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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

'89 APR 21 P3:12

In the Matter of

VERMONT YANKEE NUCLEAR
POWER CORPORATION

(Vermont Yankee Nuclear Power
Station)

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Docket No. 50-271-0LA
(Spent Fuel Pool Amendment)

"NRC STAFF SUPPLEMENTAL BRIEF
ON REFERRAL OF LBP-89-06"

Ann P. Hodgdon
Counsel for NRC Staff

April 20, 1989

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In the Matter of

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In the Matter of

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Docket No. 50-271-OLA
(Spent Fuel Pool Amendment)

NRC STAFF SUPPLEMENTAL BRIEF
ON REFERRAL OF LBP-89-06

I. INTRODUCTION

On April 7, 1989, the Atomic Safety Licensing Board Appeal Board issued a Memorandum and Order in which it, among other things, requested the NRC staff to file a supplemental brief discussing the U.S. Court of Appeals for the Third Circuit decision in Limerick Ecology Action, Inc. v. NRC, No. 85-3431 (3rd Cir. February 28, 1989). ^{1/} The Appeal Board indicated that the supplemental brief should be limited to the Limerick decision, its relevance to the instant case and the related arguments of intervenors.

As set forth below, the Limerick decision does not compel the admission of the New England Coalition on Nuclear Pollution (NECNP)/ Commonwealth of Massachusetts (Commonwealth) contention that is the subject of this referral.

^{1/} On April 12, 1989, the Commission filed a petition for rehearing and suggestion for rehearing en banc with the United States Court of Appeals for the Third Circuit.

II. DISCUSSION

- A. The Limerick decision does not compel admission of a contention asserting the need for an EIS where the Commission's regulations do not require one.
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In its brief, ^{2/} NECNP cites the Limerick decision as stating that the NRC must comply with the procedural requirements of NEPA in licensing proceedings, regardless of compliance with the safety requirements of the Atomic Energy Act (AEA). NECNP brief at 13, citing Limerick slip op. at 24-25. Of course, the NRC must comply with the procedural requirements of NEPA. In the instant case, the NRC did comply with NEPA. The Staff published an Environmental Assessment (EA) and a Finding of No Significant Impact. The EA considered severe accidents, including a zircaloy cladding fire due to loss of water in the spent fuel pool. Such an accident was considered without regard to cause. Therefore, there could be no reason to supplement the EA to address the chain of causation that NECNP assigns to such a fire: a severe reactor accident involving substantial fuel damage, hydrogen generation and detonation, reactor vessel failure and breach of primary containment, ultimately resulting in an accident in the spent fuel pool, whose consequences would be greater because of the increased inventory of spent fuel authorized by the proposed amendment. See ALAB-876 at 283.

The Limerick decision concerns what to include in an EIS where NEPA and the Commission's regulations are clear that an EIS is required: on a proposal to operate a nuclear power plant. It does not address the

^{2/} "New England Coalition on Nuclear Pollution's Brief on the Decision of the Licensing Board Admitting Joint Contention 1," March 29, 1989.

application of NEPA requirements to an operating license amendment proceeding.

- B. The Limerick decision does not preclude rejection of a contention that does not satisfy the Commission's regulations.

NECNP argues that the instant referral involves reliance on the same policy statement on which the Third Circuit Court of Appeals in Limerick held the Commission had erroneously relied, namely the Severe Accident Policy Statement. ^{3/} NECNP brief at 24. However, this is not the case. The Appeal Board's reliance was on the Commission's NEPA policy, for the proposition that consideration of severe accidents under NEPA is not required for operating license amendments, as the policy runs only to operating licenses, not amendments. There is language in ALAB-869 and ALAB-876 that indicates that the Appeal Board, relying on San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd en banc, 789 F.2d 26, cert. denied, 479 U.S. 923 (1986), concluded that contentions raising beyond design basis accidents need not be considered since they are "by definition, highly improbably -- i.e. remote and speculative." ALAB-876, 26 NRC at 282, ALAB-869, 26 NRC at 30. The court in Limerick rejected what it stated to be an NRC determination that, since design alternatives could be excluded under the Atomic Energy Act, NEPA could require no more. At 44. The court's holding would undercut that portion of the holdings in ALAB-869 and ALAB-876 that suggest that beyond design

