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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Before Administrative Judges:

G. Paul Bollwerk III, Chairman
Alan S. Rosenthal
Howard A. Wilber

In the Matter of PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL. (Seabrook Station, Units 1 and 2)	Docket Nos. 50-443-OL 50-444-OL February 6, 1990

EMERGENCY MOTION OF THE INTERVENORS:
(1) TO CLARIFY THE STATUS OF THE APPEAL OF LBP-89-33
AND (2) TO REOPEN THE RECORD ON THE NHRERP
AS TO THE NEED FOR SHELTERING IN CERTAIN CIRCUMSTANCES

INTRODUCTION

The Massachusetts Attorney General ("Mass AG"), the Seacoast Anti-Pollution League and the New England Coalition On Nuclear Pollution (the "Intervenors") received the Applicants' February 1 Response to the Licensing Board Order of January 11, 1990 on February 2, 1990. This pleading is attached hereto as Exhibit 1. Certain representations in this pleading require a response by the Mass. AG to this Board. Specifically, the Applicants assert that the Licensing Board's November 20 "explanation" (LBP-89-33) concerning ALAB-924's remanded issues was itself either never appealed, or if appealed, the Intervenors' claims of error were never briefed to this Board.

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Further, astoundingly, the Applicants now assert _for the first time_ that an October 10, 1988 plan revision to the NHRERP effectively eliminated sheltering as a protective measure option for what was called in ALAB-924 at 50 Condition (1): those circumstances in which sheltering for the general beach population would maximize dose savings. The Intervenors move in response for permission to clarify and have this Board confirm that there has been no failure to seek review of LBP-89-33 by the Intervenors. Further, Intervenors move to reopen the record on the NHRERP in light of the Applicants' February 1, 1990 disclosure of the meaning of the October 1988 plan revision. If the plan is now to be interpreted as represented by the Applicants to the Smith Board, even under those circumstances when sheltering the beach population would be the dose-minimizing strategy _as found by the Smith Board and upheld on appeal in ALAB-924_, sheltering nonetheless would _not_ be recommended. Thus, new evidence--the October 1988 plan changes as interpreted as of February 1, 1990--should be considered in determining whether the NHRERP makes the most effective use of sheltering and otherwise contains protective action decision criteria which maximize dose savings under the circumstances of the Seabrook site. The Intervenors move to reopen the record to have this Board consider this "new" NHRERP revision. Further they seek summary disposition on the NHRERP sheltering contentions based on the principles of _res judicata_.

I. INTERVENORS HAVE PRESERVED THEIR RIGHT TO APPEAL LBP-89-33 AND HAVE OTHERWISE EXHAUSTED ALL INTRA-AGENCY APPELLATE OPPORTUNITIES AVAILABLE TO DATE TO CHALLENGE LBP-89-33

The Applicants assert that:

> LBP-89-33 is now the law of the case, subject only to sua sponte Appeal Board review. This is so because two Intervenors, NECNP and SAPL, never filed a Notice of Appeal with respect to LBP-89-33, and the remaining intervenors never sought an extension of time to brief their appeals with respect to that decision. Thus, there is no appellate challenge to LBP-89-33.

Exhibit 1 at 3, n.6. This statement is simply wrong.

1. First, the Applicants no doubt make this assertion because they intend to argue, if and when necessary, to the Court of Appeals (before whom appeal of the Smith Board's November 9 licensing action is now pending) that Intervenors did not preserve their appellate rights regarding LBP-89-33 and that, therefore, based on principles of exhaustion of administrative remedies, they can not claim error in the Licensing Board's disposition of the ALAB-924 remand.

2. In fact, Applicants' statements are based on a fundamental misunderstanding of the nature of Intervenors' efforts to have the Licensing Board's errors regarding the ALAB-924 remand corrected. As this Board is aware, on November 13, Intervenors filed a motion to revoke the November 9 licensing action on the grounds, inter alia, that the Smith Board had violated the letter and spirit of the mandate of ALAB-924. This November 13 motion for mandatory relief was filed pursuant to this Board's jurisdiction over LBP-88-32 and Intervenors' appeal thereof. On November 16, the Commission

took jurisdiction over this motion away from this Board indicating that it would rule on this motion. On November 20, the Smith Board issued LBP-89-33. On November 22, the Mass AG noticed the appeal of LBP-89-32 and also specifically noted that he was appealing LBP-89-33. On December 1, the Intervenors then supplemented their mandamus motion before the Commission to include a discussion of the errors made by the Board in LBP-89-33 as further support for mandatory relief. Then, on January 24, 1990, the Mass AG (and other Intervenors) filed briefs on LBP-89-32, excluding from these briefs the legal errors already briefed at length on December 1 in support of the mandamus petitions pending before the Commission. At 1-2 of his January 24 Brief on Appeal of LBP-89-32, the Mass AG noted the absence of any briefing on the issues surrounding the disposition of the remanded issues and stated:

> The Mass AG believes those errors entitle Intervenors to mandatory relief revoking the November 9 license authorization. The merits of Intervenors' motions for such mandatory relief are presently pending before the Commission.

