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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
CAROLINA POWER AND LIGHT COMPANY AND	)	
NORTH CAROLINA EASTERN MUNICIPAL	)	Docket Nos. 50-400 OL
POWER AGENCY	)	50-401 OL
	)	
(Shearon Harris Nuclear Power Plant,	)	
Units 1 and 2)	)	

NRC STAFF RESPONSE TO APPEAL BOARD ORDER OF JANUARY 9, 1986

Janice E. Moore
Counsel for NRC Staff

January 30, 1986

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I. INTRODUCTION

On January 9, 1986, the Atomic Safety and Licensing Appeal Board (Appeal Board) designated to preside over appeals of Licensing Board decisions in the above-captioned operating license proceeding issued an order requiring the parties to file supplemental briefs. The Appeal Board asked three questions concerning Eddleman Contention 12, a contention which the Licensing Board rejected. The responses of the Staff of the Nuclear Regulatory Commission (Staff) to the Appeal Board's questions are set forth below.

II. BACKGROUND

Intervenor Wells Eddleman filed Contention 12 in his supplement to his petition to intervene in this proceeding. "Supplement To Petition To Intervene by Wells Eddleman, pro se" at 61 (May 14, 1982). Contention 12 alleged that:

> Applicants' FSAR, ER, the SER, and the ES do not properly include the environmental effects of dumping low-level radioactive wastes produced at SHNPP into the ocean, which EPA has proposed a rulemaking to allow (1982). This issue is particularly relevant to SHNPP as a special case because the State of NC is not now a member of any radioactive waste disposal compact, has no land burial facility for low-level radioactive wastes, and thus may in 1986 (well within the operation period anticipated for Harris 1 and 2) have no other alternative means of disposing of the low-level wastes produced by the Harris project, other than ocean disposal.

Both the Applicants and the Staff opposed the admission of this contention. 1/ The Licensing Board rejected the contention on the grounds that Mr. Eddleman failed to provide a basis for consideration of ocean dumping, and that there was no indication that it was a probable consequence of the proposed action. In The Matter of Carolina Power And Light Company and North Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2092 (1982).

Intervenor Eddleman appealed the Licensing Board's rejection of this contention on the ground that the Licensing Board, he alleged, went to the merits of the contention in rejecting it. "Appeal From Partial Initial Decision on Environmental Contentions" at 21-22 (April 9, 1985). Both the Applicants and the Staff supported the Licensing Board's decision. "Applicants' Brief In Reply To Intervenors' Appeal From The

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1/ "Applicants' Response to Supplement to Petition to Intervene by Wells Eddleman" at 52-53 (June 15, 1982); "NRC Staff Response to Supplemental Statements of Contention by Petitioners to Intervene" at 22 (June 22, 1982).

Partial Initial Decision On Environmental Contentions" at 36-38 (May 9, 1985); "NRC Staff Brief In Reply To The Appeal Of Joint Intervenors And Wells Eddleman Of The Licensing Board's Partial Initial Decision On Environmental Matters" at 34-35 (May 24, 1985).

On January 9, 1986, the Appeal Board issued an order asking for supplemental briefs from the parties on three questions. The questions are as follows:

> 1) Did the Licensing Board in LBP-82-199A, 16 NRC 2069, 2092 (1982) err in rejecting Eddleman Contention 12 (concerning ocean dumping) in light of our decision in Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 425-26 (1973)... ?
>
> 2) Did the Marine Protection, Research and Sanctuaries Act of 1972, as amended, 33 U.S.C. 1401 et seq., any other statute, or any regulation (e.g., 40 C.F.R. Part 220), prohibit ocean dumping of low level radioactive commercial reactor waste at the time of the Licensing Board's rejection of Eddleman Contention 12 or does any statute or regulation currently prohibit such dumping?
>
> 3) Assuming the first question is answered in the affirmative and both parts of the second question are answered in the negative, would our imposition of a condition (prohibiting the ocean dumping of Shearon Harris low level radioactive waste) on any future Licensing Board authorization for an operating license alleviate the need to reverse and remand this issue for further proceedings?

This brief responds to the above questions.

