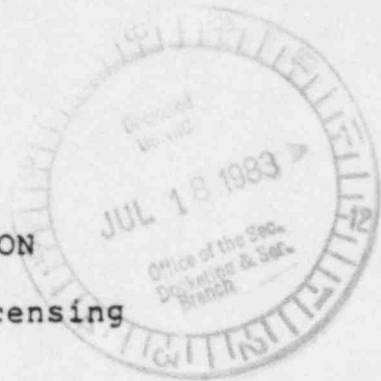


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing
Appeal Board



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

July 15, 1983

PETITION OF ATTORNEY GENERAL
FRANCIS X. BELLOTTI FOR
DIRECTED CERTIFICATION OF
ASLB DECISION ON APPLICANTS'
TWENTY-FIRST MOTION FOR
SUMMARY DISPOSITION

On June 30, 1983 the Atomic Safety and Licensing Board issued a Memorandum and Order in which it summarily dismissed certain contentions filed by the New England Coalition on Nuclear Pollution (Contentions NECNP III.12 and 13) relating to the Applicants' evacuation time estimates and drastically limited the scope of the evidentiary hearing now scheduled to commence on August 17 to two of the many important issues raised by those contentions. See Memorandum and Order (Ruling

on Motions for Summary Disposition), June 30, 1983, a copy of which is attached hereto as "Exhibit A," at 1, 6-16.^{1/} In issuing this Order the ASLB has operated under several fundamental misconceptions as to the rules governing summary disposition. The Board has effectively ruled that any intervenor faced with a motion for summary disposition, no matter how limited its factual basis, must file all of its testimony on the affected contention in order to survive summary dismissal. The Board has further ruled, in effect, that a motion for summary disposition entitles it to reconsider its prior determinations that a contention has regulatory basis and that the bases for it have been stated with sufficient specificity. And, finally, the Board has with this ruling resolved admitted conflicts between experts without the benefit of a hearing. It is difficult to view this ruling as reflecting anything other than an underlying conviction that intervenors, and their experts, have nothing useful to say and a total lack of appreciation for the limits which the law imposes on the Board in acting on such a conviction.

^{1/} The Board rewrote NECNP's contentions to allow for testimony on two of the many alleged deficiencies in the Applicants' evacuation time study. See Exhibit A, at 15. The scope of the allowable testimony under the rewritten contention is far from clear. What is clear, however, is that the Board has drastically limited the concerns which may be addressed at the hearing.

Attorney General Bellotti, the Attorney General for the Commonwealth of Massachusetts, has been admitted to this license proceeding as a representative of an interested state. See Memorandum and Order, dated September 14, 1982, at 90. ^{2/} Prior to the Board's recent ruling, Attorney General Bellotti had indicated on the record his desire to present testimony on NECNP Contentions III.12 and 13 given their relevance to the concerns which he is seeking to raise in the off-site emergency planning area. See Motion of Attorney General Francis X. Bellotti for Extension of Time to File Rebuttal Testimony on Contentions Regarding Applicants' Evacuation Time Estimates (Contentions NECNP III.12 and 13), dated June 28, 1983, at 1. Attorney General Bellotti has been advised that NECNP intends to seek directed certification of this ruling and supports that request, not only because of the effect of this ruling on the litigation by all parties of the specific issues addressed by NECNP's contentions, but also because of its clear indications as to the likely course of the remainder of the proceeding generally.

^{2/}Attorney General Bellotti petitioned to intervene as a full party on the issue of emergency planning and submitted contentions related to that issue, all of which were ruled premature in the absence of off-site emergency plans. See Memorandum and Order, dated September 14, 1982, at 86-90. The first off-site emergency plan, that of the State of New Hampshire, has now been filed with the Board and Attorney General Bellotti has filed contentions reiterating the concerns addressed in his original pleadings. See Contentions of Attorney General Francis X. Bellotti Relative to Emergency Planning for the State of New Hampshire, filed June 23, 1983.

Attorney General Bellotti acknowledges that it is unusual for a ruling on a single motion for summary disposition to be the occasion for interlocutory review. However, when an ASLB order demonstrates such a profound lack of appreciation for the minimal requirements of due process as does this one, failure to review it immediately will have a pervasive and highly unusual effect on the entire course of the remaining proceeding. Just as participants in administrative proceedings are not required to exhaust their administrative remedies before seeking judicial review where to do so would be futile, the intervenors to this proceeding cannot be expected to participate in a licensing proceeding where it has now been made clear that they will, in fact, be afforded no opportunity for the hearing to which they are statutorily entitled.

I. The Board's Ruling

The contentions at issue here read as follows:

NECNP Contention III.12:

The evacuation time estimates provided by the Applicants in Appendix C of the Radiological Emergency Plan are inaccurate in that they provide unreasonably optimistic estimates of the time required for evacuation. In addition, the estimates provided in the radiological emergency plan are useless to emergency planning because they fail to include bounds of error, to indicate the basis for codes or assumptions used for the time estimates, to indicate whether the model used is static or dynamic, to provide a sensitivity analysis of the estimates or to reveal the underlying assumptions.

NECNP Contention III.13:

The preliminary evacuation time estimates submitted by the Applicants assume favorable weather conditions and thus fail to account for the worst case situation of adverse weather conditions developing on a busy summer weekend afternoon. Nor do they take into account evacuee directional bias, evacuation shadow, or reasonably expected vehicle mix. As a result, the estimates are unduly optimistic and useless to future planning.