3. Applicants' notion that LBP-89-33 has never been challenged by the Intervenors in briefs is a remarkable misreading of this record. Mandamus, of course, is an <u>appellate</u> remedy available to enforce the mandate of a superior tribunal when it has been disobeyed. Mandamus can lie <u>as an alternative</u> to appeal and error if the disobedient tribunal's order is otherwise final and reviewable. On November 13, Intervenors sought mandatory relief as a form of appellate remedy for the Smith Board's contravention of ALAB-924 (which had issued on review of LBP-88-32). That mandamus remedy was

(and is) available as part of the ongoing appeal of the New Hampshire decision and was available on November 13 notwithstanding the fact that no appeal of LBP-89-32 had been filed at that time. After the Commission took jurisdiction over the Intervenors' mandamus away from this Board on November 16, <u>all claims that the disposition of the ALAB-924 remand by the Smith Board was in error were no longer before this Board</u>. This is the case whether those claims are part of the continuation of Intervenors' appeal of LBP-88-32 (the November 13 Motion) or are part of Intervenors' appeal of LBP-89-32 (the December 1 Supplemental Motion). Indeed, Intervenors supplemented their mandamus with the clear errors committed by the Smith Board in LBP-89-33 (which of course simply "explained" the errors actually committed in and by LBP-89-32).[1/] Thus, the Intervenors <u>have briefed</u> the errors

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1/ It was actually unnecessary for the Mass AG to separately identify LBP-89-33 in his November 22 Notice of Appeal. SAPL and NECNP by noticing an appeal of LBP-89-32 also, <u>in effect</u>, were appealing <u>all</u> post-facto "explanations" for this licensing action. The alternative proposed by the Applicants would result in either a <u>final and appealable</u> decision being noticed for appeal and the lengthy series of post-facto "explanations" that issue <u>afterward</u> not being considered as part of that decision or if each later decision is appealed separately each would become a separate decision on appeal needing to be consolidated with the first. But then how and why was the first decision "final" and "reviewable" if the later-issued "explanations" are necessary to it? The procedural morass arises because of the inherent intellectual confusion of the Smith Board which issued a "final" and "reviewable" decision on November 9 (beginning the immediate effectiveness review, for example) and then a lengthy series of "post-final" decisions. Intervenors were under no obligation to file separate notices of appeal each time as each post-facto "explanation" must be deemed (if it is to be even considered at all) part of the "final" and "reviewable" decision issued in LBP-89-32. Regarding the exquisite procedural complexity that results when a Board first decides to license and only later decides how and why, <u>see</u> Intervenors' January 22 Brief on Appeal of LBP-89-38 at 4-13.

in LBP-89-33 and that decision has been challenged to the full extent possible before this agency.

Apparently, the Applicants understand some of this and yet they assert that the Mass AG should have sought "an extension of time to brief [his] appeals" with respect to LBP-89-33 and the disposition of the remanded issues. Exhibit 1 at 3 n.6. But this Board after November 16, 1989 did not have appellate jurisdiction over the disposition of the ALAB-924 remand and LBP-89-33. Moreover, Intervenors had already briefed these issues on December 1. So, it is simply incoherent to assert that Intervenors should have asked for more time: 1) to brief issues he (with other Intervenors) had already briefed; and 2) to put these briefs before a Board which no longer had jurisdiction.

Of course, in the event the Commission grants the Intervenors' November 17 Motion for Reconsideration and returns the mandamus claims -- asserted after November 22 pursuant to appeal of both LBP-88-32 and LBP-89-32 -- to this Board, then this Board can proceed to determine whether the Smith Board disobeyed its mandate.[2/] In that event, the Commission would

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2/ For example, this Board could then decide the not-very-difficult question whether ALAB-924 was disobeyed when the Smith Board asserted (LBP-89-33 at 4) that ALAB-924 did not impact on the "requisite findings of reasonable assurance of public safety" even though ALAB-924 held that the NHRERP was not an approvable plan and no reasonable assurance finding could be made without sheltering detail. ALAB-924 at 68, n.194 and cases cited therein. Indeed, no terribly difficult analysis is needed to determine the necessity for a mandamus when one compares LBP-88-32, 28 NRC at 769-770 with ALAB-924 at 60-61, 63-64 and then with LBP-89-33 at 29-33.

be returning to this Board the mandamus motions in their present posture with LBP-89-33 <u>fully briefed</u>. It was in this sense and in light of these circumstances that the Mass AG on January 24 asserted to this Board that he had not briefed these remand issues again and that the merits of his challenge to the disposition of the ALAB-924 remand in LBP-89-32 and LBP-89-33 was before the Commission.

4. Because of the potential importance of any argument that might later be made concerning the exhaustion of administrative remedies regarding this all-important error which Intervenors are seeking to have the Court of Appeals review, the Mass AG moves that this Board clarify the present posture of Intervenor efforts to seek intra-agency appellate review of the errors in the disposition of the ALAB-924 remand and issue an order that states:

A. Intervenors, (SAPL, NECNP and the Mass AG) did timely file Notices of Appeal of LBP-89-32. The Mass AG expressly referenced LBP-89-33 in his Notice of Appeal. SAPL and NECNP are deemed to have appealed LBP-89-33 when they noticed the appeal of LBP-89-32 on November 22, 1989. Indeed, their notices of appeal were filed 2 days after LBP-89-33 issued.

B. Intervenors, (SAPL, NECNP and the Mass AG) have timely briefed the errors they claim the Smith Board committed in its disposition of the ALAB-924 remand. Intervenors were under no obligation on January 24 to file briefs with this Appeal Board which repeated what they had already argued to the Commission and were under no obligation to seek an extension of time from this Board in which to file or refile such briefs. As of November 16, 1989, the Commission and not this Board had jurisdiction over these claims of error.

II. THIS BOARD SHOULD IMMEDIATELY REOPEN THE RECORD ON THE NHRERP AND GRANT INTERVENORS SUMMARY DISPOSITION ON THE SHELTERING CONTENTIONS.

