

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)
OFFSHORE POWER SYSTEMS)
(Floating Nuclear Power Plants))

Locket No. STN 50-43



NRC STAFF'S RESPONSE TO REQUEST
FOR DIRECTED CERTIFICATION

The NRC Staff opposes the request for directed certification filed by the Natural Resources Defense Council (NRDC) on November 30, 1978, in the captioned proceeding. NRDC seeks review by this Board of the Licensing Board's determination that the following contention is inadmissible as a challenge to 10 CFR Part 50, Appendix M:

The Staff has failed to find any even potentially acceptable estuarine or riverine site for an FNP, has identified serious real problems with such sites, has been advised by EPA that no estuarine, riverine or barrier island sites would be acceptable for an FNP and has therefore insufficient basis for concluding that the FNPs can with reasonable assurance be sited at shoreline sites. In effect, the Staff has attempted to justify a programmatic and generic finding of acceptability without having sufficient evidence upon which to base that finding -- a programmatic conclusion without programmatic findings. The following provide the bases for this and in all but one instance contain detailed reference to defects in the draft FES Addendum II, which, regrettably, were not corrected or modified in any significant way in the final FES Addendum II:

- i. NRDC Comments on Draft Addendum to FES Part II (4/27/78), including the June 9, 1978, letter to Mr. Kington;

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2. Letter to Kington from EPA dated May 1, 1978, pp. 1-2;
3. Letter to Knighton from EPA dated May 8, 1978, and attachment thereto (pp. 1-2);
4. Letter to Knighton from EPA dated July 5, 1978, pp. 1-2;
5. State of New Jersey Coastal Management Program - Bay and Ocean Shore Segment (May 1978), Draft Environmental Impact Statement (United States Department of Commerce (NOAA - Office of Coastal Zone Management)) - Section 7.4 (Energy Use Policies), Subsection 7.4.13, pp. 145-46.

The thrust of NRDC's contention is that a manufacturing license cannot issue in this proceeding unless and until specific acceptable riverine or estuarine sites are identified in the Staff's Final Environmental Statement. The Licensing Board ruled, after receiving responses to this contention from the Staff^{1/} and the Applicant,^{2/} that the contention was a clear challenge to Appendix M to 10 CFR Part 50,^{3/} which does not require, as a condition precedent to the issuance of a manufacturing license, that any specific sites be discussed or approved:

^{1/}"NRC Staff Answer to Natural Resources Defense Council Motion to Amend Contentions," dated August 24, 1978.

^{2/}"Applicant's Opposition to NRDC Motion to Amend Contentions," dated August 21, 1978.

^{3/}"Order" dated September 11, 1978.

An applicant for a manufacturing license pursuant to this Appendix M shall submit with his application an environmental report as required of applicants for construction permits in accordance with Part 51, provided, however, that such report shall be directed at the manufacture of the reactor(s) at the manufacturing site; and, in general terms, at the construction and operation of the reactor(s) at an hypothetical site or sites having characteristics that fall within the postulated site parameters. The related draft and final detailed statement of environmental considerations prepared by the Commission's regulatory staff will be similarly directed.

NRDC's "Request for Reconsideration or in the Alternative for Certification," dated September 15, 1978, was denied by the Licensing Board on November 9, 1978.

The purpose of the generic environmental review related to the operation of floating nuclear plants along the Atlantic and Gulf Coasts of the United States is to determine whether there is reasonable assurance that the eight plants to be manufactured can be sited and operated somewhere (either offshore or at shoreline locations) in the above geographical zones. In its Final Addendum to the Final Environmental Statement, Part II (NUREG-0056), the Staff discussed at length the siting of floating nuclear plants (FNPs) in rivers and estuaries, and raised significant environmental problems which would have to be overcome in siting FNPs in riverine or estuarine sites. However, the Staff had no basis upon which to make a generic

conclusion that it was impossible to find environmentally acceptable sites along the shoreline of the Atlantic and Gulf Coasts. Therefore, the Staff concluded (p. viii) that:

The eight floating nuclear power plants proposed for manufacture can, with a reasonable degree of assurance, be sited and operated as electric generating stations at offshore or shoreline sites.

