

MCBRIDE BAKER & COLES

A Law Partnership Including Professional Corporations

Malcolm H. Brooks

312 715-5717
brooks@mbc.com

500 West Madison Street, 40th Floor
Chicago, Illinois 60661-2511

312 715-5700
Fax 312 993-9350
www.mbc.com

One Mid America Plaza
Suite 1000
Oakbrook Terrace, IL 60181-4710
630 954-2100
Fax 630 954-2112

September 21, 1998

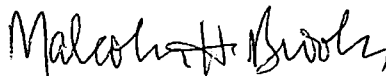
To Attached Service List.

Re: *In the Matter of Conam Inspection, Inc., Docket No. 30-31373-CivP*

To The Board:

We are sending to Judge Bechhoefer and to the Secretary our Notice of Filing with respect to a Memorandum filed last week by Conam Inspection during the hearing in the above-referenced case. We are also sending to Judge Bechhoefer and to the Secretary copies of Exhibit 37, which is a videotape that was entered into evidence at the hearing.

Sincerely,



Malcolm H. Brooks

(-jr)

MHB/jr

Enclosures

cc: Charles A. Barth

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

98 SEP 23 PM 12:12

DOCKETED
USMRC

SECY-ETHD-006

DS03

19541

U.S. NUCLEAR REGULATORY COMMISSION
RULEMAKING & ADJUDICATION STAFF
OFFICE OF THE SECRETARY
OF THE COMMISSION

Document Statistics

Postmark Date 9/21/98
Copies Received 1
Add'l Copies Reproduced 1
Special Distribution RINS, DEC

In the Matter of Conam Inspection, Inc., Docket No. 30-31373-CivP

Charles Bechhoefer, Chairman
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: cxb2@nrc.gov

Charles A. Barth
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Washington, D.C. 20555
e-mail: cab@nrc.gov
Fax: (301) 415-3725

Dr. Richard F. Cole
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Fax: (301) 415-5599

Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Charles N. Kelber
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Fax: (301) 415-5599

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

'98 SEP 23 P12:12
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

CONAM INSPECTION, INC.)

(Order Imposing Civil Monetary Penalty))

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Docket No. 30-31373-CivP

ASLBP No. 98-735-01-CivP

NOTICE OF FILING

PLEASE TAKE NOTICE that on September 14, 1998, we filed with the Board at the hearing in the above-referenced matter the attached Memorandum of Conam Inspection, Inc. Respecting the Jurisdiction of the Atomic Safety And Licensing Board to Approve Use of Weighting Factors for External Dose Assessment under 10 C.F.R. §20.1003.

CONAM INSPECTION, INC.

By: Malcolm H. Brooks
One of its Attorneys (h)

Clifford A. Lake
Malcolm H. Brooks
McBRIDE BAKER & COLES
500 West Madison Street
40th Floor
Chicago, Illinois 60661
(312) 715-5700

U.S. NUCLEAR REGULATORY COMMISSION
REGULATORY RELATIONS STAFF
U.S. DEPARTMENT OF ENERGY
WASHINGTON, D.C. 20545

ATTENTION: RESOURCES

Request No. 9121198
Order No. 1
No. of Pages 1
Special Instructions _____

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'98 SEP 23 P12:12

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)	
)	Docket No. 30-31373-CivP
CONAM INSPECTION, INC.)	
)	
(Order Imposing Civil Monetary Penalty))	ASLBP No. 98-735-01-CivP

**MEMORANDUM OF CONAM INSPECTION, INC.
RESPECTING THE JURISDICTION OF THE ATOMIC SAFETY
AND LICENSING BOARD TO APPROVE USE OF WEIGHTING FACTORS
FOR EXTERNAL DOSE ASSESSMENT UNDER 10 C.F.R. §20.1003**

Conam Inspection, Inc. ("Conam") submits the following memorandum concerning the Panel's authority to consider and approve weighting factors other than 1.0, in analyzing the radiation dose to Conam's former radiographer, Mr. Chastain, which is at issue in this case.

**I. THIS PANEL HAS THE AUTHORITY TO APPROVE
USE OF ALTERNATE WEIGHTING FACTORS**

The Atomic Safety and Licensing Board is created under 42 U.S.C. §2241. It is to be appointed by the NRC "to conduct such hearings as the Commission may direct, and make such immediate or final decisions as the Commission may authorize, with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this Act, any other provision of law, or any regulation of the Commission issued thereunder." 42 U.S.C. §2241(a).