^{3/} The Third Circuit's conclusion with regard to policy statements is broad: "We conclude that the NRC's Final [Severe Accident] Policy Statement is entitled to no greater deference than any other policy statement, i.e., none." Slip op. at 36.

basis accidents are by definition remote and speculative and need not be considered under NEPA. However, those statements are not the sole basis for the Appeal Board's determination that a previous version of the contention on referral should not be admitted. In addition, there is language in ALAB-869 and ALAB-876 to support the conclusion that the rejected contention lacks the basis and specificity required by the Commission's regulations in 10 C.F.R. § 2.714(b). And there is nothing in the Limerick decision that in any way suggests that the Commission may not reject contentions that fail to provide adequate basis and specificity.

The Appeal Board's decision in ALAB-869 exposes the circularity of NECNP's reasoning. According to the Appeal Board, a NEPA contention calling for an EIS in an operating license amendment request where the Commission's regulations do not require one must have

"some basis for requiring an EIS other than a claim of increased risk from a beyond design-basis accident scenario. In contrast, intervenors' claim of increased risk here is 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."

ALAB-869 at 31. ^{4/}

^{4/} NECNP states in its brief that in the Limerick decision the Third Circuit Court of Appeals has ruled that what is remote and speculative must be the subject of factual hearings. NECNP brief at 16. However, NECNP is mistaken. What the Limerick decision says is that severe accident potential may not be treated as a generic issue.

(FOOTNOTE CONTINUED ON NEXT PAGE)

It is clear from the language in ALAB-869 that the Appeal Board's rejection of then Contention 2 was based in part on a lack of specificity and basis. Intervenors claimed increased risk but that is all they did. They did not provide a basis with specificity for such a claim. They simply asserted that there is a significant risk of the beyond design basis scenario they postulated without any basis for such an assertion.

III. CONCLUSION

As discussed above, the Limerick decision does not compel admission of the contention on referral.

Respectfully submitted,

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Counsel for NRC Staff

Dated at Rockville, Maryland
this 20th day of April, 1989

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

The Court of Appeals reasoned that because the Severe Accident Policy Statement was not a rulemaking, it did not absolve the NRC of the required NEPA consideration of environmental effects. The Court of Appeals concluded that in the NRC Limerick proceeding, the decision maker, the NRC, failed to take the NEPA required "hard look" at severe accident mitigation design alternatives (SAMDAs). The court further concluded that the underlying issue of SAMDAs is not generic and therefore could not be disposed of summarily.

With regard to whether the risk was remote and speculative, the court found that the NRC decisions were not based on the belief that the risk of severe accidents is remote and speculative but rather on staff findings in the Final Environmental Statement (FES) that the risks of severe accidents at Limerick were "small" or "not significant." The court concluded this phase of the discussion with the summary statement that the conclusion that the risk is "small" or "insignificant" is not the same as a conclusion that it is remote and speculative. Slip op. at 44-45. Thus, the court did not hold, as NECNP states that it did, that the NRC must conduct factual hearings to determine whether or not an impact is remote and speculative.

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Docket No. 50-271-OLA
(Spent Fuel Pool Amendment)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF SUPPLEMENTAL BRIEF ON REFERRAL OF LBP-89-06" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by a double asterisk by use of express mail service, this 20th day of April, 1989:

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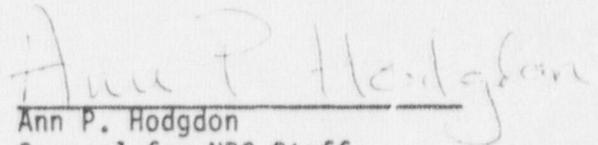
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