UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence Brenner, Chairman
Dr. A. Dixon Callihan
Dr. Richard F. Cole

In the Matter of	Docket Nos. 50-456 50-457
COMMONWEALTH EDISON COMPANY	
(Braidwood Nuclear Power Station, Units 1 and 2)	July 30, 1985
	LBP-85-27

MEMORANDUM DETAILING RATIONALE IN SUPPORT OF JUNE 21, 1985 ORDER ON ADMISSIBILITY OF NEINER FARMS CONTENTION 4 (RAILROAD EXPLOSION)

BACKGROUND

On January 12, 1979, Bob Neiner Farms, Inc. submitted a petition to intervene in the Braidwood operating license proceeding. Among the contentions Neiner Farms wished to have litigated was one alleging that the use of the Illinois Central Railroad to transport explosive materials from the Joliet Army Ammunition Plant creates a hazardous condition due to the proximity of the railroad tracks to the Braidwood facility. This contention has been designated "Neiner Farms Contention 4." The admissibility of Neiner Contention 4 was addressed in the Licensing Board's Special Prehearing Conference Order ("SPCO"). LBP-85-11, 21 NRC 609, 617-24 (April 17, 1985).

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In earlier pleadings, both Applicant and Staff had urged the Board to bar the relitigation of Contention 4 under the legal theory of collateral estoppel. 1/ The Applicant and Staff claimed that because issues associated with transporting explosive substances by rail were considered and ruled upon by the Licensing Board in the construction permit stage Braidwood site suitability determination, this Board is estopped from considering the issue in the operating license case. See 8 AEC 1197, 1226-27 (Findings 85-88) (1975); SPCO, 21 NRC at 619. For the reasons stated in the SPCO, the Board rejected the collateral estoppel argument and admitted the entire contention for litigation in the OL proceeding. SPCO, supra. 21 NRC at 617-24.

Applicant timely filed objections to the Board's SPCO. Applicant apparently reconsidered its earlier argument and eschewed challenging our determination that collateral estoppel would not be properly applied to Contention 4. Applicant's Objections to Board Order, at 2, dated April 29, 1985 ("Applicant's Objections"). In its Objections, Applicant instead propounded a different basis for excluding the contention and requested that the Board reconsider the contention's admission. Applicant's new argument rests on the claim that litigation of Contention 4 is barred because it impermissibly challenges NRC

1/ Answer of Commonwealth Edison Company to the Contentions of Bob Neiner Farms, at 4-5 (August 22, 1979); Applicant's Supplemental Brief, September 17, 1979; Staff letter to Board, September 12, 1979.

regulation 10 C.F.R. § 50.13, which encompasses both U.S. defense activities and acts of sabotage. 2/

On April 30, 1985, the Board issued an unpublished Order directing the NRC Staff and Neiner Farms to respond to Applicant's new argument. We also directed the Staff and permitted Neiner Farms to address several Board questions. We find ourselves in basic agreement with the "NRC Staff Response to Applicant's Objections to Licensing Board's Special Prehearing Conference Order," dated May 20, 1985 ("Staff Response").

2/ See 10 C.F.R. § 2.758a; Metropolitan Edison Co. et al. (Three Mile Island Nuclear Station, Unit 2), ALAB-456, 7 NRC 63, 65 (1978); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), LBP-80-30, 12 NRC 683, 692-93 (1980).

Applicant acknowledges that its new arguments based on 10 C.F.R. § 50.13 should have been raised at an earlier stage in the proceedings. Applicant's Objections, at 7. We agree. It should have been raised in this operating license proceeding six years ago, in its August 22, 1979 answer to contentions. Indeed, it arguably should have been raised over ten years ago, before a similar issue was considered by the Licensing Board in the uncontested site suitability hearing phase of the construction permit proceeding. However, we also agree with Applicant, at least in the circumstances of the regulation in question, that Applicant's objections to the subject matter jurisdiction of the Board should not be deemed to have been waived. Cf. F.R.C.P. 12(h). Applicant's Objections, at 8. There is no suggestion by anyone, nor do we perceive any possible basis for one, that Applicant for some strategic reason would have knowingly deferred making its subject matter jurisdiction objection. Any inconvenience to the other parties and the Board has been insubstantial (given the result we reach on the new objections), and is far outweighed by the goal of correctly defining, in advance of trial, the Board's jurisdiction over the issues advanced by Neiner Farms Contention 4. Indeed, prior to the filing of Applicant's new objections, the Board had been considering whether to ask the parties to address the admissibility of subpart (c) of Contention 4 in light of Section 50.13(a).