In making this conclusion, the Staff emphasized (p. ix):

The evaluations summarized above support recommendation of the issuance of a manufacturing license to the applicant, such license to have no bearing on approvals for site-specific construction of floating nuclear power stations. These evaluations, which include environmental reviews, will be initiated in response to applications from purchasers of floating nuclear plants when individual purchasers file construction permits to site and operate floating nuclear power plants. This Environmental Statement does not address authorization or approval of any specific site as related to the filing by a utility-owner of any construction permit or other site-specific evaluation such as an early site review." (Emphasis supplied.)

The above conclusion of the Staff is simply an explicit recognition of the provision of Appendix M which states:

Prior to the "commencement of construction," as defined in §50.10, of a facility (manufactured pursuant to such a Commission license) on a site at which it is to operate--that is preparation of the site and installation of the facility--a construction permit that, among other things, reflects approval of the site on which the facility is to be operated must be issued by the Commission.

Of course, a purchaser of a floating nuclear plant for construction and operation at a specific site would submit an environmental report directed at the specific site chosen; before any commencement of construction at that site, the NRC would have to conclude that such construction would be compatible with NEPA.

STANDARDS FOR DIRECTED CERTIFICATION

As an initial matter, this Board has made clear that it strongly disfavors the certification of threshold issues regarding the admissibility of contentions in licensing proceedings:

This Board has not the duty, the resources or the inclination to commence a general practice of arbitrating at the threshold disputes over what are cognizable contentions-- either under Section 2.718(i) procedures or otherwise. 4/

In refusing to reconsider the above ruling, this Board emphasized that:

[a]lthough not going so far as to rule out entirely the availability of relief of that sort, we endeavored to make clear that petitions such as the one at bar would have little chance of success unless there appeared to be a high probability-- and not just some possibility--that serious error had been committed below. 5/

4/ Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-326, 3 NRC 406, 407 (1976) reconsideration denied, ALAB-330, 3 NRC 613 (1976), reversed in part on other grounds sub nom U.S. ERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976).

5/ ALAB-330, 4 NRC 613 at 615.

Further, as a general matter, this Board has not entertained discretionary interlocutory appeals except when the Licensing Board's ruling either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal, or (2) affected the basic structure of the proceeding in a pervasive or unusual manner.^{6/} Judged by these standards, NRDC's Motion not only fails to be persuasive, but borders on the frivolous.

NRDC'S SPECIFIC ARGUMENTS

The entire underpinning of NRDC's Motion is its statement that EPA has determined that there would be no acceptable sites available in rivers or estuaries for the siting of FNPs.^{7/} As a result of this determination, NRDC argues, there is no reasonable assurance that FNPs can be sited at shoreline sites. However, NRDC has inaccurately portrayed EPA's current position regarding shoreline siting of FNPs, which was set forth in a letter from the Administrator of EPA, Mr. Costle, to Offshore Power Systems dated Nov. 3, 1978.^{8/} Mr. Costle referred, in that letter, to a previous letter from the Applicant

^{6/}Public Service Co. of Indiana, Inc. (Marble Hill Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

^{7/}Motion, p. 3-4.

^{8/}A copy of this letter and the cover letter from the Applicant transmitting it to the Staff is provided as an Attachment. The reference to "RDES-II" in the cover letter is an obvious typographical error. It should read "RDES-III."

to EPA expressing concern that EPA was asking the NRC to prohibit shoreline siting of FNPs. In this regard, Mr. Costle states that EPA is seeking no such ban, but that he believes it will be extremely difficult to find environmentally acceptable shoreline sites. He further states:

In our role of advising the Commission on the environmental consequences of their licensing action, we are attempting to make it clear that special consideration for siting in these important and sensitive areas is essential. By emphasizing these concerns now, we hope to avoid future time consuming and non productive debate on inappropriate site proposals.

This EPA advice essentially comports with the Staff's conclusions in the Final Addendum to the Final Environmental Statement, Part II. Having inaccurately stated EPA's position on the matter, there is no remaining basis for NRDC's requested certification. Moreover, if NRDC is attempting to imply that EPA approval of a proposal is required in order for an agency to proceed with that proposal, it offers no support for that position. Indeed, the United States Court of Appeals for the District of Columbia Circuit recently refused to enjoin a proposal for sale of oil leases in circumstances in which both EPA and CEQ rated the proposal as unsatisfactory.^{9/}

^{9/} State of Alaska v. Andrus, 580 F.2d 465 (D. C. Cir. 1978).