Pursuant to this broad statutory authority, the Commission created the Atomic Safety and Licensing Board, in 10 C.F.R. §2.721, "to preside in such proceedings for granting, suspending, revoking, or amending licenses or authorizations as the Commission may designate, and to perform such other adjudicatory functions as the Commission deems appropriate." In §2.721(c), the Atomic Safety and Licensing Board is authorized to "exercise the powers of a 'presiding officer' as granted by §2.718, and otherwise by this part." Under §2.718, a "presiding officer" is authorized to exercise a variety of duties intended to insure the conduct of a proper hearing, *e.g.*, the administration of oaths and affirmations, issuance of subpoenas, *etc.* In the final two subparagraphs of 10 C.F.R. §2.718, the "presiding officer" is also authorized to "(l) issue final decisions and (m) take any other action consistent with the Atomic Energy Act, this chapter and Sections 551 through 558 of Title 5 of the U.S. Code."

Acting in a manner consistent with 5 U.S.C. §554(e), is among the statutory powers conferred on a presiding officer by §2.718 and thus on the Atomic Safety and Licensing Board. That statutory subpart provides that an agency may issue a "declaratory order to terminate a controversy or to remove uncertainty." This authority has been construed to authorize administrative agencies to grant declaratory relief. *Merchants Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 915-16 (5th Cir. 1993). Unlike Article III federal courts, an agency is not bound by the "case or controversy" requirement of the Constitution. In *Tennessee Gas Pipeline, Co. v. Federal Power Commission*, 606 F.2d 1373 (D.C. Cir. 1979), the court held that federal administrative agencies are generally

free to act in advisory or legislative capacities, and this is true not only in cases of rulemaking, but also “where an agency proceeds via traditional adjudicatory forms of decision.” The court continued, noting that “if an agency is authorized by statute, [it] may issue an advisory opinion or abstract declaration without regard to the existence of an actual controversy.” 606 F.2d at 1380. *Accord, American Hospital Ass’n v. NLRB*, 111 S. Ct. 1539, 1543 (1991).

This line of case law interpreting 5 U.S.C. §554(e) together with the provisions of 10 C.F.R. §2.718(m), provide the Atomic Safety and Licensing Board with the authority to consider and approve use of a weighting factor other than 1.0, as contemplated in the footnote to the 10 C.F.R. §20.1003, definition of “weighting factors,” because to do so will “terminate a controversy or remove an uncertainty” in this proceeding.

**II. APPROVAL ON “CASE-BY-CASE” BASIS MEANS
LOOKING AT PARTICULAR FACTS AND
CIRCUMSTANCES, NOT PRIOR APPROVAL**

In December, 1996, Conam first presented to the NRC Enforcement Staff for consideration dose calculations making use of the weighting factors specified in ANSI N13.41. NRC Enforcement refused to even consider the use of those weighting factors for two reasons: (1) the ANSI N13.41 standard had not at that time had not received final approval and publication, and (2) in any event, Conam could use alternate weighting factors only if, prior to the Chastain exposure, Conam had received prior approval to do so in the form of a licensing amendment. The first argument is now moot, as the ANSI N 13.41 system has been approved and published, as well as being adopted by other federal

agencies. The NRC Staff's second argument fails because (a) approval on a "case-by-case" basis cannot require prior approval in the form of a licensing amendment, and (b) the regulations cannot be read to require prior approval.

**A. "Case-By-Case" Approval Requires Looking
At Particular Facts And Circumstances.**

The footnote to §20.1003's definition of "weighting factors" provides that "the use of other [than 1.0] weighting factors for external exposure will be approved on a case-by-case basis until such time as specific guidance is issued." The NRC has always used the term "case-by-case basis" to refer to an inquiry that required looking at the particular facts and circumstances of an issue or request¹. This is done where the NRC lacks the ability to promulgate a generally applicable rule, often because it is trying a new approach, or because new information in the area is still being developed.