A. Background

This Board is intimately familiar with the issues surrounding sheltering as a protective action in the NHRERP for the general beach population at Seabrook. ALAB-924 at 47-69. In brief outline, in earlier versions of the NHRERP, it was stated that "sheltering may not be considered a feasible protective action on the seacoast beach during the summer." NHRERP, §2.6.5. In response to FEMA's concerns about the absence of adequate consideration or exploration of a sheltering option, the State of New Hampshire between approximately September 1987 and October 1988 determined that sheltering for the general beach population would be appropriate in certain circumstances. See App. Direct Testimony No. 6 at 19-20 and Appendix 1 at 7-8, ff. Tr. 10022. At the hearings on the NHRERP in May and June 1988, witnesses for the Applicants and the State of New Hampshire asserted that certain changes[3/] to the NHRERP indicated that there would

3/ Attached as Attachment II to Appendix 1 (beginning 42 of 47) of the Applicants' Direct Testimony No. 6, ff. Tr. 10022, were proposed modifications to the protective action decision criteria in the NHRERP. See also Attachment 1 to App's Direct Testimony No. 6 (1-35). These proposals were as of April 27, 1988, the date of the testimony, which was received on May 2, 1988. These changes were not made before the record closed in June 1988. At ¶8.14 of LBP-88-32, the Smith Board noted that revisions would be made in the NHRERP reflecting the proposals litigated.

be 2 different sets of circumstances or conditions when sheltering would be recommended for the general beach population:

(1) if sheltering is the dose minimizing protective action; and

(2) if there are physical constraints on evacuation. ALAB-924 at 50, citing record at notes 133-136. Condition (1) was represented to include a certain kind of release for which it was asserted sheltering would be the dose minimizing action. ALAB-924 at 50-51. See also 52 at notes 140-142 and accompanying text. FEMA's Keller reviewed the proposed sheltering option and found it appropriate at this site "not to shelter the summer beach population except in very limited circumstances." Amended Testimony of Cumming/Keller, ff. Tr. 13,968 at 11 (emphasis supplied). Of course, those limited circumstances are the same identified as Conditions (1) and (2) above.

The Licensing Board in December 1988 approved the NHRERP based on the use of sheltering as a protective action for the general population in these limited circumstances.[4/] Although this Board then reversed the Smith Board regarding the need for sheltering detail, it affirmed the Board regarding

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4/ Intervenors argued (and continue to argue) that: 1) sheltering is underutilized for the beaches in light of the long ETEs and 2) comparative efficacy of protective actions cannot be determined in the absence of dose comparisons which were excluded when proffered.

the appropriateness of limiting sheltering to these identified conditions in November 1989. ALAB-924 at 50-58. Indeed, at oral argument in July 1989 this Board (Judge Rosenthal) explored at some length the precise circumstances under which sheltering is considered by New Hampshire as the dose minimizing protective action. Tr. of Oral Argument, July 27, 1989 at 15-17.

> JUDGE ROSENTHAL: Well, accepting for the moment that thesis, your opponents argue quite vigorously that the plan deals with the sheltering alternative. And I would like your response to that. . . . (88)
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> MR. DIGNAN: [Condition] [n]umber one is, I use the example of the "puff release", and I mean the true puff release. I don't mean the one you have to predict in advance, because that's pretty difficult. But technical people tell me it is possible you could have an accident situation develop where you had a pressurization situation and you would have a planned release: you would know you're going to release, or how long you're going to release and you could reach a decision, a rational decision as an emergency planner at that point to shelter instead of evacuate because you would know your duration. You would know the type of release you're going to get and so forth and so on. That's item [or condition] number one.
>
> JUDGE ROSENTHAL: Well, now here is item number one: now let's say that you have this puff release and we're invoking number one. . . . What does the plan do with respect to sheltering.
>
> MR. DIGNAN: New Hampshire is all sheltering-in-place; that's what the plan. And the shelter-in-place concept in laid out in the plan. . . . (90-91)

B. <u>Amendment and Revision of the NHRERP</u>

Applicants and the State of New Hampshire represented to the Smith Board in sworn testimony that the NHRERP would be updated and revised to reflect the changes in protective action criteria. As noted above, at ¶8.14 of LBP-88-32, the Smith

Board noted that revisions would be made in the decision criteria reflecting changes proposed in Attachment 1 to the Applicants' Direct Testimony No. 6, ff. Tr. 10022 (to be distinguished from Attachments I and II to Appendix 1 to that same testimony). At ¶8.20 the Board noted:

> NHRERP is being updated to reference the emergency classification and plant conditions under which precautionary and protective action recommendations would be made. App. Dir. No. 6, ff. Tr. 10022, at 11-12, Attachment 2.

Indeed, the FEMA's approval of the plan on which the Smith Board then relied, is predicated on the identification of those circumstances, albeit limited, when sheltering would be employed as the protective action for the general beach population. See Appendix 1 to Applicants Direct Testimony No. 6 at page 1 of 47 (Strome quoting FEMA's January 25, 1988 position). These circumstances were identified in the testimony and representations were made that the NHRERP would be or was being updated to reflect these circumstances. In fact, the Smith Board made these revisions into a license condition:

> [I]ssuance of an operating license for Seabrook Station shall be subject to the satisfaction of the following conditions:
>
> . . .
>
> (b) The Director of Nuclear Reactor Regulation, in consultation with the [FEMA], shall verify that the NHRERP revisions committed to by the State of New Hampshire, as discussed herein, have been made.

LBP-88-32 at ¶10.4

In October 1988, the NHRERP was amended, ostensibly in compliance with the representations made during the hearings.

In December 1988, LBP-88-32 issued with its holding regarding the circumstances in which sheltering would be recommended. In July 1989, oral argument before this Board was held as noted above. In November 1989, this Board issued ALAB-924 reversing the Smith Board regarding the need for sheltering detail. On January 11, 1990 the Board <u>for the first time</u> sought guidance from the parties as to how to proceed to resolve the remanded issues. Then on February 1, 1990 <u>for the first time</u> the Applicants asserted that plan changes in October 1988 <u>actually eliminated sheltering for the general beach population under Condition (1) as discussed above!</u> Since only Condition (2) is left, say the Applicants, and the beach population by definition is small under these conditions,[5/] there is nothing left to resolve regarding the absence of sheltering detail. <u>See</u> Exhibit 1 at 8-12.[6/] Thus, in an attempt to

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5/ Intervenors do not question here the accuracy of Applicants' characterization of Condition (2). That is a matter for the Smith Board. The elimination of Condition (1), however, is a matter <u>not remanded</u> to the Smith Board. <u>See infra</u>.