Neiner Farm's May 20, 1985 response was extremely brief and unhelpful. It did not discuss or challenge Applicant's argument that subsection (c) of the contention, relating to sabotage, is barred by 10 C.F.R. § 50.13(a). It did challenge, with little discussion, Applicant's argument that the entire contention is barred by Section 50.13(b), by asserting, in agreement with the Staff and our holding below, that the railroad transportation of munitions from the ammunition plant is not a deployment of weapons.

Applicant's objections to the admission of Contention 4 were ruled on in the Board's unpublished June 21, 1985 Order Reconsidering Admission of Neiner Farms Contention 4. In summary fashion, the Board ruled that, as asserted by Applicant and the NRC Staff, Contention 4(c) is barred by Section 50.13(a) (relating to sabotage). However, we rejected Applicant's other objection that the entire contention is barred by Section 50.13(b) (relating to U.S. defense activities). On this point, we agreed with the NRC Staff and Neiner Farms. Accordingly, the Board ruled that subparts (a) and (b) of the contention are appropriate for litigation in this operating license proceeding. This memorandum serves to supplement the Board's June 21, 1985 Order, explaining more fully why the Board ruled as it did on reconsideration of Neiner Farms Contention 4.

RATIONALE FOR RULING

As accepted by the Board in the SPCO, Neiner Farms Contention 4 stated: 3/

> Intervenors contend that the proximity of the Illinois Central Railroad to the plant site and the use of the rail system to transport explosive materials from the Joliet, Illinois arsenal and other plants or depositories creates an unacceptably hazardous condition not considered by the Atomic Safety and Licensing Board, which issued the partial initial decision on environmental and site suitability matters for the Braidwood Station (LBP-75-1, 8 AEC 1197 (January, 1975)).

3/ Pursuant to the Board's encouragement, the contention has now been reworded by agreement of the parties to better reflect the actual controversy. July 11, 1985 filing by NRC Staff; Tr. 155. The Board approves the rewording, which states:

> 4. Intervenors contend that the proximity of the Illinois Central Railroad line to the Braidwood Station site and the use of that rail line to transport munitions from the Joliet Army Ammunition Plant, including the potential transport of RDX and HMX explosives which may be manufactured at that facility in the future, create an unacceptably hazardous condition. The condition is hazardous in the following respects:
>
> a. The probability of an accident involving an explosion of munitions on the rail line is not so low as to preclude its consideration as a design basis accident; and
>
> b. The design of the Braidwood Station is such that the facility could not withstand the occurrence of an explosion of munitions on the rail line without endangering the public health and safety.

> At the construction permit stage the analysis of the probability of an explosion was inadequate in that:
>
> a) the six-month period during 1974 for which the traffic from the Joliet arsenal was analyzed is not representative of other traffic periods in the past and may not be representative of the traffic to be expected in the future.
>
> b) the analysis of the traffic was based on peacetime traffic only.
>
> c) only the probability of accidental or inadvertent explosions were assessed and the probability of sabotage or purposefully caused explosions were not explored.

Applicant argues, as we have already noted, that litigation of Neiner Farms Contention 4 would be an impermissible challenge to 10 C.F.R. § 50.13. That regulation provides:

> An applicant for a license to construct and operate a production or utilization facility, or for an amendment to such license, is not required to provide for design features or other measures for the specific purpose of protection against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person, or (b) use or deployment of weapons incident to U.S. defense activities.

We begin our evaluation of Applicant's argument by reviewing the rationale behind Section 50.13. We find that this provides the primary basis for our rulings on the contention.

Section 50.13 was adopted by the NRC's predecessor agency, the Atomic Energy Commission ("AEC"), in 1967 because there was an obvious, practical need to exempt applicants from being forced to protect against certain types of military or paramilitary attacks which the Commission recognized were beyond the sphere of an applicant's responsibility. This included situations in which the national security was threatened, even if the attack directed its force against a nuclear power facility. When the Commission developed the policy of excluding hostile attacks from litigation, it did so based on its determination that the country's national security is intended to be left entirely to the nation's defense establishment and security agencies. Florida Power & Light Co. (Turkey Point Nuclear Generating Units 3 & 4), 4 AEC 9, 13 (1967), affirmed, Seigel v. AEC, 400 F.2d 778 (D.C. Cir. 1968).