For example, in *In the Matter of Toledo Edison Company, et al. (Davis-Besse Nuclear Power Station, Unit No. 1)*, 25 NRC 287 (April 15, 1987), the Commission observed:

Permission to carry out land disposal of waste on the Davis-Besse site was requested under an NRC regulation (10 C.F.R. §20.302(a)) that provides for a method for obtaining approval for disposing of large volumes of waste containing very low levels of reactivity by means other than transfer to a commercial burial site. The NRC notified all reactor licensees of the availability of this approach under its regulations in 1983 . . . In its notice, the Staff cited the Commission's recognition of the need for provisions of exemption

¹ A LEXIS inquiry designed to select all NRC cases in which the words "case-by-case basis" are used, discloses that on 132 occasions this phrase appears in NRC decisions. In each of these instances, the interpretation given by the NRC to "case-by-case basis" is precisely the same interpretation as would be given under the common law (and common sense), *i.e.*, that a determination will be made taking into account all of the particular facts and circumstances in order to achieve a stated regulatory goal.

of some low-level wastes from the requirements of 10 C.F.R. Part 61, and that pending further development of regulations, such exemption could be examined on a case-by-case basis under §20.302.”

In a similar fashion, *In the Matter of Commonwealth Edison Company (Zion Nuclear Power Station, Units 1 and 2)* 41 N.R.C. 350 (May 26, 1995) involved interpretation of 10 C.F.R. §73.55(h)(3). This provision requires that at least ten armed guards be immediately available at a nuclear power plant, “unless specifically required otherwise on a case-by-case basis by the Commission; however, this number may not in any case be reduced to less than five guards.” Considering all of the facts and circumstances, the NRC Staff reviewed Commonwealth Edison’s Security Plan and the particular details of the location, operation, threats and risks at that plant. The Commission concluded that Commonwealth Edison had made the case-by-case demonstration necessary to justify fewer armed guards at the Zion facility than the default number of ten.

This is precisely the sense of “case-by-case basis” in the “weighting factor” footnote, and precisely the way in which Conam has addressed the issue. At the time when the 10 CFR Part 20 regulations were issued, there were various weighting factors available applicable to external doses, but none that had been generally approved or adopted. Thus, by specifying approval on a “case-by-case” basis, the footnote recognized that use of weighting factors other than 1.0 could be approved *only* to the

extent that it could be shown that they were appropriate to particular circumstances to which they were being applied.

Indeed, at the time of the Chastain exposure in February, 1996, there *still* were no generally applicable industry-consensus external dose weighting factors in use. Various agencies and entities used various types of weighting factors under various circumstances. ANSI N13.41 was approved in June, 1996, and issued in its final form on December 1, 1996 as an industry-consensus standard. Thus, Conam was able to submit to NRC Enforcement in December, 1996, a clear justification of why the ANSI N13.41 standards were appropriate for use, both scientifically, and as applied to the facts and circumstances of this particular case.

This panel has the opportunity, and the authority, to look at the facts and circumstances of this case, and to approve the use of the ANSI N13.41 weighting factors to the extent that they are appropriate to those facts and circumstances. The regulatory goal here is to determine as accurately and as meaningfully as possible the dose of radiation actually received by Mr. Chastain in order to compare it to the annual dose permitted under 10 C.F.R. §20.1201 for the "whole body." The ANSI N13.41 weighting factors permit the most accurate and meaningful look at that issue.

B. The Regulation Does Not Require Prior Approval

Wholly apart from the common sense notion that “case-by-case” approval means looking at the particular facts and circumstances to which the approval is directed, the regulation in question simply does not say that prior approval is required. The drafters of NRC regulations say that prior approval is required, when that is what they intend. See, 10 CFR §20.1204(c)(2) (“the licensee may upon *prior approval of the Commission* adjust the DAC. . .”); 10 CFR §20.1901(d) (“licensee shall notify, in writing, the Regional administrator. . . *at least 30 days before the date* that respiratory protection equipment is first used. . .” (emphasis added). It is significant that the regulatory footnote at issue does not specify *prior* approval as to the use of external dose weighting factors.

CONCLUSION

The regulations contemplate approval of alternate weighting factors on a case-by-case basis. Conam has submitted to the NRC the most appropriate weighting factors, but NRC Enforcement has refused even to consider such factors, on grounds that are not authorized or anticipated by the regulations. This Panel not only has the authority to approve the use of appropriate weighting factors for the purposes of this case, but it is apparently the only source remaining for consideration of such approval. This Panel can and should carry out the intent of the regulation by providing a forum for consideration of approval of alternate weighting factors in this case.

Respectfully submitted,

CONAM INSPECTION, INC.



One of its attorneys

Dated: September 14, 1998

Clifton A. Lake, Esq.
Malcolm H. Brooks, Esq.
McBride Baker & Coles
500 West Madison Street, 40th Floor
Chicago, Illinois 60661-2511
(312) 715-5700
256048-1