6/ Applicants identify Step IV.B.4 (General Emergency) as the key change made in October 1988 that apparently put the Board and the parties on notice that the State of New Hampshire was not going to update the NHRERP as it represented that it would during the hearings and as the Board required with a license condition regarding the use of sheltering. Attached as Exhibit 2 hereto are the relevant pages from the October 1988 revisions to Appendix U to Volume 4A of the NHRERP. (Appendix F to Volume 4 and Appendix U to Volume 4A are virtually identical.) Certainly, these pages do <u>not</u> assert or state that even under those limited circumstances when sheltering is dose minimizing (like the "puff release") evacuation is <u>always preferred</u>. Obviously, the Board and parties read the October 1988 revision in light of the representations made by the witnesses for the Applicants and the State of New Hampshire regarding the appropriate conditions for sheltering the general beach population.

eliminate the blatant errors the Smith Board made in finding "reasonable assurance" without sheltering detail in place (in express contradiction to ALAB-924) and in denying Intervenors' their prelicensing hearing rights regarding sheltering detail, the Applicants now simply assert for the first time that since October 1988 sheltering has not been the recommended protective action under the NHRERP even when, as Applicants' counsel described it at oral argument in July 1989, technical conditions make sheltering the dose-minimizing action! Thus, the NHRERP has essentially been returned to that state where it had started in 1985 and 1986 in which sheltering the general beach population is simply not considered feasible or implementable!

C. Motion to Reopen This Record and For Summary Disposition.

Under normal adjudicatory conditions it seems obvious that Applicants would be and should be estopped from asserting that the NHRERP was amended in October 1988 as represented by them for the first time in February 1990. However, emergency planning is not a static but an ongoing process. If the NHRERP has been changed as Applicants represent and sheltering for Condition (1) has been eliminated, then based on the record developed during the New Hampshire proceeding concerning the dose minimizing aspects of sheltering in certain circumstances, and the holdings of the Smith Board and this Board, the effect

of that change is an inadequate plan not in compliance with the regulations because the protective actions provided therein do not maximize dose savings in certain circumstances. Thus, Intervenors move to reopen the record on the NHRERP regarding the sheltering contentions (NECNP/RERP-8, SAPL-16 and TOH-VIII) and to have this Board review new evidence not available before February 2, 1990; viz. the October 1988 NHRERP revisions as now interpreted by the Applicants.

1. Jurisdiction

This Board has jurisdiction over LBP-88-32. In ALAB-924, certain issues were remanded to the Smith Board. Regarding sheltering detail, this Board stated:

> [T]he Licensing Board should have required that the same implementation actions that are being taken for the beach population without transportation under sheltering condition (3) be taken for the entire beach population under conditions (1) and (2). Therefore, we remand the matter for appropriate corrective action by the Licensing Board.

ALAB-924 at 68. From this it is clear that this Board held that implementing detail is necessary for conditions (1) and (2). Thus, if the record must now be reopened regarding the adequacy of the NHRERP in the absence of sheltering as the protective action for Condition (1) then this Board and not the Smith Board has jurisdiction over this matter. Obviously, the Smith Board is not free to violate the mandate of ALAB-924 and

now find that sheltering is __not__ __necessary__ for Condition (1).[7/]

2. __Timeliness__

As discussed above, there was no reason for the Board and the parties to read the October 1988 revisions as anything other than the revisions and updates promised in the State of New Hampshire's and Applicants' sworn testimony in May and June, 1988. The Applicants did not amend their proposed findings on sheltering after October 1988 (filed on July 15, 1988) from which much of the Board's decision is taken. Thus, at Applicants' PF 10.1.41 (at 19 of the July 15, 1988 filing) the conditions for sheltering the general beach population are set out. The Applicants did not alert the Board that this proposed finding was no longer accurate after October 1988. Thus, although the State of New Hampshire is not estopped or otherwise prevented from changing its plan (or now disclosing that it had earlier changed its plan), on the narrow issue of timeliness, the Applicants __are__ __estopped__ from asserting that Intervenors were on notice as of October 1988 concerning the

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7/ Even though Applicants' representations about the October 1, 1988 revision and the elimination of Condition (1) fly directly in the face of what they represented to the Smith Board in 1988 and what that Board expressly found in LBP-88-32, they now seek literally by magic to have that Board simply reverse itself and eliminate the need for sheltering. Of course, the Smith Board is constrained on this issue by the __affirmance__ in ALAB-924 of its earlier holding in LBP-88-32 regarding the circumstances in which sheltering is appropriate. An affirmance on appeal on an issue is just as much a "mandate" on remand of a linked issue as a reversal. In any event, the remand back to the Smith Board did __not__ include the authority to decide whether sheltering should be or would be appropriate and therefore necessary for Condition (1).

meaning and significance of these earlier changes.[8/]

3. Safety Significance

This Board has already held that the absence of sheltering detail for those conditions in the NHRERP in which sheltering is appropriate prevents the reasonable assurance finding.[9/] ALAB-924 at 68, n.194, and cases cited therein. It follows that if sheltering is no longer to be relied upon at all in those very circumstances in which it was established and held to be the appropriate dose minimizing protective action, then this deficiency too prevents a reasonable assurance finding and is safety significant. ALAB-924 at 58 n.164

8/ Of course, had Intervenors moved to reopen the record in October 1988, the Applicants and the State of New Hampshire could easily have asserted that the October revisions were precisely what were described in the May and June 1988 testimony. This is because nothing in the October 1988 revision is expressly inconsistent with still retaining sheltering for Condition (1). Obviously, the Board read the revisions the same way when it received them before it issued LBP-88-32 and nonetheless proceeded to adopt the Applicants' findings on the conditions for which sheltering is appropriate.