Presumably as a result of the assumed EPA position regarding shoreline siting, NRDC argues that any manufacturing license issued should be limited to the member of units for which it can now be reasonably assured that sites are available. Apart from NRDC's inaccuracy in setting forth the current EPA position, this argument is a direct challenge to Appendix M, which specifically provides for issuance of a manufacturing license without such a finding. Perhaps in recognition of this fact, NRDC argues that the Commission had only ocean sites in mind when Appendix M was promulgated and may have assumed that ocean sites were plentiful, but that shoreline sites present a far different situation. However, there is no support for this assumption by NRDC. While it quotes from the Statement of Considerations issued at the time Appendix M was promulgated, the quoted language indicates only that "some of these sites may be ocean sites." That language doesn't support the argument that Appendix M applies only to ocean sites.

As further support for the requested certification, NRDC argues that without the availability of inshore siting, the number of plants proposed to be built may be drastically reduced or even eliminated. This argument is based upon a fundamental misunderstanding of the manufacturing license process. Even assuming, arguendo, that inshore siting were precluded, the

manufacturing license could still issue for eight plants if reasonable assurance were demonstrated that those plants could be sited in the open ocean along the Atlantic and Gulf Coasts. NRDC has never argued, nor does it now, that such reasonable assurance is lacking for ocean sites.

As a further basis for its position that specific sites must be analyzed in connection with this proceeding, NRDC argues that this case is analogous to the Pilgrim^{10/} and St. Lucie^{11/} cases, in which hypothetical alternative sites were analyzed by the Staff and the analyses were found to be unacceptable. However, the facts in the cited cases are not even remotely analogous to this proceeding. Pilgrim and St. Lucie dealt with alternatives to specific sites and were applications for siting at particular locations. However, the question of alternative sites is not involved at all in this proceeding, since unlike St. Lucie and Pilgrim, no approval for any specific site is sought. Of course, the Staff and Applicants for construction permits to emplace FNPs at specific ocean or estuarine sites will have to discuss the question of specific alternative sites. However, the application for a manufacturing license is far different; Appendix M requires an analysis of hypothetical sites.

^{10/} Boston Edison Co., et al. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-479, 7 NRC 774 (1978).

^{11/} Florida Power and Light Co. (St. Lucie Nuclear Power Project, Unit No. 2), LBP-77-27, 5 NRC 1038 (1977), affirmed ALAB-435, 6 NRC 541 (1977).

While it is not entirely clear, NRDC seems to seek certification on the ground that if certification is denied, and NRDC later wins an appeal, the record would have to be reopened necessitating a stay or accumulation of sunk costs. This argument is unavailing. First, as has been discussed, supra, even if shoreline sites were ultimately precluded, it does not necessarily follow that fewer FNPs would be manufactured. The sunk costs argument just doesn't work here. More importantly, however, this argument could be raised every time a contention is disallowed by a Licensing Board, since, if that determination is overturned on appeal, the record must be reopened and the possibility of a stay exists. NRDC has raised nothing unique here which would warrant the extraordinary action of directed certification.

Lastly, NRDC argues that directed certification would not prejudice any party to this proceeding. Suffice it to say that this is not one of the criteria for interlocutory review discussed, supra. Thus, the allegation, even if true, would not warrant the relief requested.

NRDC'S SUGGESTED QUESTIONS
FOR CERTIFICATION

In Attachment to its Motion, NRDC requests that the following specific questions be certified for this Board's consideration, on the basis of the arguments described above:

1. May a party contend in an Appendix M proceeding that approval of a manufacturing license and a finding that there is reasonable assurance that FNPs can be sited in a certain category of sites are not permissible where there are no possible sites within the identified category?

2. In promulgating Paragraph 3 of 10 CFR Part 50, Appendix M, did the Commission consider whether "hypothetical site or sites having characteristics that fall within the postulated site parameters" could include non-existent sites and, if not, does the non-existence of such sites constitute "special circumstances" within the meaning of 10 CFR §2.758?

3. Where the opposition to a contention is based upon its legal invalidity, as opposed to its procedural deficiency, should the contending party at least be provided with a reasonable opportunity to reply to the answer?

4. Prior to rejecting a contention as a challenge to a Commission regulation, should the contending party be provided an opportunity to demonstrate that "special circumstances" exist warranting application of the provisions of 10 CFR §2.758?