III. DISCUSSION

A. The Licensing Board Did Not Err in Rejecting Eddleman Contention 12

The Appeal Board in its first question asks whether, in light of an Appeal Board decision in Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423 (1973), the Licensing Board in this proceeding erred in rejecting Eddleman Contention 12. In the Staff's view the Licensing Board's decision to reject

Eddleman Contention 12 was correct. ALAB-130 is distinguishable from the situation presented to the Licensing Board in Harris, and thus is inapplicable. There are several reasons for its inapplicability.

First, ALAB-130 was concerned with alternatives to the proposed action of constructing the Grand Gulf facility. Eddleman Contention 12, on the other hand, alleges that a potential environmental impact of the proposed operation of the Harris facility was not considered by the Applicants or the Staff. As the Appeal Board and the Courts have previously noted, the Staff's consideration of environmental impacts in the EIS is limited to those significant aspects of the probable consequences of a proposed action. Public Service Electric and Gas Company, Atlantic City Electric Company (Hope Creek Generating Station, Units 1 and 2) ALAB-518, 9 NRC 14, 38-39 (1979); Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (C.A. 9, 1975); Life of the Land v. Brinegar, 485 F.2d 460, 472 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974). Judgement as to what impacts must be considered in an EIS is bounded by a rule of reason. Trout, supra. Therefore, in order for an Intervenor to establish an admissible contention concerning an alleged environmental impact of, for example, the operation of a facility, as basis for his contention he must at least allege with some specificity why the alleged impact is a probable consequence of the proposed action. Such a showing is necessary in order for an intervenor to establish that his contention meets the basis requirement of 10 C.F.R. § 2.714(b) of the Commission's regulations. Unless an intervenor at least alleges, with some minimal support, that the impact relates in some way to the proposed action, Licensing Boards

would be unable to determine whether the rule of reason, which is such an integral part of NEPA law, mandates consideration of the alleged environmental impact.

Mr. Eddleman never made any attempt to allege that ocean dumping was a probable consequence of operation of the Harris facility by alleging even that the license application, the ER, or the FSAR stated that ocean dumping was contemplated. Mr. Eddleman merely speculated that ocean dumping might occur some time in the future due to the operation of Harris. He bases this speculation on the absence of a waste disposal compact to which the state of North Carolina is a party. However, in this contention he ignores the Applicants' stated plan for disposal of low level waste at a land burial site. 2/ See, e.g. FSAR § 11.4; SER p. 11-16; "Affidavit of George H. Warriner" (May 8, 1984). On that bare allegation, the Licensing Board had no basis to allow litigation of the alleged environmental impact. Therefore, the contention was correctly rejected.

In contrast, ALAB-130 involved the question of whether the subject of the alternative to construction of a nuclear facility of energy production from geothermal sources was an appropriate one for litigation.

2/ Mr. Eddleman also proposed a contention on the potential unavailability of waste disposal sites. This contention was dismissed by the Licensing Board at the summary disposition stage. "Memorandum and Order (Revision of and Schedule for Filing Written Testimony on Eddleman Contention 9; Rulings on Eddleman Contentions 45 and 67)" (July 24, 1984) [Hereinafter Board Order]. See, discussion in Section C, Infra.

The contention there was that Applicant had failed to consider the use of geothermal sources as an alternate source of energy. Grand Gulf, supra, 6 AEC at 425-26. There is no judicial or commission precedent which requires that alternatives, to be considered, must be a probable consequence of the proposed action. Rather, what is required is that alternatives be feasible, and not remote and speculative. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. et. al. 435 U.S. 519, 551-554 (1978). As long as the allegation of feasibility is made, then a basis has been established, according to Commission precedent, for litigation of the question of whether a particular alternative has been adequately considered by the Staff and/or an Applicant. See, Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1) ALAB-590, 11 NRC 542 (1980). Such an allegation was made in ALAB-130.