After hearing all objections to these contentions the Board, by order dated November 17, 1982, determined that they satisfied the Commission's requirements with respect to basis and specificity and accepted them for litigation. See Memorandum and Order, dated November 17, 1982, at 2, 19. Attorney General Bellotti had also submitted a contention challenging, inter alia, the accuracy of the Applicants' evacuation time estimates. See Supplement to the Petition to Intervene of the Commonwealth of Massachusetts, dated April 20, 1983, at 6, 9-11; Brief of the Commonwealth of Massachusetts in Support of its Contentions [containing redrafted contentions], dated July 22, 1982, Exhibit B, at 3-5. Although these contentions raised challenges to the Applicants' evacuation time study similar (and in many cases identical) to NECNP's contentions, the Board (apparently because of incorporation of these challenges into contentions relating more generally to off-site emergency planning) ruled that Mr. Bellotti's contentions were premature and should be refiled once off-site emergency plans were made available. See Memorandum and Order, dated September 14, 1982, at 86-91.

On February 14, 1983, the Applicants moved for summary disposition of NECNP Contentions III.12 and 13 and provided a statement of four material facts as to which they alleged there was no dispute and an affidavit of an expert designed to support that allegation. See Applicants' Twenty-First Motion for Summary Disposition (Contentions NECNP III.12 and 13), filed February 14, 1983. Neither the Applicants' "Statement of Material Facts as to which there is No Dispute" nor the "Affidavit of James A. MacDonald on NECNP III.12 and 13" addressed any of the following allegations set forth in NECNP's answers to the Applicants' interrogatories on these contentions or in the bases which Attorney General Bellotti stated for his comparable contentions, ^{3/}except to say that Applicants' methodology was consistent with that employed in a study performed by an NRC contractor:

- 1) That the Applicants' evacuation time study employs inappropriate assumptions as to traffic management and control and breakdowns in orderly traffic flow. See NECNP Response to Interrogatories Pursuant to

3/ At the time they submitted their motion for summary disposition the Applicants knew, of course, that Attorney General Bellotti had been admitted to the proceeding as a representative of an interested state and would have the right to present testimony on NECNP's contentions. They also knew the nature of the Attorney General's objections to their evacuation time study, as those objections had been specifically set forth in the bases to Mr. Bellotti's contentions. See Supplement to the Petition to Intervene of the Commonwealth of Massachusetts, dated April 20, 1983, at 6, 9-11; Brief of the Commonwealth of Massachusetts in Support of its Contentions dated July 22, 1982, Exhibit B, at 3-5.

Licensing Board Order of March 24, 1983, filed March 31, 1983, [hereinafter, "NECNP's Answers to Interrogatories"], at 5, 7,; Supplement to the Petition to Intervene of the Commonwealth of Massachusetts dated April 20, 1982 [hereinafter, "Commonwealth's Supplement"], at 11.

- 2) That the Applicants have not properly accounted for evacuation of schools, hospitals, and other institutions or for the public transportation - dependent population. See NECNP's Answers to Interrogatories, at 6; Commonwealth's Supplement, at 10.
- 3) That the Applicants have completely failed to account for other than home-based evacuation traffic. See Commonwealth's Supplement, at 11.
- 4) That the Applicants have failed to include major employers in its estimates of summer automobile demand. See Commonwealth's Supplement, at 10.
- 5) That the Applicants' study fails to account properly for notification, preparation, mobilization, and confirmation time. See NECNP's Answers to Interrogatories, at 5-6; Commonwealth's Supplement, at 9.
- 6) That the Applicants' study uses improper population statistics and automobile demand estimates and fails to account for population growth over the life of the plant. See NECNP's Answers to Interrogatories, at 6, 7; Commonwealth's Supplement, at 10.
- 7) That the Applicants have failed to account for the simultaneous evacuation of the peak summer population on the beach areas lying NE to SSE of the site or to provide an estimate for the full EPZ. See NECNP's Answers to Interrogatories, at 6; Commonwealth's Supplement, at 9, 10.
- 8) And that the Applicants' study fails either to use realistic assumptions with respect to the information available to evacuees when choosing evacuation routes or actual planned evacuation routes. See Commonwealth's Supplement, at 11.

The only allegations as to which the Applicants did supply expert opinion were the allegations that they had improperly accounted for adverse summer weather conditions and the evacuation shadow phenomenon and the issues of "evacuee

directional bias," "expected vehicle mix," and a prior evacuation experience in this area. See Affidavit of James A. MacDonald on NECNP III.12 and 13, at page 2.

While knowing, then, that all of these issues might be the subject of testimony on NECNP's contentions, the Applicants limited the bases for their motion for summary disposition to the following four facts, as to which they alleged there was no dispute:

- 1) That most people do not go to, remain on, or congregate at, beaches in storms;
- 2) That the time estimates made by Applicants have been subjected to validation studies;
- 3) That the transportation simulation model methodology is consistent with that set out in NUREG/CR-2504; and
- 4) That evacuation pursuant to specific plans for Seabrook is not comparable to past history or experience.

See Applicants' Twenty-First Motion for Summary Disposition (Contentions NECNP III.12 and 13), filed February 14, 1983, at 3. On June 1, 1983, in accordance with a schedule previously set by the Board, NECNP filed an objection to the Applicants' motion together with an expert affidavit disputing all but the first fact listed by the Applicants, including its contention that its methodology was consistent with that of an NRC study, and challenging the Applicants' conclusions as to the import of the first stated fact. The affidavit further set forth the

opinion of NECNP's expert that the Applicants' evacuation time estimates are unrealistically low, derived from faulty methodology, and fail to provide officials with much information which they will need to respond to an emergency at Seabrook Station and stated numerous bases for that opinion. See NECNP's Objection to the Applicants' Twenty-First Motion for Summary Disposition (Contentions NECNP III.12 and 13), Affidavit of Philip B. Herr on NECNP Contentions III.12 and 13, dated May 27, 1983, Pars. 3-15.