Prior to the adoption of 10 C.F.R. § 50.13, the Atomic Energy Commission had articulated the reasoning in support of the regulation in the Turkey Point facility construction permit case, which arose in the late 1960s. Turkey Point, supra, 4 AEC 9 [4/] In the Turkey Point proceeding, the Commission addressed whether the Licensing Board was required to adjudicate intentional efforts to damage a facility when those efforts are carried out by an enemy of the United States, the same

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4/ See also the Statement of Consideration, issued with the final rule. 32 Fed. Reg. 13,445 (September 26, 1967.)

question this Board faces vis-a-vis Contention 4(c). Id. At the time the Commission issued its decision in Turkey Point, what is now Section 50.13 was only a proposed rule. (See 32 Fed. Reg. 2821, February 11, 1967.) The Commission noted that the background information provided with the publication of the proposed rule "confirmed the Commission's past practice of not requiring applicants for facility licenses to provide for special design features or other measures for protection against the effects of attacks and destructive acts directed against the facility by an enemy of the United States." Turkey Point supra, 4 AEC at 11.

We quote the Commission's language in the August 4, 1967 Turkey Point Memorandum and Order, which sets forth the rationale for excluding enemy sabotage from licensing considerations:

> We believe that our practice of excluding [protection against enemy attacks or destructive acts] from licensing consideration is founded on compelling factors. It would appear manifest, as an initial proposition, that the protection of the United States against hostile enemy acts is a responsibility of the nation's defense establishment and of the various agencies of our Government having internal security functions. The power reactors which the Commission licenses are, of course, equipped with numerous features intended to assure the safety of plant employees and the public, as indicated by our earlier summary description of the proposed Turkey Point facility. These safeguards, while designed to protect against accidents and their consequences, do not have as their specific purpose protection against

> the effects of enemy attacks and destructive acts--although the massive containment and the procedures and systems for rapid shutdown of the facility could also serve a useful purpose in the latter regard. One factor underlying our practice in this connection has been a recognition that reactor design features to protect against the full range of the modern arsenal of weapons are simply not practicable and that the defense and internal security capabilities of this country constitute, of necessity, the basic "safeguards" as respects possible hostile acts by an enemy of the United States.
>
> The circumstances which compel our recognition are not, of course, unique as regards a nuclear facility; they apply also to other structures which play vital roles within our complex industrial economy. The risk of enemy attack or sabotage against such structures, like the risk of all other hostile acts which might be directed against this country, is a risk that is shared by the nation as a whole. This principle, we believe, is rooted in our political history and we find no Congressional indication that nuclear facilities are to be treated differently in the subject regard.

4 AEC at 13.

The United States Court of Appeals for the District of Columbia reviewed the Commission's Memorandum & Order in the Turkey Point case. The Court of Appeals affirmed the Commission and basically aligned itself with the Commission's legal reasoning. Seigel v. Atomic Energy Commission, 400 F.2d 778 (1968). The Court summarized the basis on which the Commission made its decision as:

> (1) the impracticability, particularly in the case of civilian industry, of anticipating accurately the nature of enemy attack and of designing defenses against it, (2) the settled tradition of looking to the military to deal with this problem and the consequent sharing of its burdens by all citizens, and (3) the unavailability, through security classification and otherwise, of relevant information

> and the undesirability of ventilating what is available in public proceedings.

400 F.2d at 782.

The Court of Appeals understood and endorsed the Commission's determination that requiring an applicant to demonstrate that its nuclear facility is protected against various forms of enemy attack would "stifle utterly the peaceful utilization of atomic energy in the United States." Seigel, 400 F.2d at 783-84. The Court's conclusion clearly upholds Section 50.13:

> In short, Congress certainly can be taken to have expected that an applicant for a license should bear the burden of proving the security of his proposed facility as against his own treachery, negligence, or incapacity. It did not expect him to demonstrate how his plant would be invulnerable to whatever destructive forces a foreign enemy might be able to direct against it in 1984.

400 F.2d at 784.

Contention 4(c) is Barred by Section 50.13(a)

We turn now to the two inquiries necessitated under Section 50.13(a). The first is whether the sabotage postulated by Contention 4(c) is "directed against the facility." Applicant argues that the postulated attack or sabotage against the Illinois railroad train transporting explosives from the ammunition plant would be "directed against" the Braidwood facility within the meaning of the regulation.

