posing no significant threat of harm to the environment are not required by NEPA.

speculative" (for NEPA purposes). To the contrary, the Commission has specifically concluded:

> "Thus, this change in policy [effect prospectively by the NEPA Policy Statement] is not to be construed as any lack of confidence in conclusions regarding the environmental risks of accidents expressed in any previously issued [Environmental Impact] Statements, nor, absent a showing of similar special circumstances, as a basis for opening, reopening or expanding any previous or ongoing proceeding."

NEPA Policy Statement, CCH Nuc. Reg. Rptr. at p. 2268 (emphasis added).

The contention that came before this Appeal Board in ALAB-869 had two thrusts. First, it contended that the preparation of an EIS to consider the environmental implications of a beyond design-basis accident was required by the NEPA statute. Second, it contended that, even if not required by statute, the Commission had elected to consider such implications as a matter of discretion (and, ex hypothesi, the Staff's failure to do so was in dereliction of its duty to carry out the Commission's discretionary undertaking). This Appeal Board's disposition of the contention likewise had two aspects. The assertion of a statutory obligation was disposed of on the basis of the statute and the cases interpreting and defining the obligation, and in particular the limitations on the obligation, imposed upon the Commission by statute. The second aspect of ALAB-869 was a rejection of the intervenors' interpretation of the

undertaking self-imposed upon itself by the Commission as a matter of its discretion.

The first aspect of ALAB-869 did not depend upon a policy statement.

The second aspect of ALAB-869 did depend upon the limits of the NEPA policy statement. However, since the NEPA policy statement is inclusive in nature,[15] any requirement of ignoring it does not change the outcome of ALAB-869. If, in fact, the Commission (unlike other agencies) cannot implement NEPA's "rule of reason" by anything less than a formal APA regulation, then the only obligation of the Commission enforceable by the Appeal Board is that imposed by the NEPA statute itself, and that obligation does not extend to beyond design-basis accidents.[16]

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[15]That is to say, it defined a set of cases in which the inclusion in an EIS of matter not required by the NEPA statute to be prepared will be effected as a discretionary, non-mandatory Commission undertaking. One cannot contest the limits of such an undertaking without challenging the underlying proposition that the matter is not required by NEPA. As applied in this case, the conclusion that NEPA does not require the preparation of an EIS to discuss the risk of environmental impacts of beyond design-bases accidents is a substantive rule firmly established in Commission jurisprudence, accepted by the Courts of Appeal on review, and not substantively rejected either by Sierra Club or Limerick.

[16]Symptomatic, we respectfully submit, of the poor fit of the Limerick decision to this case is NECNP's perceived need to revise the history of the disposition of its contention in order to take advantage of Limerick. Thus, NECNP contends that "The NRC is obligated to consider the substantive arguments of the parties about the risks of the postulated accident during the license amendment hearing and fully defend its reasons for accepting or rejecting them during those individualized proceeding." NECNP Brief at 25. However, insofar as NECNP ever advanced the bare assertion

IV.

As set forth above, the holding of Limerick does not require this Appeal Board to reverse its own prior rulings in ALAB-869 and ALAB-872. Even were the effect of Limerick thought to be otherwise, however, that decision is affected by two plain errors that counsel that it should not be followed by this Appeal Board in a case in which it is not required to be, and one plain error in which this Board may not follow it absent Commission direction to do so.

A. The Limerick Court bases its decision, in part, on a rejection of a Commission-proffered argument that it finds in the language "NEPA could not logically require more than the safety provisions of the Atomic Energy Act." Limerick at

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that any accident about which it might be concerned (the parameters of which were never defined) was within the range of risks for which NEPA requires specific treatment, its offering was rejected by this Appeal Board precisely because NECNP offered only bare assertions and no "substantive arguments." ALAB-876, 26 NRC at 284. Likewise, NECNP now asserts that "For the same reason, the NRC Staff's argument that the NEPA Policy Statement precludes consideration of severe accident risks in license amendment proceedings must also be rejected." NECNP Brief at 25 n.30. However, in ALAB-869 and ALAB-876, this Appeal Board did not reject the proffered contention because the NEPA Policy Statement excluded it, but rather and specifically because the NEPA Policy Statement did not rescue is from the fate otherwise required in the absence of the undertakings of the NEPA Policy Statement. ALAB-869, 26 NRC at 31; ALAB-876, 26 NRC at 284 ("NECNP's argument that we improperly relied on the NEPA Policy Statement to make factual findings binding on the parties reflects a complete misunderstanding of that policy and our application of it."). In sum, NECNP now contends that Limerick renders erroneous a disposition that this Board never made and that, when presented with the same assertion earlier, this Board pointed out that it had never made.

20, quoting Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 696 n.10 (1985). For support, the Limerick Court cites Public Service Company of New Hampshire v. NRC, 582 F.2d 77, 81 (1st Cir. 1978). Prescinding from whether the quoted statement is absolutely true in every conceivable case, and prescinding further from the authoritative value of the Public Service Company case, in which the issue (transmission lines) had no Atomic Energy Act or NRC regulations implications at all, the Court is, we respectfully submit, guilty of taking the quote out of context.