On June 6, 1983, the NRC Staff filed an answer to the Applicants' Motion for Summary Disposition supporting that request. See NRC Staff Response to Applicants' Seventh (Contention NH-21) and Twenty-First (Contentions NECNP III.12 and 13) Motions for Summary Disposition, filed June 6, 1983 [hereinafter, "Staff's Response"]. The Affidavit of John R. Sears submitted in conjunction with the Staff's Response merely reported general conclusions allegedly reached by the NRC contractor in its review of the Applicants' estimates and did not address any of the specific concerns raised by NECNP or by Attorney General Bellotti. As we have noted, NECNP's expert had already provided an affidavit disputing the assertion that the NPC study validates the Applicants' work. Moreover, the principal conclusion of that study cited by the Staff's expert is that which is always true, barring deliberate manipulation

or error in application of a computer model -- namely, that the Applicants' results follow from their assumptions and methods. NECNP's contentions, of course, address the adequacy of the Applicants' assumptions and methodology and are, therefore, in no way countered by this conclusion.

The Staff's affidavit amounts to a general conclusory statement (based not on the affiant's own review of Applicants' study, but rather on his reading of the report of another party's review thereof) that the Applicants' study served one of the two purposes for which it was required -- namely, use as a tool for emergency planners. Even the Staff's expert concludes that it is only if local emergency plans (not yet available) reflect the traffic control and routing assumptions used by the Applicants that their estimates will satisfy the second purpose for which they are required and serve as useful tools for decision-makers at the time of an emergency. See Affidavit of John R. Sears, Par. 12.

The Board provided no opportunity for oral argument on Applicants' motion. On June 30, 1983, it issued its decision, a copy of which is attached hereto as Exhibit A. In its decision the Board rules that NECNP was obliged not only to address those facts which Applicants and the Staff contended were not in dispute and entitled them to judgment as a matter of law, but also all facts upon which it relied in support of

its general contention, previously accepted as sufficiently specific, that the Applicants' estimates were unrealistically optimistic. Thus, the Board indicates that it is once again reviewing the acceptability of NECNP's contentions and rules that it "accepts NECNP's general allegation only to the extent it is supported by a specific allegation or averment." See Exhibit A, at 8. The Board's ruling, therefore, stands for the proposition that an intervenor, facing a motion for summary dismissal of a contention which states only one fact as to which it is alleged there is no dispute, must not only establish that there is a dispute as to that fact (or, if not disputed, that the movant is not entitled to judgment as a matter of law on the basis of that fact), but must specifically set forth in an affidavit every fact upon which it relies in support of its contention. In other words, the intervenor must submit its testimony on the contention in writing before the Board will even allow a hearing on the issues. That, of course, is not an intervenor's burden in opposing a motion for summary disposition. If it were, Applicants would be in a position to shift the burden of proof on every licensing issue through the simple device of moving for summary disposition, and with an affidavit addressed to only one of the many factual issues relevant to the contention.

In this case, NECNP had no obligation even to respond to the Applicants' affidavit to the extent it merely cited an NRC contractor's study and alleged that it confirmed the Applicants' results since, even if that were true, it would not resolve as a matter of law the question of the adequacy of the Applicants' study. However, NECNP did supply an affidavit which contained the opinion of an expert, whose qualifications were not challenged by any party, that the NRC study did not, in fact, validate the Applicants' work. The affidavit further disputed the position of the Applicants' expert on the few specific issues which he did address and stated numerous other problems with the Applicants' time study.

Thus, with the decision which is challenged here the Board has improperly foreclosed the submission of testimony and cross-examination of witnesses on the many issues encompassed by NECNP's contentions and specifically identified by NECNP and others in pleadings on file in this proceeding which were not addressed by the Applicants' or the Staff's experts in their affidavits. See discussion, supra, at 7-8. Indeed, the Board has, without explanation, precluded testimony and cross-examination on specific points addressed in the expert affidavit supplied by NECNP. Thus, in reviewing what it deemed to be the "specific averments" of Mr. Herr's affidavit which it would "accept," the Board completely overlooked the following

allegations: (1) that the Applicants' time study fails to account for other than home-based evacuation traffic or to provide estimates for evacuation of special institutions and the public transportation-dependent population, see Affidavit of Philip B. Herr, at Par. 4; and (2) that other identified evacuation time studies cast doubt on the validity of the Applicants' study, see Affidavit of Philip B. Herr, at Par. 14. And, in the case of the few specific issues which were addressed by the Applicants' or the Staff's experts in their affidavits, the Board has resolved acknowledged disputes between experts without the benefit of a hearing. All of this reflects utter disregard for the statutory right of intervenors to an evidentiary hearing on all material issues of fact, see Section 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. §2239(a)(1); see also Public Service Company of New Hampshire v. FERC, 600 F.2d 944, 955 (D.C. Cir. 1979), cert. den., 444 U.S. 990 (1979); Independent Bankers Association of Georgia v. Board of Governors of the Federal Reserve System, 516 F.2d 1206, 1221 (D.C. Cir. 1975), and effectively shifts the burden of proof on every admitted contention to the intervenors.

It is a well-established principle of civil procedure that witnesses' credibility and the weight to be given their opinions cannot be decided on the basis of affidavits. See Poller v. Columbia Broadcasting System, 368 U.S. 464, 473

(1962); Sarnoff v. Ciaglia, 165 F.2d 167 (3d Cir. 1947); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627-29 (1944).

And this general principle applies with particular force to expert opinions. See Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 880 (1st Cir. 1978); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944). As the First Circuit observed in Seacoast Anti-Pollution League v. Costle, supra, at 880:

The public hearing can be especially important in cases such as this one which turn not so much upon the actual baseline data (which presumably all parties will be happy to have submitted in written form) as upon experts' interpretation of the data. The experts' credibility is, therefore, very much at issue here. ...