Even if Contention 12 were to be interpreted as suggesting an alternative to a portion of the proposed action, 3/ the Intervenor in ALAB-130 presented more of a basis for the proffered contention than Mr. Eddleman provided to the Licensing Board in Harris. Counsel for the Intervenor in Grand Gulf alleged that he would present evidence that there were geothermal sources in the Applicant's service area. Though that is indeed a minimal basis, it is a colorable one. Any further

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3/ It is not clear what Mr. Eddleman meant to imply by this contention. The contention as written does not suggest that it would be preferable to engage in ocean dumping rather than land burial of low level radioactive waste. Contentions concerning alternatives usually attempt to raise preferable alternatives to a proposed action.

exploration of that allegation would have required the Licensing Board in Grand Gulf to examine evidence from all parties to determine the factual correctness of the allegation. No such situation existed in Harris. Mr. Eddleman did not, as mentioned above, allege that the Applicants were seeking permission from the pertinent authorities to engage in ocean dumping, or that they had entered or discussed entering into any contract with an entity which was seeking authority to engage in ocean dumping. He did not point to any part of the license application which indicated that ocean dumping was contemplated. Therefore, as the Licensing Board noted, he provided them with no basis for his contention. No argument can be made that he even presented a colorable basis. Such a colorable basis is necessary to satisfy the standards of 10 C.F.R. § 2.714(b). For this reason, ALAB-130 would not require the Licensing Board to admit Eddleman Contention 12.

For the reasons discussed above, the Staff concludes that the Appeal Board's first question must be answered in the negative. The Licensing Board did not err in rejecting Eddleman Contention 12, because ALAB-130 was inapplicable to the situation before the Licensing Board.

B. There is No Statute or Regulation Which Would Have Precluded Ocean Dumping at the time the Contention Was Rejected, or at the Present Time

In its second question the Appeal Board is seeking information about the state of the law concerning ocean dumping. The act which controls ocean dumping is the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, (P.L. 97-424) commonly known as the Ocean Dumping Act. 33 U.S.C. § 1401 et. seq. Ocean dumping of low level radioactive waste

is also governed by the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention) 26 UST 2403, TIAS 8165 (December 29, 1972). 4/ The regulations promulgated by the Environmental Protection Agency (EPA) to govern ocean dumping of waste are contained in 40 C.F.R. Part 220.

The Ocean Dumping Act governs the ocean disposal of all waste materials. 33 U.S.C. § 1401(b). It allows the Administrator of EPA to issue permits for ocean disposal of low level radioactive waste, only if EPA determines that "such dumping will not unreasonably degrade or endanger human health, welfare, or amenities or the marine environment, ecological systems or economic potentialities." 33 U.S.C. § 1412(a). 5/

While the disposal of low level radioactive waste is now theoretically allowed, the process to engage in it is a complex one. Permit applications for ocean disposal must be accompanied by a Radioactive Material Disposal Impact Assessment which must include, among other things, an environmental analysis of the dumping site, a plan for the retrieval of the material if the container leaks or decomposes, a comprehensive monitoring program, and an analysis of the resulting

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4/ The Convention establishes criteria for ocean dumping carried out under the jurisdiction of the signatory nations. The United States has ratified the treaty and United States statutory and regulatory provisions are consistent with the treaty.

5/ Amendments to the Ocean Dumping Act placed a two-year moratorium on the authority of the Administrator of EPA to approve permits for ocean dumping of low level radioactive waste, although limited disposal associated with research could be allowed. 33 USC § 1414 (h). This moratorium extended from January of 1983 until January of 1985.

environmental and economic conditions if the containers fail to contain the radioactive waste initially deposited at the site. 33 U.S.C. § 1414(i)(1). The Impact Assessment must also include determinations by the affected states that any proposed action would be consistent with approved coastal zone management programs. 33 U.S.C. § 1414(i)(1)(F). Finally, the assessment must contain the results of comments, the results of meetings with state officials, and the results of public hearings in the affected states. 33 U.S.C. § 1414(i)(1)(I). In addition, the amendments prohibit the Administrator of EPA from issuing a permit without the express approval of both houses of Congress. 33 U.S.C. § 1414(i)((4)(A-B). Therefore, while ocean dumping is not now precluded, and was not precluded at the time the Eddleman Contention 12 was rejected, 6/ the current process for obtaining a permit to engage in ocean dumping is an involved one, with the final authority for its approval or disapproval resting with another federal agency and with Congress.

As discussed above, in addition to the Ocean Dumping Act, low level waste disposal in the ocean is also subject to the provisions of the London Dumping Convention. Any disposal of low level waste by a signatory nation is required to be in accordance with this convention and the recommendations of the International Atomic Energy Agency. London Dumping Convention, Annex II D.