We agree. The very premise of Neiner Contention 4(c) is that the attack or sabotage of the train will take place at a location in proximity to the Braidwood plant, consistent with the further apparent premise that it is the intent of the attackers (or saboteurs) to damage the nuclear power station. Any such attack would be a more localized attack and, therefore, one even more clearly directed against the nuclear facility than other postulated "indirect" attacks barred from consideration in other cases. In any event, the subjective intent of such attackers is not material.

In Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-81-42, 14 NRC 842, 844-45 (1981), intervenors argued that their postulation of an act of detonating a nuclear explosion during an attack on a neighboring country which allegedly could damage the Perry nuclear plant, was not an attack "directed against" the facility. The Perry Board found, and we agree given the rationale of Section 50.13 described above, that a Board is not required to engage in the absurdity of the subjective test of inquiring into the mind of an attacker (or saboteur) to decide whether the act was intended to damage the nuclear facility or whether such damage was merely incidental to some other hostile goal of the attacker. Id. at 844. Rather, as stated by another Licensing Board, the very nature of the act of detonating a nuclear device which could damage a nuclear power plant constitutes, a priori, a destructive act directed against the facility. Washington

Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-66, 18 NRC 780, 783 (1983).

Therefore, while the postulated attack or sabotage may be perpetrated on the train or its tracks, such activity satisfies the requirement that the sabotage be "directed against the facility." This would be so whether or not the subjective intent of the perpetrators is to damage the nuclear facility.

The second inquiry is whether, in the words of Section 50.13(a), the saboteurs qualify as "an enemy of the United States, whether a foreign government or other person." We find it implausible to categorize any group of individuals who attempt to damage a trainload of munitions traveling from a federal arsenal as other than an enemy of the United States. Moreover, as Applicant discusses in its Objections, at 5-6, the Appeal Board has addressed an intervenor's exception to a Licensing Board's finding that an applicant need not protect against an armed band of saboteurs intent upon, and capable of, damaging the plant. Consolidated Edison Co. (Indian Point Station, Unit No. 2), ALAB-202, 7 AEC 825 (1974). The Appeal Board in Indian Point characterized the intervenor's exception as raising the issue of whether an applicant must take affirmative measures against an attack by an armed group which is not an enemy of the United States. Id. at 829-30. In denying the intervenor's exception, the Appeal Board focused on whether it would be reasonable to require an Applicant to provide such protection. The

Indian Point decision is unequivocal that it would not be a reasonable requirement.

> This situation presents problems which, from an applicant's standpoint, differ little in kind or degree from the problems presented if the armed band is in fact an enemy of the United States. 19/ From a practical standpoint, if there is an attack by a substantial force, those who have to decide whether to seek assistance, and whether to provide responsive capabilities, will probably not first ponder over the question of whether or not the force is an enemy of the United States.

Id. at 830 19/. See and compare Seigel v. AEC, 400 F.2d 778, 782 (D.C. Cir. 1968).

The logic of the Appeal Board's reasoning is supported with its interpretation of the rationale behind Section 50.13. The Appeal Board notes that the regulation does not require "an applicant to protect against the effects of enemy attacks and destructive acts" and that the same rationale "would also apply to an armed band of trained saboteurs." 7 AEC at 830. The Appeal Board concluded:

> As in the case of defending against the threat of an attack by an enemy of the United States, it seems that an applicant should be entitled to rely on settled and traditional governmental assistance in handling an attack by an armed band of trained saboteurs. Without such reliance, each facility could indeed become an armed camp.

Id.

The more recent Perry decision also provides legal reasoning from which we may conclude that the saboteur band postulated by Neiner Contention 4(c) would be an enemy of the United States. Perry, supra, 14 NRC 842. The portion of the decision explaining the rejection of a subjective test to determine if a nuclear weapon-induced electromagnetic pulse is "directed against the facility" (consideration of which would be precluded under Section 50.13(a)), also explains how the Board determines whether the attacking force is an "enemy of the United States."

> . . . if a nation fires a nuclear device which causes electromagnetic pulses over the United States, that nation is responsible for the result. By that hostile act, the nation becomes an enemy of the United States and is responsible for direct or indirect consequences resulting from its use of a nuclear weapon.

Perry, supra, 14 NRC at 844. We concur that where an act is hostile, and could damage a nuclear plant and thereby cause harm to the public health and safety resulting from radiation releases, then the perpetrator of that act is an enemy of the United States for purposes of application of Section 50.13(a). Where, as here, such enemy act is beyond the type of design basis security threat encompassed by 10 C.F.R. § 73.1(a), then an applicant is entitled to rely on the government's military or law enforcement agencies to handle such an attack.