The Board could not, therefore, summarily dismiss NECNP's contentions, or any part thereof, on the ground that it did not credit the expert testimony contained in the affidavit which NECNP submitted unless the tendered evidence was "too incredible to be accepted by reasonable minds." Whitaker v. Coleman, 115 F.2d 305, 306 (5th Cir. 1940).

The Board violated these fundamental principles repeatedly in its action on NECNP's contentions. On the issue of the Applicants' failure to account for the so-called "evacuation shadow phenomenon," or the possibility that many persons other than those ordered to evacuate will voluntarily choose to do so, the Applicants' expert had merely observed in his affidavit that "the transportation corridors serving the overall

area . . . are not taxed to capacity in the evacuation estimate analyses performed by the Applicants." See Affidavit of James A. MacDonald on NECNP III.12 and 13. That was the sole basis given for Mr. MacDonald's rejection of NECNP's claim that the phenomenon had not been appropriately considered. Philip Herr, in the affidavit submitted by NECNP, explained that the mere fact that transportation corridors in the area are not taxed to capacity in the Applicants' study does not assure that they can accommodate the voluntary evacuees without affecting evacuation times. Mr. Herr cited and attached to his affidavit a lengthy study of voluntary evacuation and explained that it confirms that, depending on the distribution of population by distance in a particular area, the number of people who actually evacuate may be double, quadruple, or even more, the number ordered to evacuate. See Affidavit of Philip B. Herr on NECNP Contentions III.12 and 13, Par. 10. Mr. Herr stated that, in his expert opinion, the Applicants' failure to estimate the voluntary evacuee population or to analyze the effect of such voluntary evacuation on evacuation times rendered their estimates purely speculative. Ibid.

In its order the Board, while acknowledging that Mr. Herr disputed Mr. MacDonald's opinion on the evacuation shadow issue, resolved that disputed fact on the basis of the affidavits on the ground that Mr. Herr had "aver[red] no hard

facts in support of his opinion." The Board thus ruled on the weight to be given expert testimony on the basis of affidavits, in violation of the settled principles discussed above. The Board further shifted the burden of proof on a licensing issue to NECNP. NECNP's contention is that the Applicants are required to study the evacuation shadow phenomenon. Applicants have the burden of proving either that they are as a matter of law not required to examine that factor or that they have done so adequately. It is not the burden of NECNP or its expert to perform a study of the evacuation shadow phenomenon for this site before it can ever be heard on its contention that the Applicants must perform that study.

Similarly, the Board has resolved on the basis of affidavits a dispute between NECNP's expert and the Applicants' on the adequacy of the latter's vehicle demand estimates. As we have observed, the Applicants' expert failed even to address this concern in his submission except by way of his general contention that an NRC time study validates the Applicants' overall methodology and results. Mr. Herr, on behalf of NECNP, disputed that conclusion both generally and with respect to the particular matter of vehicle demand estimates and cited another NRC-sponsored study which concludes that the assumption employed by the Applicants in arriving at their estimates always results in a low estimate of the number of automobiles

being evacuated. See Affidavit of Philip B. Herr, on NECNP Contentions III.12 and 13, Pars. 7, 11. The Board's ruling on this specific point again violates the elementary proposition that trials are not to be conducted by affidavit and reflects the erroneous view that it is NECNP which bears the burden of proof on this issue. Thus, the Board ruled against NECNP on the affidavits, finding its expert's opinion "vague and speculative" because he had not conducted a site-specific study of automobile demand. See Exhibit A, at 13.

In addition to committing these errors the Board has, without any discussion, explanation, or rulings, precluded testimony and cross-examination on another issue specifically addressed by both the Applicants' expert and NECNP's as to which they disagreed -- namely, the significance for evaluation of the Applicants' time study of certain prior experiences with evacuation in this area. See Affidavit of James A. MacDonald on NECNP III.12 and 13; Affidavit of Philip B. Herr on NECNP Contentions III.12 and 13, Par. 12. And the Board has committed clear error in its rulings of law on other issues. It has, with respect to the issues of the need for evacuation time estimates to reflect notification/preparation/mobilization times and population growth over the lifetime of a plant, admitted that the Commission's regulations do not specifically address these matters one way or another. And yet, faced with

the opinion of NECNP's expert that these items are critical and with an NRC-sponsored study which demands inclusion of notification/preparation/mobilization times and an NRC Staff document incorporated into the Commission's regulations which NECNP's expert reads as requiring consideration of population growth, ^{4/} the Board has ruled as a matter of law that these items are not required. See Exhibit A, at 10-11, 13-14. It has done so without the benefit of expert testimony or argument on (a) the importance of these factors, (b) the fact that they have been considered in virtually all other evacuation time studies, and (c) the illogic of any interpretation of the Commission's regulations as not requiring their consideration.

II. Bases For Interlocutory Review

Attorney General Bellotti urges this Board to undertake interlocutory review of the Licensing Board's action on these contentions because the Board's grossly erroneous view of the law governing summary dismissal of contentions, as demonstrated by this recent ruling, will affect the basic structure of the remainder of this proceeding in a pervasive and unusual manner,

^{4/} The Board reads the NUREG document differently than does NECNP's expert, but cites nothing in support of its reading. See Exhibit A, at 13-14.

result in unusual litigation expense and delay, and impede rather than aid development of a sound record for decision-making. See Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-379, 5 NRC 565, at 566-68 (1977); Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, at 483 (1975). The Board's misconceptions as to the obligations which the Applicants must meet in this proceeding and the rights of intervenors further threaten all intervenors with "immediate and serious irreparable impact which, as a practical matter, [cannot] be alleviated by a later appeal." See Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), supra, at 1192. No later appeal can remedy the harm, both to intervenors' finances and to the important matters of public health and safety which they are seeking to address, of being forced to participate in a proceeding where their most fundamental rights will be consistently violated.