In the context in which it was used by the Appeal Board, the assertion is that the class of accidents for which specific design protections are not required because of their improbability could not, by definition, be other than the very "remote and speculative" risks for which the Courts have said Congress intended to impose no NEPA responsibilities. The Atomic Energy Act may not be the "functional equivalent" of NEPA in all applications, but the categorization of severe accidents for safety regulation purposes is surely the functional equivalent of the classification of events for determining the NEPA-applicable spectrum of matters meeting the "rule of reason" standard. The Limerick decision should be not allowed to require the preparation of an EIS to consider alternatives to a proposed license amendment at Vermont Yankee where those alternatives have no potential for

avoiding anything but remote and speculative environmental impact.

B. The Limerick Court, presumably in support of its assumption that but for the Commission's Severe Accident Policy Statement, the consideration of severe accident mitigation design alternatives would have been considered in the discretionary discussion of beyond design-basis concerns in the required-for-other-reasons Limerick EIS, asserts that "[T]he [Appeal] Board did not state or even intimate that it would, without the Final Policy Statement, reject the design alternatives [environmental] contention . . . ." Limerick, slip opinion at 29. This, we respectfully submit, is neither fair to the Appeal Board in Limerick not reflective of the context in which that decision was written. That context, rather, was that while no discussion of beyond design-basis accident concerns was required by NEPA, the Commission nonetheless undertook such a discussion as a matter of discretion. ALAB-819, 22 NRC at 697.[17] The results of that discussion were that the risk of beyond design-basis accidents at the Limerick facility was remote. Id. It necessarily follows that no discussion of avoidance alternatives

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[17]As the Limerick proceeding was an initial operating license case, the preparation of an EIS was required by 10 C.F.R. § 51.20(b)(2). As an EIS was otherwise required, in turn, a discussion of the risks of environmental impact on account of beyond design-basis accidents was required by the NEPA Policy Statement. Thus, in the Limerick proceeding the very threshold questions that form the beginning and end of the present controversy were not presented.

is required because no such alternatives have the potential for avoiding a "significant" environmental effect of the pending operating license proposal; as stated by the Appeal Board, the discretionary relook at the risks of beyond design basis accidents "only served to confirm the Commission's view of the low risk posed by the facility. . . . A fortiori, consideration of possible design alternatives to mitigate a severe accident is not required [by NEPA] either." Id. This language, understood in the full context of the NEPA implications for nuclear power plant licensing, is -- and with appropriate respect to the Third Circuit, was intended by the Appeal Board to be -- independent of anything proscriptive in the Severe Accident Policy Statement.[18] Whatever the Limerick Court's perception of the resultant effect of striking down the Commission's policy statement, that perception should not lead to the imposition in the Vermont

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[18]NEPA does not require the consideration of alternatives for the sake of filling time, but rather with the prospect of identifying an alternative that, while equally effective at achieving the purpose of the proposed action and economically feasible, nonetheless avoids a significant environmental affect. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 456-58 (1980); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 162-63 (1978). It necessarily follows that, if the proposed action has only a remote environmental impact, then by definition, no alternative has the potential for achieving a significant environmental improvement. ALAB-584, 11 NRC at 458 ("in order to reject the Applicant's proposal, it would have to be determined both that (1) at least one of the alternatives was environmentally superior; and (2) that environmental superiority was not outweighed by other considerations such as comparative costs.").

Yankee proceeding of a requirement not imposed by the NEPA statute.

C. At least in part -- and perhaps at bottom -- the Limerick decision appears to be based the Court's disinclination to accept that severe reactor accidents are, in fact, remote and speculative. Indeed, the Court articulates the perception that the Commission itself no longer adheres to that view. Thus: "[the] Commission did not find that such risks [to wit: those from beyond design-basis accidents] are remote and speculative . . . ." Limerick, slip opinion at 8. Rather, the Limerick Court perceives the Commission as having abandoned its earlier conclusion that severe accidents were too remote and speculative to require consideration under NEPA:

> "In sum, the NRC originally thought severe accidents too unlikely to justify consideration of their likelihood in reviewing and determining the safety of nuclear plants. It retreated from that viewpoint following the TMI accident and subsequently set safety goals with respect to severe accidents. However, it refused to set quantitative limits; it provided that severe accident mitigation design alternatives should not be studied on a case-by-case basis; and it excluded environmental considerations under NEPA in the case sub judice."

Limerick, slip opinion at 18.

In this respect, the Limerick Court is fundamentally in error. As pointed out above, the Commission has continuously, since before the promulgation of either the NEPA Policy Statement or the Severe Accident Policy Statement, adhered firmly to the technical conclusion, based on numerous studies

and the consensus of the informed technical community, that the occurrence of a beyond design-basis accident with significant off-site consequences is improbable. Nor is there anything in this case that suggests to the contrary; indeed, the very "basis" upon which the intervenors rely puts the probability of the dominant risk contributor at one chance in 149,254 per year of VYNPS operation.[19]

This perception is simply erroneous. It may or may not be reparable in the case of the power plant sub judice the Limerick Court. It need not and should not be followed where it is not required to be.

Conclusion

For the reasons set forth herein and in the "Brief of the Licensee, Vermont Yankee Nuclear Power Corporation," LBP-89-6 should be reversed.

Respectfully submitted,

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April 20, 1989.

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[19] See note 2, supra. 6.7/1,000,000 = 1/149,254.

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Certificate of Service

I, R. K. Gad III, hereby certify that on April 20, 1989, I made service of the within "Supplemental Brief of the Licensee, Vermont Yankee Nuclear Power Corporation," by depositing a copy thereof with Federal Express (except where indicated by an asterisk, in which case by mailing a copy thereof postage prepage) as follows:

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