With regard to Question 1, as discussed above, NRDC has no basis for its allegation that there are no possible shoreline sites, because EPA's position is not as portrayed by NRDC. Even if the EPA position were set forth accurately, there is no authority to support the proposition that EPA's approval of the shoreline siting option is a condition precedent to the issuance of the manufacturing license. In addition to suggesting a question clearly based upon a false premise, NRDC has failed to demonstrate that the required tests for interlocutory relief set forth in Clinch River and Marble Hill, supra, are met in this case.

Question 2 asks for a determination whether the Commission meant for hypothetical sites to include nonexistent sites. First, if the Staff had evaluated specific existing sites, the sites would no longer be hypothetical. Secondly, to evaluate such specific existing sites would be to prejudge future site specific applications. Instead, the Staff analyzed in depth six biogeographical zones to determine whether the characteristics of those zones were such as to provide reasonable assurance that eight FNPs could be sited there, whether in the open ocean or near the shoreline. Thirdly, since this question is based upon the same false premise as involved in Question 1, there is no basis for the allegation upon which the question is grounded. In addition, NRDC's proposed

contention is, as the Licensing Board has twice ruled, such a clear challenge to Appendix M that no useful purpose would be served by further consideration of either Question 1 or 2 at this point in the proceeding; none of the showings required by the Clinch River and Marble Hill decisions have been made. Finally, to the extent NRDC suggests that the nonexistence of shoreline sites constitute special circumstances which would allow a waiver to Appendix M in this proceeding, NRDC is fully aware of the requirements for such a requested waiver pursuant to 10 CFR §2.758, and has complied with none of them. Specifically, NRDC has never presented to the Licensing Board a petition for waiver of Appendix M, accompanied by the required affidavit, and discussing the factors set forth in §2.758(b). Once the Licensing Board had ruled that the contention in question constituted a rules challenge, NRDC was free to file a petition for waiver but chose not to do so.

With regard to Questions 3 and 4, the instant Motion is devoid of any discussion of these questions. NRDC has not even attempted to provide any justification for its certification request. Since NRDC has not even attempted, let alone succeeded, in satisfying the burdens imposed it by the Clinch River and Marble Hill decisions, supra, no basis exists upon which this Board could grant certification. However, the Staff believes that a few brief comments are in order concerning these

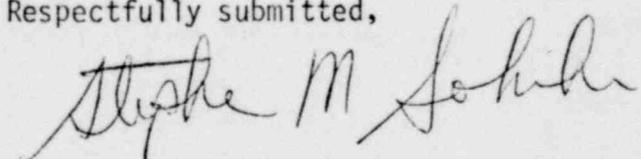
questions. First, as NRDC well knows, there exists no right of reply to responses to contentions under the rules of practice. NRDC is charged with knowledge of the regulations, specifically in this instance with the provisions of Appendix M. If a party believes that the Licensing Board has misapprehended the thrust of its contention in making a ruling, it may, as in fact NRDC did here, request that the ruling be reconsidered. In this case, NRDC had the opportunity to convince the Board that its contention was not a challenge to the regulations and failed.

Question 4 also fails to present an issue which should concern this Board at an interlocutory stage of the proceeding. There has never been a ruling by the Licensing Board precluding NRDC from filing a petition for waiver of Appendix M in this proceeding. NRDC simply never exercised its option to do so. Having failed to pursue this matter before the Licensing Board, NRDC may not ask this Board to deal with the proposed question.

CONCLUSION

For all of the above reasons, NRDC's Motion should be denied.^{12/}

Respectfully submitted,



Dated at Bethesda, Maryland,
this 19th day of December, 1978.

Stephen M. Sohinki
Counsel for NRC Staff

^{12/}NRDC also complains (Motion, p. 5) that it was not permitted to brief the merits of its contention before the Licensing Board. This argument places the cart before the horse. Since the contention is not litigable, it is axiomatic that the merits cannot be reached.



ATTACHMENT

Offshore Power Systems

8000 Arlington Expressway
Box 8000, Jacksonville, Florida 32211

904-724-7700
Telex: 568406

November 29, 1978

Mr. Clifford A. Haupt
Environmental Project Mgr.
Div. of Nuclear Reactor Regulation
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

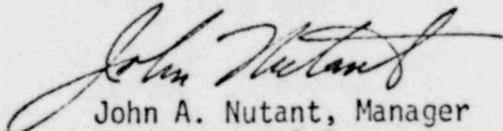
Dear Mr. Haupt:

On September 8, 1978, Mr. A. P. Zechella, President of Offshore Power Systems wrote Mr. Douglas Costle, Administrator of the U. S. Environmental Protection Agency regarding EPA's position on the riverine and estuarine siting of floating nuclear plants (FNP's). I have attached Mr. Costle's reply to our letter.