In the event that this Board does not direct certification of this order to it, Attorney General Bellotti will be forced to consider seeking extraordinary relief in federal court to prevent an enormous waste of the financial and other resources of the Commonwealth of Massachusetts. Such waste would

necessarily follow from forced participation in a proceeding before a tribunal which believes that it has the authority to dismiss significant health and safety concerns supported by expert affidavit without ever hearing the expert's testimony and which is as confused as is the Board below over which party has the burden of proof in this proceeding.

Respectfully submitted,

ATTORNEY GENERAL
FRANCIS X. BELLOTTI

By:



Jo Ann Shotwell
Assistant Attorney General
Environmental Protection Division

"EXHIBIT A"

RECEIVED

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E. P. D.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Helen F. Hoyt, Chairperson
Emmeth A Luebke
Jerry Harbour

In the Matter of)	Docket Nos. 50-443-OL
)	50-444-OL
PUBLIC SERVICE COMPANY)	(ASLBP No. 82-471-02-OL)
OF NEW HAMPSHIRE, et al.)	
(Seabrook Station, Units 1 and 2))	June 30, 1983

MEMORANDUM AND ORDER
(Ruling on Motions for Summary Disposition)

MEMORANDUM

As discussed below, the Board grants in part and denies in part Applicants' Twenty-First Motion for Summary Disposition and dismisses New England Coalition Against Nuclear Pollution (NECNP) Contentions III.12 and III.13. The Board also grants Applicants' Seventh Motion for Summary Disposition to the extent that motion has not been withdrawn.

I. On February 14, 1983, Applicants filed their Seventh Motion for Summary Disposition, which addressed inter alia New Hampshire (NH) Contention 21, and their Twenty-First Motion for Summary Disposition, which addressed NECNP Contentions III.12 and III.13. NH 21, NECNP III.12, and NECNP III.13 relate to Applicants' on-site emergency plans and evacuation time estimates.

By Order of March 16, 1983, the Board deferred until further notice

the due date for answers to motions for summary disposition of on-site emergency planning contentions.¹ Nevertheless, answers to Applicants' motions were received from the Seacoast Anti-Pollution League (SAPL)² and from NH.³ Then, on May 11, 1983, the Board ruled that answers or supplemental answers to the pending motions for summary disposition were due within 20 days after service of the SER Supplement addressing Applicants' on-site emergency plan, and that pursuant to 10 CFR § 2.749(a), parties opposing any answer filed in support of a pending motion for summary disposition would have 10 days from service of that answer to respond to any new facts or arguments presented in the answer. Memorandum and Order (Memorializing Prehearing Conference and Ruling on Motions for Summary Disposition), at 7 (May 11, 1983).

On May 11, 1983, the Staff served the parties with the SER Supplement addressing on-site emergency plans. On June 1, NECNP filed its answer opposing Applicants' Twenty-First Motion for Summary Disposition; and on June 6, the Staff filed an answer opposing Applicants' Seventh Motion for Summary Disposition and supporting Applicants' Twenty-First Motion for Summary Disposition. New Hampshire did not supplement its previous answer to Applicants' Seventh Motion,

1. The Board's Order ruled on NECNP Motion for Deferral of Motions for Summary Disposition or for Dismissal (March 3, 1983). Answers to this NECNP Motion were filed by Applicants and NH on March 8, 1983, and by the NRC Staff on March 10, 1983.

2. SAPL Objection to Applicants' Twenty-First Motion for Summary Disposition (March 15, 1983).

3. NH Answer to Applicants' Seventh Motion for Summary Disposition (March 23, 1983).

and NECNP did not respond to the NRC Staff's answer in support of Applicants' Twenty-First Motion. The Applicants, however, subsequently withdrew part of their Seventh Motion, owing to the Staff's opposition. Applicants' Letter to the Board (June 13, 1983); Applicants' Letter to the Board (June 20, 1983).

II. NH-21 states:

Protective Action

The State contends that the Applicant's emergency plan does not demonstrate how, in case of an accident resulting in a site area or general emergency, the large numbers of people in the zone of danger may be protected or evacuated. Until there is reasonable assurance that adequate on-site and off-site protective measures can and will be taken, the Board should not issue an operating license.

In admitting this contention, the Board limited it to on-site protective measures. Memorandum and Order at 32 (Sep. 13, 1982).

In their Seventh Motion for Summary Disposition, Applicants asserted that all requirements related to on-site emergency protective measures have been addressed and described. On the other hand, NH in its Answer, supra note 3, avers generally 1) that Applicants have not adequately

described the measures to be employed in minimizing personnel exposure to radiation and 2) Applicants have not adequately described the arrangements for medical services.

The Board finds that NH's averments, although generalizations, are supported by and not inconsistent with the specific issues the Staff raises in opposition to Applicants' Seventh Motion. According to the Staff, Applicants' on-site emergency plans is deficient in the following respects:

- a. Updated letters of agreement with local fire, hospital and ambulance services must be submitted to the NRC;
- b. The Applicants must describe their capability for monitoring and decontamination of plant evacuees and their vehicles at the plant and at the off-site assembly area;
- c. The Applicants must list equipment and its location for individuals remaining or arriving on-site for respiratory protection, protective clothing and radioprotective drugs; and
- d. A further description of first aid facilities including supplies, layout, capacity and access to decontamination capabilities must be provided.

NRC Response to Applicants' Seventh and Twenty-First Motions for Summary Disposition, at 3 (June 6, 1983).