The discussion of our rejection of Contention 4(c) would not be complete without some mention of the physical protection of nuclear

power plants mandated under the NRC regulations. The Seigel Court, as quoted supra at 10, had alluded to the security responsibilities to be shouldered by an applicant. Those provisions in the regulations requiring an applicant to provide physical security measures as a prerequisite to obtaining an operating license are contained in 10 C.F.R. Part 73. It has been previously stated by a Licensing Board that Section 50.13 is to be read in pari materia with the regulations of Part 73. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 & 2), LBP-82-119A, 16 NRC 2069, 2098 (1982). The distinctions between these two parts of the regulations serve to shore up our conclusion that Neiner Contention 4(c) may not be litigated in this proceeding.

The regulations encompassed by Part 73 require a nuclear facility to be secure against specific design-basis threats. Such threats contemplate well-trained individuals (likely assisted by a knowledgeable insider), who carry hand-held weapons and/or other hand-carried equipment for destroying the reactor's integrity. 10 C.F.R. § 73.1(a)(1). Part 73 refers to sabotage accomplished with the use of small weapons by small bands of saboteurs. In contrast, when read in the light of its own rationale (discussed above) and Section 73.1, Section 50.13 addresses military-style attacks which are broader in nature and carried out with heavier weapons. Shearon Harris, supra, 16 NRC at 2098.

The threat postulated in Contention 4(c) is an explosion of the railroad train and its cargo, even if it is argued that this explosion may stem from a chain reaction begun by a small band of attackers with hand-held equipment. Thus, the method and nature of sabotage contemplated by Contention 4(c) would be beyond the scope of the design basis threat contemplated under 73.1(a)(1). We agree with the NRC Staff (Response, at 10) that a railroad carload of munitions clearly was not intended for litigation under a regulation related to "hand-held weapons."

Furthermore, the sabotage envisioned by Part 73 is perpetrated at the plant site or against nuclear fuel being shipped to or from the site. Section 73.1(b). Thus, Applicant is required to take certain precautions to ensure the plant's security. In the scenario postulated by Contention 4(c), sabotage is committed outside the plant's security boundary along the railroad's route from the Joliet arsenal. For that reason alone, Contention 4(c) could not be litigated under 10 C.F.R. § 73 because the security measures required by Part 73 do not extend beyond the vicinity of the plant's boundaries. See 10 C.F.R. §§ 73.45 and 73.46. (As noted, under part 73, other measures must be taken to protect shipments of nuclear material to or from the plant. This subject is unrelated to the contention.)

Contention 4 is not Barred by Section 50.13(b)

In our June 21, 1985 Memorandum and Order, the Board ruled that Neiner Contention 4(a) and 4(b) is admissible for litigation in this proceeding. We disagree with Applicant that the accidents postulated by Neiner Farms in subparts (a) & (b) of the contention would be the result of use or deployment of weapons incident to U.S. defense activities, consideration of which is barred by Section 50.13(b). Rather, we are in essential agreement with the NRC Staff. The Staff has provided the Board with a well-reasoned explanation of those areas in which Applicant's arguments falter. NRC Staff Response, at 3-6.

We first examine the language of Section 50.13(b) to determine whether the shipment of explosive materials and munitions from (or even to) the Joliet Army Ammunition Plant would be encompassed within the regulation's intended meaning of "deployment of weapons." Proceeding initially with the simplest of linguistic tools, we found that the definition of deployment contained in Webster's Third New International Dictionary (unabridged) is as follows:

> de-ploy ... vt 1a: to extend (a military or naval unit) in width or in both width and depth [he deployed his squad on both sides of the road] b: to place or arrange (armed forces) in battle disposition or formation or in locations appropriate for their future employment [deployed forces to check aggressions] 2: to extend or place as if deploying troops [deploying the editors ... in various phases of political reporting -- Newsweek]

> [harried roadmasters deploying equipment and work gangs along the grade in military fashion -- R. L. Neuberger] deploy vi: to move in or as if in deployment [the squad deployed and made a dash for the hill -- Hanama Tasaki] [the staff deployed to their phones -- Time.]