9/ Intervenors believe that if there is a planning deficiency in the NHRERP which prevents the reasonable assurance finding, then if this deficiency is discovered and asserted after the record has closed, it is of sufficient safety significance to merit reopening the record under §2.734. The alternative is absurd: a deficiency sufficient to prevent the 50.47 (a)(1) finding and preclude licensing until remedied is somehow not sufficient to reopen a closed record if established after licensing. Of course, if the record is reopened after a license authorization but before that license has been made effective by the lifting of the §2.734 immediate effectiveness stay, that authorization is stayed as a matter of law until the material issues now reopened are adjudicated and then any deficiencies found are corrected. Such a procedural posture is distinct from the record being reopened after a license has become effective.

(noting that although sheltering is not per se required by the "range" requirement of 50.47 (b)(10) or by the "adequate protection" underpinings of 50.47 (a)(1), it is required when found appropriate by planners based upon "site-specific circumstances").

4. Materially Different Result

Had the Smith Board and this Board been apprised of the meaning of the October 1988 update of the NHRERP it is quite obvious that that evidence would have likely affected the disposition of Intervenors' claims that sheltering is underutilized for the general beach population at Seabrook. As this Board noted:

> Intervenors' central concern is whether confining sheltering to such a limited use under the plan is, in accordance with the first condition specified in the NHRERP, the most effective use of this protective action option to achieve maximum dose reductions.

ALAB-924 at 51. If the use were even further limited -- not even to be used when as set forth in Condition (1) it is dose-minimizing for the population -- Intervenors would have prevailed on this issue for the very reasons this Board ruled against them. See ALAB-924 at 51-58.

5. Affidavit Requirement

Intervenors rely in support of their motion to reopen on the February 1, 1990 uncontradicted representation by the Applicants regarding the meaning of the October 1988 NHRERP update and those portions of the record of the NHRERP proceeding cited by the Smith Board and this Board in which

sworn testimony was received regarding the conditions under which sheltering the beach population would be the dose minimizing strategy. ALAB-924 at 51 at notes 135 and 136 and accompanying text; 52, notes 141 and 142 and accompanying text. LBP-88-32 at ¶8.70. See also Tr. 14231.

6. Summary Disposition

As discussed above, the material change in the NHRERP disclosed for the first time on February 1, 1990 supports the reopening of the record on the NHRERP. Moreover, summary disposition is appropriate in light of the principles of res judicata.[10/] Thus, based on the same adjudicated facts as found by the Licensing Board and this Board regarding the appropriateness of sheltering for Condition (1), Intervenors are entitled to summary disposition on their sheltering contentions as a matter of law.

7. Expeditious Consideration

The representations made by the Applicants in their February 1, 1990 pleading are remarkable and indeed astounding. The NHRERP has been approved[11/]

10/ Again: the State of New Hampshire and the Applicants are free to change the plan (or now disclose that the plan was changed). However, on principles of res judicata the inadequacy of the NHRERP in light of this change is established. Thus, without further evidence in the record that would support this change and permit the holding of LBP-88-32 and ALAB-924 in this regard to be modified, the absence of sheltering for Condition (1) is a deficiency precluding the reasonable assurance finding.

11/ Intervenors ignore the conundrum that it was also disapproved by this Board on November 7 regarding a related but legally distinct issue.

by the Smith Board on November 9, 1989, based on an apparent and understandable failure to comprehend the significance of plan changes made in October 1988. As is now clear, the NHRERP is <u>not an adequate plan and has not</u> been adequate since October 1988. As this Board is aware, the Commission is nearing the end of its immediate effectiveness review which may lead to plant operation. This motion should be entertained immediately and ruled upon so that the Commission can be apprised about the significance of those changes. Obviously, if Intervenors are now entitled as a matter of law to have the record reopened, this should occur before operations would actually begin so that any deficiencies would be corrected <u>beforehand</u>.[12/]

CONCLUSION

For all the reasons set forth above, this Board should:

1. Issue an order declaring the status of Intervenors' efforts to appeal LBP-89-33 and the disposition of the remanded issues by the Smith Board as set out above;

12/ Applicants and the NRC Staff may urge the Board to refer this motion to the Commission. That would be an inappropriate disposition for the following reasons: 1) this Board has appellate jurisdiction over LBP-88-32 and the record on the NHRERP - it has lost jurisdiction <u>only</u> over the disposition of the remanded issues in LBP-89-32 (and LBP-89-33) as that disposition supports a mandamus for violation of ALAB-924; 2) the integrity of <u>this Board's</u> adjudicative processes are at issue in this motion; and 3) the Commission has not taken review of ALAB-924 and otherwise has not put the NHRERP record before it.

2. Grant expeditious consideration of Intervenors' motion to reopen the record on the NHRERP;

3. Grant Intervenors' Motion to Reopen that record in the particulars as set out above; and

4. Grant Intervenors' Motion for Summary Disposition on the present inadequacy of the protective action decision criteria in the NHRERP.

Respectfully submitted,

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Dated: February 6, 1990

EXHIBIT 1

February 1, 1990

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2)	)	Docket Nos. 50-443-OL 50-444-OL Off-site Emergency Planning Issues

APPLICANTS' RESPONSE TO LICENSING BOARD ORDER OF JANUARY 11, 1990

On January 11, 1990, this Board issued an order asking the parties still interested in participating in these proceedings[1] "to advise the Board on how to proceed in accordance with the directives of ALAB-924 and how [the parties] propose to participate in the resolution of the remanded issues."[2] The Board also required the Applicants to

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[1] By letter of January 19, 1990, the Seacoast Anti-Pollution League advised the Board and parties that it did not have "the least interest whatsoever in any further proceedings before the Board." See Applicants' Motion to Dismiss Abandoned Remand Issues (Jan. 26, 1990) [hereinafter "Motion to Dismiss"] at Exhibit 1.

[2] Memorandum and Order (Regarding Issues Remanded in ALAB-924) (Jan. 11, 1990) at 1.

