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May 2, 1980

Samuel J. Chilk, Esq.
Secretary
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Commission
Washington, D.C. 20555

DOCKET NUMBER
PROPOSED RULE PR-2, 30, 40, 50, 51, 70 +110 (12)
(45 FR 13739)

Re: Proposed Amendments to 10 C.F.R. Part 51

Dear Mr. Chilk:

On March 3, 1980, the Commission published for comment a proposed new 10 C.F.R. Part 51, with related proposed amendments to other portions of 10 C.F.R. 45 Fed. Reg. 13,739. With its notice, the Commission published two letters from the Council on Environmental Quality ("CEQ") suggesting that additional consideration be given to certain matters. As counsel representing various utilities involved in the Commission's licensing process, we wish to comment on both the proposed regulations and the CEQ suggestions.

In general, we believe that the proposed new Part 51 represents a thoughtful effort by the Commission to conform its environmental review procedures with those suggested by CEQ, while maintaining the independent authority of the Commission. Accordingly, we recommend that the Commission adopt the new Part 51 in essentially the same form as proposed. We do wish to comment upon a few specific provisions that we believe could usefully be modified prior to the adoption of a final rule. For

convenience, our specific comments will be keyed to the numbered sections of the proposed rule.

Section 51.10(c). We suggest that the new Part 51 should address the limitations on the Commission's environmental review authority imposed by §511(c)(2) of the Clean Water Act. It has become clear from the decisions of the Atomic Safety and Licensing Appeal Board in Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 N.R.C. 702 (1978) and Carolina Power and Light Company (H. B. Robinson, Unit No. 2), ALAB-569, 10 N.R.C. 557 (1979) that the 1975 Memorandum of Understanding does not contain sufficient guidance on this issue. The Commission should consider restating, as part of its new regulations, the limitations imposed upon its review of non-radiological water quality matters.

Section 51.20(a)(2). This provision is ambiguous, since it fails to define any standard pursuant to which the Commission's discretion to prepare an environmental impact statement will be exercised. It is also unnecessary. Consideration of other proposed actions is adequately addressed in §51.20(b)(13). We recommend that §51.20(a)(2) be deleted.

Section 51.21(b)(3). This subsection should be modified to conform with §51.20(b)(4) to provide that an environmental assessment will be required only "if a final environmental impact statement covering full power or design capacity operation has not been previously prepared."

Section 51.22(c)(9) & (11). These subsections would create categorical exclusions for license amendments that do not involve any change or increase in the release of effluents or the exposure to radiation. It is submitted that the proposed definitions are too restrictive. Section 51.21(b)(2) requires an environmental assessment where an amendment results in a significant change in the release of effluents or exposure to radiation. To make the categorical exclusions consistent with the requirements for an environmental assessment, the language of subsections (9) and (11) should be amended to include the word "significant".

Section 51.72(b). Those subsections would confer unlimited and undefined discretion upon the Commission's staff to prepare a supplement. We believe that it is unnecessary to create such discretion. The circumstances in which a supplement is appropriate are adequately defined in subsection (a). Subsection (b) should be deleted. If it is not, then it is essential that the Commission provide a standard or standards to govern the exercise of discretion.

Section 51.73. This section provides for a comment period of 45 days from the date of publication of notice by the Environmental Protection Agency. Section 51.100 provides for the publication of notice by the Commission. We submit that these provisions are inconsistent. The comment period should be triggered by the publication of the Commission's notice, rather than being dependent upon subsequent publication by EPA. To do otherwise may result in delaying the receipt of comments and in confusion on the part of the public as to when comments are actually due.

Section 51.91(b). The requirement that responsible opposing views be discussed should be modified to require the discussion of relevant responsible opposing views.

Section 51.92(a). This subsection contains nothing to define when the preparation of a supplement is appropriate. The Commission should furnish such a definition, as it has done in §51.72(a).

Section 51.100. This section would prohibit the Commission from taking various actions conditioned upon the publication of various Federal Register notices by EPA. Sections 51.117 and .118 provide for the publication of notices by the Commission. It is submitted that the Commission's actions should be governed by its own publication of notices, not EPA's.

We turn now to a response to the suggestions of CEQ. Specifically, we wish to respond to the first three numbered paragrahs in CEQ's September 26, 1979 letter.

1. CEQ urges the adoption of 40 C.F.R. §1502.14(b) as the standard for the treatment of alternatives in an EIS. CEQ argues that this section is a restatement of existing NEPA law and is therefore binding on the Commission. We believe that CEQ's position is not supported by existing NEPA law.

CEQ has failed to recognize the impact of several recent cases on the range of alternative sites which must be discussed in an EIS. In Seacost Anti-Pollution League v. NRC, 598 F.2d 1221 (1st Cir. 1979), the court held that the NRC had not violated NEPA when it decided to terminate late stage inquiry into nine alternative sites and six additional sites which had not been proven to be "obviously superior" alternatives to the proposed site. This "obviously superior" test was approved by the court in New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978), which holds that NEPA does not require that a plant be built on the single best site for environmental

purposes. The court maintained "all that NEPA requires is that alternative sites be considered and that effects of building the plant at the alternative sites be carefully studied and factored into the ultimate decision." 582 F.2d at 95.