To these four specific issues, Applicants no longer object, but Applicants continue to seek summary disposition of any other issues within the scope of NH-21. Applicants' Letter to the Board (June 13, 1983); Applicants' Letter to the Board (June 20, 1983). In particular, Applicants believe that NH's first averment, that the on-site plan does not adequately describe measures to control exposure to radiation,

exceeds the scope of the Staff's conclusions (which is coextensive with Applicants' partial withdrawal of their Seventh Motion) and should be dismissed.

Underlying NH's first averment is NH's belief that Applicants' use of the terms "measures" and "programs" in section 10.3 of the on-site emergency plan is too imprecise. However, Applicants have stated--and it is clear from NH's Answer--that these terms are being used to describe situation-specific responses. The Board finds that the detail NH is seeking in this instance is not required by the regulations and would not be conducive to a flexible and effective emergency response capability. In view of the Staff's specific conclusions accompanied by affidavit, the affidavit accompanying Applicants' motion, the Board's own review of section 10 of the on-site emergency plan, and the lack of specificity in and lack of evidentiary support for NH's Answer,⁴ the Board grants Applicants' Seventh Motion as modified.

Accordingly, NH-21 is restated as follows:

Applicants' Emergency Plan as it relates to on-site protective measures is deficient in the following respects:

- a. Updated letters of agreement with local fire, hospital and ambulance services must be submitted to the NRC;

4. When a proper showing for summary disposition has been made by the movant, the party opposing the motion must aver specific facts in rebuttal. 10 CFR § 2.749(b). Moreover, where the movant has satisfied his initial burden and has supported his motion by affidavit, the opposing party must proffer countering evidential material or an affidavit explaining why it is impractical to do so. Id.; F.R.Civ. P. 56(e) and Advisory Committee Note; see Adickes v. Kress & Co., 398 U.S. 144, 160-61 (1970). NH has not supplied a countering affidavit, and while NH has made reference to two interrogatories, the Board finds that those interrogatories and answers do not establish the existence of a genuine issue of material fact.

- b. The Applicants must describe their capability for monitoring and decontamination of plant evacuees and their vehicles at the plant and at the off-site assembly area;
- c. The Applicants must list equipment and its location for individuals remaining or arriving on-site for respiratory protection, protective clothing and radioprotective drugs; and
- d. A further description of first aid facilities including supplies, layout, capacity and access to decontamination capabilities must be provided.

III. NECNP III.12 states

The evacuation time estimates provided by the Applicants in Appendix C of the Radiological Emergency Response Plan are inaccurate in that they provide unreasonably optimistic estimates of the time required for evacuation. In addition, the estimates provided in the radiological emergency plan are useless to emergency planning because they fail to include bounds of error, to indicate the basis for codes or assumptions used for the time estimates, to indicate whether the model used is static or dynamic, to provide a sensitivity analysis for the estimates or to reveal the underlying assumptions.

and NECNP III.13 states

The preliminary evacuation time estimates submitted by the Applicants assume favorable weather conditions and thus fail to account for the worst case situation of adverse weather conditions developing on a busy summer weekend afternoon. Nor do they take into account evacuee directional bias, evacuation shadow, or reasonably expected vehicle mix. As a result, the estimates are unduly optimistic and useless to future planning.

By affidavit of James A. MacDonald, which accompanied Applicants' Twenty-First Motion, Applicants addressed the general adequacy of their preliminary evacuation time estimates and also addressed the specific deficiencies alleged by NECNP in its two contentions.

A. SAPL's Objection

In SAPL's Objection, supra note 2, SAPL attacks the legal sufficiency of Applicants' Twenty-First Motion and accompanying

affidavit and exhibits. SAPL's argues the irrelevancy of the statements by Mr. MacDonald (Applicants' affiant) attesting to the utility of Applicants' evacuation time estimates. According to SAPL, the utility of an evacuation time estimate has no bearing on the accuracy of those estimates--the issue raised by NECNP's contentions.

The Board rejects this premise. Perfection is not the standard against which an evacuation time estimate is adjudged; rather, one can only determine whether an estimate is sufficiently accurate by considering whether it serves the purposes for which it was computed. The Board has scrutinized Applicants' Twenty-First Motion, accompanying affidavit, and exhibits and concludes that Applicants have made a sufficient showing for summary disposition.

Although SAPL's argument is that Applicants' motion is legally insufficient, SAPL also "incorporates by reference" SAPL's answers to Applicants' interrogatories, in order to demonstrate the existence of litigable issues. SAPL's Objection, supra note 2, at 2, 4. The Board has reviewed these answers, but rejects them as countering evidential material. Answers to interrogatories can be used to counter evidential material proffered in support of a motion for summary disposition, but only if they are made on the basis of personal knowledge, aver facts that would be admissible as evidence, and are made by a respondent competent to testify to those facts. SAPL, however, is proffering its own answers made by its attorney. There is no indication that SAPL's attorney was answering on the basis of personal knowledge, or that he is competent to testify as to his assertions; and his assertions would not be admissible as evidence.

B. NECNP's Answer

NECNP, for the most part, has not rebutted Applicants' statements with respect to the specific NECNP allegations. In particular, NECNP makes no mention in its Answer or accompanying affidavit of the need for Applicants to include in their evacuation time estimates: 1) bounds of error, 2) the basis for codes, 3) indication whether Applicants' model is static or dynamic, 4) a sensitivity analysis, 5) proper consideration of evacuee directional bias, and 6) proper consideration of vehicle mix. Accordingly, the Board finds that there exists no genuine issue of material fact with respect to these issues and that Applicants are entitled to a favorable decision as a matter of law; therefore, the Board grants Applicants' Twenty-First Motion to the same extent.