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"confirm their commitment respecting transportation needs for certain special facilities "in Rye and Exeter."[3]

The portions of ALAB-924 remanding four issues to the Licensing Board for further consideration are presently on appeal to the Commission.[4] It was and remains the Applicants' position, as expressed in their Petition for Review thereof, that ALAB-924 was in error and should be reversed as to those issues. A ruling by the Commission on that petition may wholly eliminate any further need for this Board to address these matters in any way. Thus, Applicants respectfully suggest, the Licensing Board may wish to defer further action on the remanded issues until the Commission has spoken. In the meantime, however, Applicants respond to the Board's directions herein.

A. **Remand Issues**

1. LOAs for Teachers Riding Evacuation Buses

In ALAB-924, the Appeal Board asked that this Board "resolve the existing inconsistency in its interpretations of the role of school personnel in an evacuation and determine

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[3] Id. at 2.

[4] See Applicants' Petition for Review of ALAB-924 (Nov. 10, 1989). The Intervenors have appealed other portions of the decision. Intervenors' Petition for Review of ALAB-924 (Nov. 21, 1989).

whether any LOAs should be obtained from school personnel."[5] The Licensing Board already has resolved that perceived inconsistency, in its Memorandum of November 20, 1989.[6] Therein the Licensing Board explained that the inconsistency arose from the use of similar terms in dealing with two otherwise distinct areas of controversy.[7] The Board went on to clarify that LOAs are not required for evacuating teachers because: (1) they would be acting as "individuals who collectively supply a labor force or activity;"[8] (2) some teachers would be using the buses for their own evacuation, and thus "would in every sense be recipients of that evacuation service;"[9] (3) the school as a whole, of which the teachers are an integral part, are recipients of evacuation

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[5] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC ___ (Nov. 7, 1989) [hereinafter "ALAB-924" and cited to the slip. opinion] at 11.

[6] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-33, 30 NRC __ (Nov. 20, 1989) [hereinafter "LBP-89-33" and cited to the slip. opinion]. In this connection, it should be noted that LBP-89-33 is now the law of the case, subject only to sua sponte Appeal Board review. This is so because two intervenors, NECNP and SAPL, never filed a notice of appeal with respect to LBP-89-33, and the remaining intervenors never sought an extension of time to brief their appeals with respect to that decision. Thus there is no appellate challenge to LBP-89-33.

[7] Id. at 9-10.

[8] Id. at 10

[9] Id. at 11.

services;[10] and (4) the weight of the evidence is that "teachers as a group will not abandon students needing their care."[11]

The Board having responded to the Appeal Board's request, no further proceedings on this issue are required. Moreover, the Seacoast Anti-Pollution League ("SAPL"), sponsor of the contention under which the issue arose, has refused to participate in any further proceedings.[12] For that reason too, no further action on this issue is warranted.

2. Sufficiency of the 1986 NHCDA Special Needs Survey

In ALAB-924, the Appeal Board "remand[ed] the matter of the sufficiency of the 1986 Special Needs Survey for further consideration by the Licensing Board."[13] The Appeal Board did so because it concluded that at least some issues of

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[10] Id. In part because they collectively are service recipients, LOAs are not required for the schools themselves. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 856-58 (1985).

[11] LBP-89-83 at 11; see also id. at 8-9. Moreover, the Board noted that teacher participation is not essential to the planned evacuation of the school children. Id. at 8; see also Tr. 3356-57. Even if no school personnel participated, the children would be under the supervision of the bus drivers while being evacuated, e.g., Tr. 3388-89, and of reception center personnel and/or volunteers appointed by the Reception Center Manager after evacuation. App. Ex. 5, Vol. 4B, App. B at B-1, B-3, B-4; App. Dir. No. 4, ff. Tr. 4740 at 10; Tr. 4960-65; App. Dir. No. 7, ff. Tr. 5622 at 126.

[12] See Motion to Dismiss.

[13] ALAB-924 at 19.

material fact existed in spite of Applicants' motion for summary disposition of the survey issues.[14]

Responding to the Appeal Board's directive, this Board made a further careful review of "the factors that lead the Appeal Board to reverse the grant of partial summary disposition, the pleadings of the parties in support and in opposition to Applicants' Motion, and the information subsequently developed and reflected in the record of the New Hampshire portion of this proceeding."[15] On the basis of that review, the Board concluded that "the focus of SAPL's identified concerns regarding the adequacy of the 1986 Special Survey is to fine-tune and broaden rather than replace the methodology employed by the NHCDA to identify special needs populations,"[16] and that "the survey deficiencies identified by SAPL, even if ultimately found to be meritorious, are either of no merit or are amenable to relatively simple and timely correction."[17]

After issuance of the Licensing Board's memorandum containing the above analysis of this remanded issue, SAPL

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[14] Id. at 16. As the Appeal Board appears to concede, just what those surviving issues are is not yet clear, since SAPL has failed to identify them. See id. at n. 40.

[15] LBP-89-33 at 16.

[16] Id. at 21-22.

[17] Id. at 17.

withdrew from participation in any further proceedings.[18] Since SAPL is the sponsor of the underlying contention and the sole advocate of this issue,[19] its withdrawal eliminates the need for any further proceedings.[20]

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[18] See Motion to Dismiss at Exhibit 1.

[19] The Board noted, LBP-89-33 at 14 n. 7, that NECNP addressed an arguably similar issue, as to identification and notification of hearing-impaired individuals, under NHLP Contention 4. However, when NHLP-4 went to hearing for trial, Applicants and NECNP stipulated to a resolution of the contention, and it was withdrawn by NECNP. See Tr. 8853 and Stipulation ff. Tr. 8853.