6/ Although the pre-1983 statute governing the ocean dumping of low-level radioactive waste was not as detailed as the provisions

(FOOTNOTE CONTINUED ON NEXT PAGE)

In summary, while ocean dumping may be allowed, it is not controlled nor permitted by the Commission. Rather, it is regulated by EPA. However, the literal answer to the Appeal Board's second question is that ocean dumping of low level radioactive waste was regulated but not precluded at the time Eddleman Contention 12 was rejected, and is regulated but not prohibited now.

C. The Imposition by the Appeal Board of a License Condition to Preclude Any Future Ocean Dumping Is Unwarranted

In its third question the Appeal Board asked the parties to assume first that the Licensing Board erred in rejecting Eddleman Contention 12, and second, that there are no statutes or regulations which preclude ocean dumping of low level radioactive waste. The Appeal Board then questioned whether its imposition of a License Condition precluding future ocean dumping by Applicants would obviate the need for a reversal and a remand of the matter to the Licensing Board. January 9 Order at 2. This question must be divided into two parts. The first part concerns whether, assuming the Licensing Board erred in rejecting Eddleman Contention 12, an assumption to which the Staff does not ascribe, a license condition prohibiting ocean dumping of low level waste is warranted. The second portion of the question concerns whether, assuming that a license condition is found to be justifiable, a reversal and

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

currently in effect, a rigorous analysis of the need for, consequences of, and alternatives to, the proposed dumping action was still required.

remand of the matter to the Licensing Board would be necessary or appropriate.

First, it does not appear that the Appeal Board would have the authority to impose a license condition prohibiting ocean dumping. Under the Ocean Dumping Act, which is the controlling legislation, the agency with the authority to issue permits or deny permits for ocean dumping of low level radioactive waste is EPA. 33 U.S.C. § 1412. 7/ The situation here is analogous to that presented in Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 NRC 702, 713 (1978), and other Commission cases following that decision, Carolina Power and Light Company (H.B. Robinson, Unit No. 2), ALAB-569, 10 NRC 557 (1979); Philadelphia ELectric Company (Peach Bottom Unit 3), ALAB-532, 9 NRC 279 (1979); Public Service Company of New Hampshire (Seabrook Units 1 and 2), CLI-78-1, 7 NRC 1 (1978). These cases concerned the Commission's role in water quality matters which are regulated by EPA pursuant to the Federal Water Pollution Control Act (FWPCA). As the Appeal Board in Robinson, supra, noted, certain lessons were learned from the study of the FWPCA and it's legislative history. First, the Appeal Board noted that the responsibility of other licensing agencies for water quality matters had

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7/ The Commission's regulations at 10 C.F.R. § 20.302(b) appear to give the Commission the authority to consider applications for ocean dumping. However, this provision of Part 20 was promulgated before the passage of the Ocean Dumping Act. Since that act states that permits or licenses other than those issued pursuant to the Ocean Dumping Act are void and have no legal effect, any attempt by the Commission to approve such an application would have no legal effect. 33 U.S.C § 1416.

been curtailed. Second, the mandate for developing expertise in water quality matters was given to EPA. Finally, licensing agencies were not to second guess EPA by undertaking independent analyses and setting their own standards concerning water quality matters. 10 NRC at 561. Here the responsibility of the Administrator of EPA is either to issue or deny permits for ocean dumping. Therefore, there is a serious question as to whether it is within the authority of the Commission or the Appeal Board as its delegate, to impose license conditions which would, in effect, constitute a review of the actions of the agency charged by Congress with the responsibility for regulating ocean dumping. See, Yellow Creek, supra.