Mr. Costle clearly states that EPA is not asking the NRC to ban riverine and estuarine siting of FNP's. He does indicate EPA's concern over potential impacts that might occur. We believe that adequate discussion of these potential impacts is documented in the Final Environmental Statement, Part II and the Addendum to the Final Environmental Statement, Part II and that the positions of EPA and NRC are consistent on this matter.

We recommend that NRC include the attached letter from EPA in the comments section on the RDES-II so that the record is complete.

Very truly yours,


John A. Nutant, Manager
Environmental Programs

Attachment

/r



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

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RECEIVED

THE ADMINISTRATOR

NOV 9 1978

A. P. ZECHELLA

Mr. A.P. Zechella, President
Offshore Power Systems
8000 Arlington Expressway
Box 8000
Jacksonville, FL 32211

Dear Mr. Zechella:

This is in response to your letter of September 8, 1978, concerning the meeting which we had on Floating Nuclear Power Plants (FNP's). I appreciated the opportunity our meeting gave me to hear first-hand about the FNP concept and your company's progress to date.

In your letter you express concern that EPA might be seeking a ban of estuarine and barrier island siting as part of the Nuclear Regulatory Commission's (NRC's) license to manufacture. I can assure you that EPA is not taking that position.

I do believe, however, that it will be extremely difficult to find environmentally acceptable sites in any of the estuarine or barrier island areas along the East and Gulf coasts. Our knowledge of past experiences with construction activities in these sensitive areas together with the Nuclear Regulatory Commission's analysis of the potential impacts (as presented in the environmental impact statement (EIS) supplement to Part II) makes it apparent that only under the most restrictive circumstances could an FNP be sited in these areas in an environmentally acceptable manner.

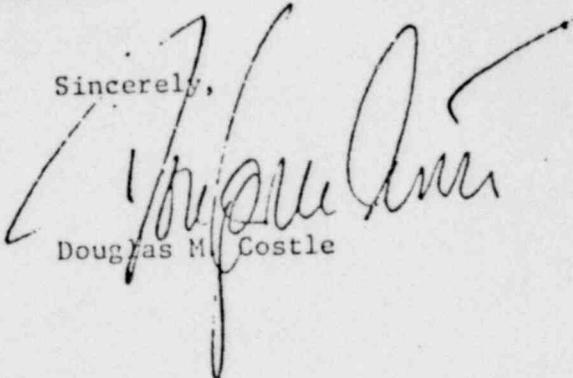
In our role of advising the Commission on the environmental consequences of their licensing action, we are attempting to make it clear that special consideration for siting in these important and sensitive areas is essential. By emphasizing these concerns now, we hope to avoid future time consuming and nonproductive debate on inappropriate site proposals.

To define our concerns, our August 28, 1978 letter to the NRC lists those mitigative techniques which EPA believes are essential to siting in sensitive estuarine and barrier island areas. It is our position that the Nuclear Regulatory Commission's licensing decision should

include consideration of the probability of successfully mitigating impacts in estuarine and barrier island areas. We have not, however, advised them on the mechanism for accomplishing this task.

Since the Nuclear Regulatory Commission staff will prepare its final conclusions and any recommended restrictions on floating nuclear power plants for inclusion in the EIS on Part III, EPA's final comments on this project will depend on our review of Part III. Your offer of assistance during our final review is appreciated. My staff will not hesitate to call upon you, should additional information be required for the complete review of this project.

Sincerely,



Douglas M. Costle

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of

OFFSHORE POWER SYSTEMS

(Floating Nuclear Power Plants)

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} Docket No. STN 50-437

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO REQUEST FOR DIRECTED CERTIFICATION" 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 by deposit in the Nuclear Regulatory Commission internal mail system, this 19th day of December, 1978:

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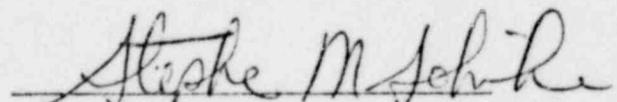
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