[20] Had SAPL not withdrawn, Applicants would have proposed proceeding along the following lines:

a) It first would have been necessary to determine what specific factual issues remain to be litigated. SAPL's Statement of Material Facts as to Which SAPL Contends that SAPL Contentions 18 and 25 Raise Genuine Issues as to Identification of Those with Special Needs (June 9, 1986), Attachment A hereto, defines the maximum scope of the issues to have been litigated. However, while the Appeal Board held that some of these issues survived, it is also clear that at least some of them did not survive Applicants' summary disposition motion. Hence Applicants would have proposed that Applicants and SAPL each file, within ten (10) days of the issuance of the Board's scheduling order on the remanded issues, a brief identifying the specific issues from Attachment A which have been disposed of and those which survived the May 1986 motion for summary disposition.

b) It is also clear that developments on the record -- including the SPMC-Exercise record -- may have disposed of all of the issues that ALAB-924 suggests survived summary disposition in 1986. Hence Applicants would have proposed that, in the briefs described above, the Applicants and SAPL also indicate which issues have been resolved, in whole or in part, by subsequent developments already on the record.

c) Finally, since 1986 two additional surveys have been conducted by the New Hampshire Office of Emergency Management (NHOEM), and the survey has been suitably "fine-tuned" and "broadened". Hence, should the Board have found, after consideration of the above-referenced briefs, that some subset of

3. Loading Time for ALS Patients

Based upon a perceived inconsistency in certain plan language,[21] and on testimony by SAPL witness Pilot which it characterized as being "without apparent contradiction,"[22] the Appeal Board remanded for further consideration "the issue of [whether] preparation time has received appropriate consideration as a factor in deriving ETEs for [advanced-life-support patients]."[23]

It is undisputed on the record that the only ALS patients in the New Hampshire EPZ are in the two EPZ hospitals.[24] In its memorandum on ALAB-924, the Licensing Board reviewed the record in detail, clarified a few mis-citations which may have misled the Appeal Board, and demonstrated that loading time for ALS patients in fact is already accounted for in the evacuation time estimates.[25] The Licensing Board then went on to note that:

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issues still remained to be resolved, Applicants would have proposed to resolve them by means of a motion for summary disposition which would have placed these new facts before the Board.

[21] ALAB-924 at 26.

[22] Id. at 25.

[23] Id. at 26-27.

[24] Tr. 4295. SAPL's appeal, too, was limited to "the time it would take to load hospital patients." Seacoast Anti-Pollution League's Brief on Appeal of the Partial Initial Decision on the NHRERP LBP-88-32, at 41 (March 21, 1989).

[25] LBP-89-33 at 24-29.

> "Some improvement could be made in the NHRERP by requiring an amendment to the plan (or town plans) to provide for instructions to the staff of special facilities to prepare ALS patients for transportation at the order to evacuate. Moreover, any confusion over the distinction between preparing special-needs persons in anticipation of arriving transportation, and assembling them can be readily resolved. This type of improvement does not require any significant revision to the NHRERP and it can be readily accomplished by the Applicants and the State and verified by the NRC Staff during the post licensing period."[26]

Applicants have consulted with the State of New Hampshire, and hereby commit to have the language clarifications suggested above by the Board made, subject to Staff oversight as indicated. Accordingly, no further proceedings on this issue are required.

Moreover, SAPL was the sponsor and sole advocate of this issue as well. Thus SAPL's refusal to participate further[27] constitutes an additional reason why no further proceedings need occur on this issue.

4. Implementing Detail for Sheltering of General Beach Population

In ALAB-924, the Appeal Board held that implementing detail was required for the general beach population (as opposed to the estimated 2 percent of the beach population without vehicles) "so long as sheltering for the beach population is a protective action option under the NHRERP."[28]

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[26] Id. at 29.

[27] See Motion to Dismiss.

[28] ALAB-924 at 59 (emphasis added).

The Appeal Board contemplated that the plan would provide for sheltering that general beach population in only two limited circumstances: (1) when sheltering would maximize dose reductions, because of "a short duration, nonparticulate (gaseous) release that would arrive at the beach within a relatively short time period when, because of a substantial beach population, the evacuation time would be significantly larger than the exposure duration" (i.e. a limited puff release on a summer beach day) and; (2) when physical impediments make evacuation impossible.[29]

During the hearings on the NHRERP, FEMA took the position, through its witness Joseph Keller, that evacuation (when physically possible) would always be the preferable protective action for the Seabrook beach population in light of, *inter alia*, the uncertainties of release composition and duration, the effects of groundshine, and the poor quality of the shelter available in the Seabrook beach area.[30] This FEMA position was vigorously contested by the Intervenors, both at trial and on appeal, and was upheld by both the Licensing Board and the Appeal Board.[31] In October 1988, the NHRERP, Rev. 2, Vol. 4, Appendix F was revised to conform to the FEMA position that was litigated (and subsequently

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[29] *Id*. at 50-51, 59.

[30] *Id*. at 52-55.

[31] *Id*. at 55-58.

upheld): at step IV.B.4 (General Emergency) it is recommended to evacuate ERPA A, an approximate two-mile radius that includes Hampton and Seabrook beaches, based on a declaration of a General Emergency subject only to constraints to evacuation. This revision to bring the plan into conformity with the FEMA position was served on the Board and parties on October 13, 1988.[32] The effect of the change is to eliminate sheltering as an option under the first of the two circumstances contemplated by the Appeal Board. Since sheltering is no longer a planned protective action option under those circumstances, no implementing detail is required in that case.

Thus there remains only the issue of implementing detail for the second circumstance, i.e. when evacuation is physically impossible, for example because a blizzard has blocked all roads or a tidal wave has destroyed all bridges.[33] The amount of implementing detail necessary in such circumstances would be minimal: with the roads blocked or the bridges out, emergency response officials would need very little additional information in order to arrive at an "accurate picture of the [shelter] option's overall benefits

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[32] See Letter of G. Huntington, Assistant Attorney General of New Hampshire, to Chairman I. Smith, Atomic Safety and Licensing Board, October 13, 1988, and enclosures thereto.