The meaning of Section 50.13(b) reasonably understood from the word "deploy" is that associated with the definitions set in a military context. The munitions (explosives or propellants for artillery shells) involved in this case, although they may be considered military munitions, are not being strategically arranged in locations appropriate for their use, unlike nuclear missiles being placed in silos from which they can be launched, or conventional weapons being tactically placed in the field with a military unit during war (or during a standby alert, or even engaged in a training exercise). Rather, the munitions in question are merely being transported from (or to) the Joliet ammunition plant, perhaps to storage locations, or to ammunition factories, or to military bases, such that in the event of a national security crisis or military exercise the munitions would then be deployed to a destination specified by the military for use in our national defense. Moreover, it stretches the rationale on which Section 50.13 is premised, as discussed above, to label as "deployment of weapons" mere movement of raw ingredients for the manufacture of ammunition, or the ammunition itself, to or from a local ammunition plant.

The remaining subject of the contention (as set forth in the reworded Contention 4(a) and (b), note 3, supra), is the alleged public hazard from damage to the Braidwood plant by an accidental explosion close to the nuclear plant of a railroad train cargo of munitions being shipped from the nearby Joliet Army Ammunition Plant. Litigation of this issue should not intrude on national defense responsibilities and concerns of the country in general, which are the province of the military defense and security establishment. No strategic actions involving the use or deployment of weapons are affected by an analysis of the risk (consequences and probability) of the alleged railroad explosion. To be sure, if we find on the merits in favor of Neiner Farms, possible remedies by the Applicant may be limited by the U.S. Army's prerogative, over which we exercise no jurisdiction, to operate the Joliet ammunition plant any way it desires to do so, including use of railroad shipments near the Braidwood plant. However, possible limitations on Applicant's remedies, if any are necessary after our decision on the merits, do not affect the NRC's subject matter jurisdiction to determine the merits of modified Neiner Farms Contention 4(a) and (b).

The Staff made the additional point that the cases cited by Applicant do not support Applicant's position that Neiner Contention 4(a) and (b) is not litigable. We agree that the cases are not factually close enough to the Braidwood circumstances to buttress Applicant's position. The cases Applicant relied upon were Philadelphia

Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1500 (1982) and Perry, supra, 14 NRC 842, 844-45. In those cases, the weapon in issue was a nuclear missile (or other nuclear weapon) explosion postulated to cause an electromagnetic pulse (EMP) over a large area. See also WPPSS, supra, 18 NRC 780, 783. The EMP was postulated to disable the nuclear plant protection systems by electrical interference. Both Boards determined that explosion of a nuclear missile or other weapon would be either an enemy act, or, if a U.S. nuclear device, would arise from the deployment of weapons by the U.S. 14 NRC at 845; 15 NRC at 1500. U.S. nuclear missiles (in silos or in the air), or other nuclear weapons in the air, are deployed weapons incident to U.S. defense activities. Stated another way, we find the widespread defense activity of the deployment of U.S. nuclear missiles in silos or in the air to be factually distinct from the localized nature of the transportation of weapons or explosives to or from the Joliet ammunition plant by railroad, particularly given the rationale behind Section 50.13. 5/

We also note that if we accept Applicant's arguments, a Licensing Board would not be permitted to consider anything related to the military that might impact on a nuclear facility. That is, the

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5/ Given our view, we do not have to consider whether the contents of the shipments from the ammunition plant would constitute "weapons."

Applicant would have the Board employ such an extremely broad reading of Section 50.13(b) that almost anything military could be argued to be a use or deployment of weapons as an incidence of U.S. defense. For example, under the Applicant's reasoning, a Licensing Board would be forbidden from considering the air traffic of military planes taking off and landing at a military airfield located near a nuclear plant. This would conflict with what we understand to be long-standing AEC and NRC practice of considering the possible risks to a nuclear plant of crashes of military airplanes. E.g., Consumers Power Co. (Big Rock Point Plant), LBP-84-32, 20 NRC 601, 639-52 (1984) (a case with which Applicant's counsel before us is familiar). Similarly, we see no reason to bar our consideration of the shipment of ammunition or raw explosive materials for the sole reason that they may, at some later point, be deployed or used in national defense activities.

CONCLUSION

The above sets forth the Board's reasons for our rulings in the unpublished Order of June 21, 1985, that:

1. Neiner Farms Contention 4(c) is barred from litigation by 10 C.F.R. § 50.13(a); and

2. Neiner Farms Contention 4(a) and (b) (as now reworded) is not barred by 10 C.F.R. § 50.13(b),

and is admitted as an issue in controversy in this proceeding.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Lawrence Brenner

Lawrence Brenner, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
July 30, 1985