

NRC PUBLIC DOCUMENT ROOM

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of)
PUGET SOUND POWER & LIGHT)
COMPANY, ET AL.)
(Skagit Nuclear Power Projects,)
Units 1 and 2))

Docket No. STN-522
STN-523

NRC STAFF'S ANSWER TO INTERVENOR SCANP'S MOTION TO
REQUIRE IMPLEMENTATION OF EXECUTIVE ORDER 12114

On October 17, 1979, Intervenor SCANP filed a motion requesting that the Licensing Board direct the Staff to evaluate and consider the environmental impacts of the proposed Skagit Nuclear Power Project upon the human environment in Canada and to prepare an environmental impact statement concerning these impacts (Motion, p. 4.). This request is premised on SCANP's assertion that the NRC is "constrained and prohibited from issuing any construction permits, limited work authorizations, or taking any other major federal action until the NRC has adopted procedures to implement Executive Order 12114, and until those procedures have been followed in this docket." (Id.) SCANP finally requests that the Board defer consideration of the issue in controversy pertaining to the adequacy of the environmental impact statements (SCANP Contentions J-1 and J-16) until compliance with Executive Order 12114 has been implemented, executed, and litigated in this proceeding. The NRC Staff opposes this Motion and submits that it should be denied for the reasons set forth below.

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Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, was issued by the President on January 4, 1979. Its purpose was to ensure that Federal agencies which authorized and approved of major actions that significantly affected the environment outside the United States would take pertinent environmental considerations into account. To implement the established purpose, the Executive Order directed every Federal agency taking actions encompassed by the order and not exempted therefrom to have implementing procedures in effect by September 4, 1979.^{1/} The President designated the Department of State, in conjunction with the Council on Environmental Quality, as the lead agency to work with other relevant agencies to develop unified procedures for environmental review of actions covered by the Order. (See, Executive Order Sec. 2) These unified procedures have not yet been implemented.^{2/} However, the fact that these procedures to implement

^{1/} SCANP asserts, incorrectly, that the implementing date is October 4, 1979.

^{2/} These procedures cannot become effective until the provisions of Section 1913 of P.L. 95-630 (92 Stat. 3727) have been complied with. That Section provides that:

SEC. 1913. No environmental rule, regulation, or procedure shall become effective with regard to exports subject to the provisions of 22 U.S.C. 3201 et seq., the Nuclear Non-Proliferation Act of 1978, until such time as the President has reported to Congress on the progress achieved pursuant to section 407 of the Act (42 U.S.C. 2153c) entitled "Protection of the Environment" which requires the President to seek to provide, in agreements required under the Act, for cooperation between the parties in protecting the environment from radioactive, chemical or thermal contaminations arising from peaceful nuclear activities.

Since the President has not reported to Congress on the progress achieved pursuant to section 407 of the Nuclear Non-Proliferation Act of 1978, the unified procedures developed by the Department of State under Executive Order 12114 have not become effective.

Executive Order 12114 have not yet become effective is not important to the Staff's response to this Motion for several reasons.

First of all, SCANP's assertion that the NRC is clearly required to implement the Executive Order is erroneous as a matter of law. The NRC is an independent regulatory agency established by an Act of Congress. Its function is to put into effect and perform the legislative policies embodied in the statute which created the agency. It is clear that the President has no inherent constitutional authority or statutory basis to unilaterally impose the requirements set forth in this Executive Order on independent regulatory agencies.^{3/} While the NRC remains free to implement these requirements as a matter of policy, we submit this motion should be denied because there clearly is no legal requirement that the NRC do so.

^{3/} Such an agency "cannot in any proper sense be characterized as an arm or an eye of the executive." Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935) (discussing the Interstate Commerce Commission). Presidential orders have the force and effect of law only "when issued pursuant to the statutory mandate or delegation of authority from Congress." See Independent Meat Packers Association v. Butz, 526 F.2d 228, 234 (8th Cir. 1975), cert. denied, 424 U.S. 966 (1976), reasoning that an executive order which required inflation impact statements was not authorized by statute or the Constitution. While this Executive Order states that it furthers the purpose of the National Environmental Policy Act (NEPA), the Marine Protection Research and Sanctuaries Act, the Deepwater Port Act, and is consistent with the foreign policy and national security policy of the United States, it concedes that it is "based on independent authority." (Executive Order 12114, Sec. 1-1) Accordingly, this Executive Order is not authorized by any statute, but rather is based on the independent authority of the President to further environmental policy set forth in NEPA.

The Executive Order also cites the President's authority "vested in me by the Constitution, and the laws of the United States...." Although the President "shall take care to see that the laws be faithfully executed" (Article II, Section 3), he has no inherent power to regulate nuclear power. And the "take care" language of the Constitution does not give an executive order the force of law. Independent Meat Packers, supra, 565 F.2d at 235.

Secondly, even assuming that the NRC develops procedures or regulations as a matter of policy to implement the requirements of Executive Order 12114, those procedures or regulations would not apply to the licensing of the Skagit Nuclear Power Project. Executive Order 12114 procedures pertain only to export related activities of Federal agencies.^{4/} With regard to the related activities of the NRC that may become subject to this Executive Order, the Exemptions and Considerations set forth in Section 2-5(v), specifically exempts all "actions relating to nuclear activities except actions providing to a foreign nation a nuclear production or utilization facility as defined in the Atomic Energy Act of 1954, as amended, or a nuclear waste management facility." Since the Skagit project does not involve an export related NRC licensing function or an action providing a reactor to a foreign nation, it is clearly not subject to the provisions of this Executive Order.

4/ See White House Fact Sheet, dated January 5, 1979 attached to SCANP's Motion. For example:

"The Order reconciles competing but legitimate goals of environmental protection and those of foreign and export policy and national security." (Paragraph 2)

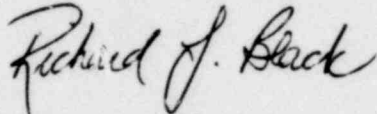
"The Order is designed to minimize any adverse effects upon U.S. exports and to further the Administration in nuclear non-proliferation, national security and other foreign policy objectives." (Paragraph 4)

"A minor fraction of the dollar volume of U.S. exports will require environmental reviews under this Order. The Order's procedures define and focus on those export actions which should receive special scrutiny because of their serious impacts on the environment and public health." (Page 2, Paragraph 3)

"The President designated the Department of State as the lead agency to develop unified procedures for environmental reviews of nuclear exports covered by the Order." (Page 2, Paragraph 4)

For the reasons set forth above, the NRC Staff submits that this Motion must be denied.

Respectfully submitted,

A handwritten signature in cursive script that reads "Richard L. Black".

Richard L. Black
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 6th day of November, 1979

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO INTERVENOR SCANP'S MOTION TO REQUIRE IMPLEMENTATION OF EXECUTIVE ORDER 12114" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 6th day of November, 1979:

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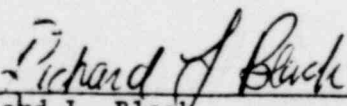
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