[33] I.e., conditions not normally conducive to large beach populations.

and limitations" vis-a-vis a non-existent evacuation option.[34] Likewise, the amount of detail needed is limited by the fact, specifically recognized by the Appeal Board, that the types of shelter available to the general beach population is so "down in the dirt in the error band, it's trivial."[35]

The only implementing detail that would be required pursuant to ALAB-924, therefore, is to direct emergency response officials to, in those extremely unlikely circumstances that a physical impediment to evacuation exists, broadcast an EBS message instructing the members of the general beach population to proceed immediately to the nearest available fully-enclosed building and remain there.[36] Applicants have consulted with the State of New Hampshire, and hereby commit to have this change made. With the existing Stone & Webster shelter survey as a reference, state decision makers can be confident that sufficient indoor space is available.[37] This change is minor and can be

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[34] ALAB-924 at 64.

[35] Id. at 57.

[36] Directing beachgoers to the nearest available building is consistent with the NHRERP's existing shelter-in-place approach. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-32, 28 NRC 667, 758 (1988).

[37] Id. at 771-72. All the buildings listed in the survey are "suitable", ALAB-924 at 68, in the sense that they possess the minimal .9 drf which the Appeal Board recognized was all that was available. Id. at 56. Beachgoers would be directed to go

accomplished under Staff oversight. Accordingly, no further proceedings on this issue are required.

B. **Transportation Commitments**

Applicants hereby confirm that the NHRERP provides for "the transportation needs of special facilities based upon maximum facility capacity . . . in the cases of the Webster facility in Rye, New Hampshire, and the Exeter Healthcare facility in Exeter, New Hampshire."[38] Specifically,

- The Webster facility staff has, in recent discussions, indicated that their maximum capacity is 69 patients, broken down as 5 Category 2, 27 Category 3, and 37 Category 4 patients. The NHRERP commits 1 evac-bed bus, 1 school bus, and 1 coach bus to the facility, with 6 Category 2 spaces, 48 Category 3 spaces,[39] and 36 Category 4 spaces, or a total of 90 spaces for a maximum of 69 riders.
- The Exeter Health Care facility has indicated that its maximum capacity is 115 patients, broken down as 58 Category 2, 36 Category 3, and 21 Category 4 patients. The NHRERP commits 6 evac-bed and 1 coach bus to the facility, with 58 Category 2 and 64

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only to underline "available" buildings, i.e. those standing and enterable.

[38] Id. at 70-71.

[39] Also useable for Category 4 patients.

Category 3[40] spaces, or a total of 122 spaces for a maximum of 115 riders.

Respectfully submitted,

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[40] See supra note 39.

EXHIBIT 2

4. General Emergency

a. Initiating conditions

All conditions

> **NOTE**
>
> Protective action recommendations will be provided by the utility emergency response organization based on emergency classification level or plant status in accordance with Attachment A. 2 2

b. Actions

(1) Advise NH local EOCs, Massachusetts EOC and NHY ORO of Governor's declaration of state of emergency.

(2) Recommend evacuation of ERPA A, including Hampton and Seabrook beaches, subject to contraints of Attachment C and proceed to Step 4. 2

> **NOTE**
>
> Complete Step 3 only if constraints of Attachment C exist. 2

(3) Advise the Department of Resources and Economic Development to close beaches and state park areas in Hampton and Seabrook from Ocean Boulevard and Great Boar's Head to the North and Route 286 and Ocean Boulevard to the South.

(4) Advise State Police to establish access control and traffic control points for affected areas. Refer to the Traffic Management Manual for identification of points in the affected area. 2

(5) Advise the Hampton, Hampton Falls and Seabrook Police Departments to establish traffic control points in accordance with the Traffic Management Manual. 2

(6) Advise Department HHS to activate Reception Centers at Salem and Manchester. Advise DPHS to activate Decontamination Centers at activated Reception Centers.

(7) Prepare the appropriate EBS Message, in accordance with Appendix G, for release. Activate EBS and authorize broadcast.

(8) New Hampshire sirens will be activated.

(9) After releasing EBS message, provide a copy to Media Center at Newington Town Hall.

(10) Consider extending protective actions to other areas of the EPZ based on procedures at Step III, Protective Action Decisions for the General Public, and using Figure 1A and update information regarding: 2

(a) Meteorological Conditions

(b) Radiological Assessment

(c) Local Conditions (Attachment C)

(d) Emergency Response Organization Status

(e) Plant Conditions

V. <u>FIGURES</u>

A. FIGURE 1A Protective Action Recommendation Worksheet

B. FIGURE 1B Special Facility Protective Action Worksheet

C. FIGURE 2 Map of Emergency Response Planning Areas (ERPA)

D. FIGURE 2A Evacuation Scenarios

E. FIGURE 3 ETE Values

F. FIGURE 4 Protective Action Recommendation Guidance Charts

G. Figure 4A Special Facility Protective Action Recommendation Guidance Charts 2

H. FIGURE 5 Special Facility Sheltering Factors

VI. <u>ATTACHMENTS</u>

ATTACHMENT A Plant Status Information and Protective Action Recommendations 2

ATTACHMENT B Access Control Points for New Hampshire EPZ

ATTACHMENT C Emergency Organization Status and Local Conditions

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Before Administrative Judges:

G. Paul Bollwerk III, Chairman
Alan S. Rosenthal
Howard A. Wilber

In the Matter of

PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE, ET AL.

(Seabrook Station, Units 1 and 2)

Docket Nos. 50-443-OL
50-444-OL

February 6, 1990

CERTIFICATE OF SERVICE

I, John Traficonte, hereby certify that on February 6, 1990, I made service of the enclosed EMERGENCY MOTION OF THE INTERVENORS 1) TO CLARIFY THE STATUS OF THE APPEAL OF LBP-89-33 AND 2) TO REOPEN THE RECORD ON THE NHRERP AS TO THE NEED FOR SHELTERING IN CERTAIN CIRCUMSTANCES via telefax as indicated by (*), and by first class mail to:

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