In addition, a license condition prohibiting future ocean dumping of low level radioactive waste is not warranted, because the Licensing Board has already determined that the premise underlying Eddleman Contention 12 is faulty. The Licensing Board admitted Eddleman Contention 67 which states:

> There is no assured disposal site to isolate the low-level radioactive wastes produced by normal operation at Harris from the environment and the public until said waste, which includes highly toxic (radiotoxic) and long-lived nuclear wastes such as Sr-90, Cs-137 and Pu-239, has decayed to virtually zero levels of radioactivity and radiotoxicity. The lack of such an assured disposal site, endangers the health and safety of the public under AEA and this condition having changed since the CP stage (and CP FES) due to the refusal of SC, NV and WA states to continue to accept unlimited amounts of low-level radioactive wastes; and by the enactment by Congress of laws allowing states to form compacts for low-level rad-waste disposal and to exclude wastes from states not members of such compacts. Sea disposal is not assured because EPA's proposed rule to allow disposal of low-level radioactive wastes in the oceans has not been enacted, and if enacted may be overturned by legal action or act of Congress.

Applicants filed a motion for summary disposition which was supported by the Staff. 8/ In their motion Applicants argued that for a number of reasons, there is reasonable assurance that disposal facilities would be available for low-level radioactive wastes generated by the operation of the Harris facility when needed. Applicants' Motion at 17. The Licensing Board in granting Applicants' Motion for Summary Disposition agreed with Applicants and the Staff that there is reasonable assurance that adequate long term disposal capacity for low-level waste generated by Harris will be available when it is needed. Board Order at 5. Mr. Eddleman did not appeal this Licensing Board decision. Therefore, Mr. Eddleman's premise that ocean dumping would be required since North Carolina is not a member of a waste disposal compact and thus land burial is not assured has already been found to be without merit. In such a situation a license condition prohibiting ocean dumping would not be justified.

Even if the Appeal Board did have the authority to impose such a license condition, it could not do so, unless the Applicants agreed to the condition, without providing the parties an opportunity to create an evidentiary record either in support of or in opposition to the license condition. Here the issue of the adequacy of Applicants' and Staff's consideration of the environmental impacts of ocean dumping was raised by

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8/ "Applicants' Motion for Summary Disposition of Eddleman 67 (Waste Disposal)" (May 8, 1984) [Hereinafter Applicants' Motion];

"NRC Staff Response In Support of Applicants' Motion for Summary Disposition of Eddleman Contention 67" (May 29, 1984)

a party, and the Licensing Board issued a decision not to conduct further inquiries into the issue. Therefore, as a general proposition, the Appeal Board would either have to remand the matter to the Licensing Board for further proceedings consistent with the Appeal Board's opinion or hold a hearing itself into the issue. The only way in which the Appeal Board could issue a license condition, assuming it had the authority to do so, without further evidentiary hearings would be if the Applicants agreed to the imposition of the condition. At this time there is no indication that Applicants would agree to such a condition. Therefore, if the Appeal Board wishes to have this issue considered further, it would necessitate either a remand to the Licensing Board or a hearing on the issue before the Appeal Board. For the reasons set forth above, the imposition of a license condition by the Appeal Board prohibiting future ocean dumping of low level radioactive waste is not warranted. However if, despite the above discussion the Appeal Board believes a license condition is necessary or appropriate, a remand would be necessary to establish an evidentiary record for the imposition of such a license condition.

IV. CONCLUSION

For the reasons set forth above, the Staff concludes in answer to the Appeal Board's three questions that: (1) the Licensing Board did not err in rejecting Eddleman Contention 12 even in light of ALAB-130; (2) there are no statutes or regulations which would prohibit ocean dumping of low level radioactive wastes now, nor were there any such statutes or regulations prohibiting ocean dumping at the time Eddleman

Contention 12 was rejected; and (3) the imposition by the Appeal Board of a license condition prohibiting ocean dumping in the future, is not warranted, but if the Appeal Board believes one is warranted it would be necessary to establish an evidentiary record to support that determination either through a remand or through a hearing before the Appeal Board.

Respectfully submitted,

Janice E. Moore
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 30th day of January, 1986

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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(Shearon Harris Nuclear Power Plant,	)	
Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO APPEAL BOARD ORDER OF JANUARY 9, 1986" in the above-captioned proceeding have been served on the following by deposit in the United states mail first class, or (*) through deposit in the Nuclear Regulatory Commission's internal mail system, or (**) by express mail or overnight delivery, or (***) by hand delivery, this 30th day of January, 1986:

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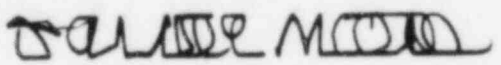

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