There remain NECNP's general allegation that Applicants' evacuation time estimates are inaccurate and NECNP's specific allegations that Applicants have improperly failed to consider 1) an adverse weather-summer scenario and 2) evacuation shadow. In addition to the two specific allegations, NECNP now avers several further items in support of its general allegation that the evacuation time estimates are inaccurate; these averments are that the evacuation time estimates 1) do not factor in notification/preparation times, 2) do not evaluate simultaneous evacuation of beaches lying from NE to SSE of the site, 3) incorrectly approximate evacuation of only one vehicle per household, 4) fail to account for population growth, and 5) are not yet based on actual, chosen evacuation routes.

The Board accepts NENCP's general allegation only to the extent it is supported by a specific allegation or averment, and accordingly the Board discusses in turn each specification below.

1. Adverse Weather-Summer Scenario

Applicants assert "the postulation of an adverse weather condition simultaneous with peak beach use was rejected as a useful analysis for evacuation traffic plan development purposes." Applicants' Twenty-First Motion (Affidavit of James A. MacDonald). The basis for this conclusion is apparently that "most people do not go to, remain on, or congregate at, beaches during a storm." Applicants' Twenty-First Motion, at 3 (Statement of Material Facts). The Staff, while supporting Applicants' motion, does not address the issue.

As NECNP correctly points out, NUREG-0654, FEMA-REP-1 (Rev. 1): "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" (Nov. 1980) [hereinafter NUREG-0654, Rev. 1], provides that adverse conditions should be considered, and that "a northern site with a high summer tourist population should consider rain, flooding or fog as the adverse condition. . . ." Id., App. 4, at 4-6, 4-7.⁵ Furthermore, while a large number of people would not generally be on the beaches

5. While a NUREG is normally considered as mere guidance to an applicant, in the case of emergency planning regulations, NUREG-0654 was specifically considered in the rulemaking proceeding and is referenced by the rules. 10 CFR Part 50, App. E, n.4. According to the Commission,

[t]he standards [in the rules] are a restatement of the basic NRC and now joint NRC-FEMA guidance to local governments. See NUREG-0654; FEMA- REP-1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants for Interim Use and Comment" [January 1980].

Statement of Consideration for Final Rule (Emergency Planning Regulations), 45 Fed. Reg. 55402 (1980).

Accordingly, the Board in this instance gives NUREG-0654 considerable weight in determining what must be included in an evacuation time estimate.

during foul weather, there might yet remain a considerable additional tourist population in the beachside hotels, summer homes, and rental properties; nor is a sudden summer storm an unforeseeable event. Therefore, the Board denies summary disposition with respect to this issue.

2. Evacuation Shadow

Applicants aver that the evacuation shadow phenomena does not affect their time evacuation estimates, because "the transportation corridors serving the overall area would be available for any additional 'evacuation shadow' evacuee use. Such transportation corridors are not taxed to capacity in the evacuation estimate analyses performed by the Applicants." Applicants' Twenty-First Motion (Affidavit of James A. MacDonald). NECNP's expert disputes this assertion, but avers no hard facts in support of his opinion. Accordingly, the Board concludes that NECNP's position with respect to this issue is speculative,⁶ that there exists no genuine issue of material fact, and that Applicants are entitled to a favorable decision as a matter of law. Therefore, the Board grants summary disposition of the issue.

3. Notification/Preparation Times

NECNP avers that Applicants' evacuation time estimate should, but

6. See Memorandum and Order (Memorializing Prehearing Conference, and Ruling on Motions for Summary Disposition), at 11 (May 11, 1983), citing 6. J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice, ¶ 56.15[3] at 56-486, 487 (2d ed. 1982).

does not, include notification and preparation time estimates, and NECNP cites NUREG/CR-1745: "Analysis of Techniques for Estimating Evacuation Times for Emergency Planning Zones" 3, 4 (Nov. 1980). NECNP Answer (Affidavit of Philip B. Herr). The Board considers this issue one of law. The Board has examined NUREG/CR-1745, which subdivides evacuation time into decision time, notification time, preparation time, and response time. However, while an analysis from initiating event to completed response might be useful, it is not required by the regulations or by NUREG-0654, as this Board reads those requirements. As stated in the version of NUREG-0654 that was considered by the Commission during its emergency planning rulemaking, "[t]he requested estimates for time required for evacuations relate primarily to the time to implement an evacuation as opposed to the time required for notification." NUREG-0654, FEMA REP-1 (Rev. 0), "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" App. 4, at 4-1 (Jan. 1980) [hereinafter NUREG-0654, Rev. 0].⁷ Although this particular passage is not found in NUREG-0654, Rev. 1, the Board can find no indication that the NRC purposely intended to change the requirement. In addition, the Board finds support for not requiring an estimate of notification times in the regulatory prescription of those times. 10 CFR Part 50, App. E, § D.3.

Accordingly, the Board concludes as a matter of law that Applicants' evacuation time estimates are not deficient in omitting notification/preparation times, and the Board grants summary disposition

7. In addition, Appendix 4 to NUREG-0654, Rev. 0, was entitled "Request for Evacuation Time Estimates (After Notification) for Areas Near Nuclear Power Plants." (Emphasis added).

with respect to this issue.

4. Simultaneous Evacuation

NECNP's expert avers that Applicants' omission of time estimates for simultaneous evacuation of the beach areas lying NE to SSE of the site prevents using the time estimates to realistically assess protective action options. NECNP Answer (Affidavit of Philip B. Herr). Because this is the first time that this specific issue has been raised (to the Board's knowledge), neither Applicants nor the Staff have addressed it.⁸

The Board has reviewed Applicants' evacuation time estimates and finds that Applicants have estimated evacuation times for various EPZ sectors in accordance with NUREG-0654, Rev-0, App. 4 at 4-3. However, the revised version, NUREG-0654, Rev. 1, now requires an estimate of the time to evacuate the entire EPZ (in addition to estimates for EPZ sectors).⁹ NUREG-0654, Rev. 1, App. 4 at 4-4. Therefore, Applicants are not entitled to a favorable decision as a matter of law, and the Board denies summary disposition of this issue. However, because neither Applicants nor the Staff have had the opportunity to address this issue (nor the Board the benefit of their advocacy), the Board would consider a timely motion for reconsideration.

8. The averment is relevant, however, to NECNP's general allegation in NECNP III.12.

9. Although an evacuation time estimate for the entire EPZ is not included in Appendix C to Applicants' Radiological Emergency Plan, NUREG/CR-2903 suggests that Applicants have in fact done such an analysis. See NUREG/CR-2903, "An Independent Assessment of Evacuation Time Estimates for a Peak Population Scenario in the Emergency Planning Zone of the Seabrook Nuclear Power Station," at 20 (Oct. 1980).

5. Vehicles per Household

NECNP cites NUREG/CR-1745, supra, in support of its averment that an assumption that approximately one vehicle per household would be used in an evacuation produces a low estimate. NECNP Answer (Affidavit of Philip B. Herr). The Board notes that Applicants estimate that more than one vehicle per household would be used.¹⁰ Moreover, the Board finds this NECNP averment vague and speculative; NECNP avers no facts specific to the Seabrook area and inconsistent with Applicants' assumption. Accordingly, with respect to this issue, the Board concludes that there exists no genuine issue of material fact and that Applicants are entitled to a favorable decision as a matter of law. Therefore, the Board grants Applicants' Twenty-First Motion with respect to this issue.

6. Population Growth

NECNP avers that Applicants' evacuation time estimates are inadequate because they fail to account for growth, and NECNP cites NUREG-0654 in support. NECNP Answer (Affidavit of Philip B. Herr, p. 5). The cited portion of NUREG-0654 states, "[t]he number of permanent residents shall be estimated using the U.S. Census data or other reliable data, adjusted as necessary for growth." NUREG-0654, Rev. 1, App. 4, at 4-2. NECNP misinterprets this provision; NUREG-0654 requires the adjustment of census data that is not current and accurate, and not

10. Applicants assume an average automobile occupancy factor of 3.0, whereas the average persons per occupied dwelling in Rockingham County is 3.3. Seabrook Radiological Emergency Plan, App. C, at 8 (Applicants' Evacuation Time Estimates).

projected evacuation time estimates for future populations. Applicants have made appropriate adjustments. Seabrook Radiological Emergency Plan, App. C, Table 1 (Applicants' Evacuation Time Estimates). And as the population in the Seabrook area changes, Applicants are required to update their estimates. NUREG-0654, Rev. 1, App. 4, at 4-1.

Accordingly, with respect to this issue, the Board concludes that there exists no genuine issue of material fact and that Applicants are entitled to a favorable decision as a matter of law. Therefore, the Board grants Applicants' Twenty-First Motion with respect to this issue.

7. Evacuation Routes

NECNP's final averment is that Applicants' evacuation time estimates are inaccurate because they are not yet based on the actual evacuation routes chosen by the emergency plans. NECNP Answer (Affidavit of Philip B. Herr, pp. 6-8).

Evacuation time estimates serve two purposes; they provide data which is used to develop specific evacuation plans, and they provide information which can be used by decision-makers in responding to an actual emergency. To date, Applicants' Preliminary Evacuation Time Estimates are tailored only to the first purpose. See Letter from Arthur M. Shepard, Project Manager, to Darrell G. Eisenhut (August 4, 1980) (submitting Applicants' Evacuation Time Estimates), Seabrook Radiological Emergency Plan, Appendix C. Only after the evacuation routes have been chosen can Applicants revise their estimates to fulfill

the second purpose, and this Applicants have stated unequivocally they will do. Id. NECNP's last averment simply presents no litigable issue, nor can any adverse legal conclusion be drawn from the present incompleteness of the estimates. Accordingly, the Board grants Applicants' Twenty-First Motion with respect to this issue.

In accordance with the above rulings, NECNP III.12 and NECNP III.13 are restated as follows:

NECNP III.12/III.13: Evacuation Time Estimates

The evacuation time estimates provided by Applicants in Appendix C of the Radiological Emergency Plan are deficient in failing to include an estimate of:

1. the times for evacuation during adverse weather conditions developing on a busy summer weekend; and
2. the times for simultaneous evacuation of beach areas lying NE to SSE of the Seabrook site.

All other issues and averments, including NECNP's professed skepticism as to the accuracy of Applicants' demographics and efficacy of their model--skepticism which the Board finds unsupported by specific, relevant, averred facts--are dismissed.

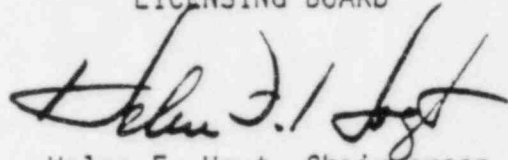
ORDER

Based on the foregoing, it is this 30th day of June, ORDERED

1. That Applicants' Seventh Motion for Summary Disposition, to the extent not withdrawn, is granted; all issues other than those in the restated NH-21, above, are dismissed.

2. That Applicants' Twenty-First Motion for Summary Disposition is granted in part and denied in part; all issues other than those in the restated NECNP III.12/III.13, above, are dismissed.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

A handwritten signature in dark ink, appearing to read "Helen F. Hoyt", written in a cursive style.

Helen F. Hoyt, Chairperson
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 30th day of June, 1983.