CEQ fails to differentiate between the decision to proceed with the development of nuclear power itself and that of whether to locate a plant in a particular area. As the court stated in Seacost Anti-Pollution League v. NRC, where the latter issue was involved:

> "Placing the plant in one place rather than another will always have significant environmental advantages from the perspective of those who are spared the presence, in their region, of a plant they oppose. But we do not think this shifting of burdens as between otherwise comparable sites, warrants an environmental study." 598 F.2d at 1232 n.9.

CEQ's recommendation that substantial treatment be given to each alternative considered is a more rigorous standard than that currently required by NEPA law. Rather than demanding a detailed study of all alternative sites, existing NEPA case law requires an in-depth analysis of only those sites that might present a substantial measure of superiority over the proposed site. Alternatives that would result in similar or greater harm need not be discussed. Sierra Club v. Morton, 510 F.2d 813, 825 (5th Cir. 1975). We believe that the Commission is justified in its decision not to implement 40 C.F.R. §1502.14(b) and that this decision is in conformity with existing NEPA law. To require a detailed analysis of all alternative sites would be a wasteful expense of time and money and would not contribute to a reasoned decision under NEPA.

2. CEQ contends that the Commission should be required to include within its EIS all relevant information which can be obtained concerning the environmental impact of a proposed project. CEQ argues that this requirement, as set forth in 40 C.F.R. §1502.22(a), is a restatement of existing NEPA law. We believe that this argument lacks legal support.

The need to obtain additional information must be assessed in conjunction with the purpose of an EIS. The fundamental purpose of an EIS is to ensure that decisions concerning federal actions will be made only after due consideration has been given to the environmental consequences. NEPA does not require that "the sum total of scientific knowledge of the environmental elements affected by a proposal" be considered prior to the drafting of an

EIS. EDF v. Corps of Engineers, 348 F.Supp. 916, 927 (N.D. Miss. 1972). Similarly, in Alaska v. Andrus, 580 F.2d 465 (D.C. Cir. 1978), the court asserted that "NEPA cannot be read as a requirement that complete information concerning the environmental impact of a project must be obtained before action may be taken." 580 F.2d at 473, quoting Jicarrilla Apache Tribe of Indians v. Morton, 471 F.2d 1275, 1280 (9th Cir. 1973).

We understand that CEQ relies on EDF v. Hardin, 325 F.Supp. 1404 (D.D.C. 1971) as authority for its proposition that additional information must be obtained if essential to a reasoned choice. However, EDF v. Hardin requires only that an adequate research program be completed prior to a final decision. The case does not hold, or even suggest, that information that is not readily available and would be difficult or expensive to obtain must nevertheless be gathered.

Although CEQ acknowledges that the compilation of information for an EIS is subject to the rule of reason established in NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972), it ignores the courts' continual assertions that NEPA does not require that an EIS be exhaustive in scope nor analytically perfect. We believe that the Commission is justified in its decision not to implement 40 C.F.R. §1502.22(a). So long as the Commission bases it actions upon sufficient information to permit a well-reasoned decision, the mandate of NEPA will be fulfilled.

3. CEQ asserts that the Commission should consider Class 9 accidents as part of its environmental review. CEQ's position has been reasserted and amplified in a March 20, 1980 letter from its Chairman to Chairman Ahearne. We believe that CEQ's position lacks both legal and factual support.

CEQ has chosen to ignore a line of court decisions upholding the Commission's established practice of refusing to analyze the consequences of any Class 9 accident in its environmental impact statements. In the latest of those decisions, Hodder v. NRC, 13 ERC 1711 (D.C. Cir. 1978), cert. denied, 100 S. Ct. 55 (1979), the Court of Appeals said:

> "It is well settled that, because of the extreme improbability of their occurrence, the NRC need not consider the environmental effects of so-called 'Class 9' accidents." 13 ERC at 1712.

Indeed, the Court of Appeals considered that conclusion to be so routine that it ordered its decision not to be

pubished pursuant to §8(b) of its Rules. See 589 F.2d 1115 (D.C. Cir. 1978).

CEQ argues that Hodder and the cases preceeding it are no longer good law because those decisions did not take into account the Commission's "repudiation" of the Rasmussen report, WASH-1400, and the accident at Three Mile Island. Essentially the same arguments were advanced by Hodder in his petition for a writ of certiorari. The Supreme Court, however, routinely denied certiorari six months after Three Mile Island. 100 S. Ct. 55.

CEQ's position is not simply that the Commission should consider a Three Mile Island accident at other plants. CEQ wants the NRC to analyze in detail the consequences of a core melt accident with a breach of containment. The fact that Three Mile Island may be characterized as a Class 9 accident scarcely supports the conclusion that such infinitely more serious events are now sufficiently probable to require detailed analysis. We believe that the Commission is fully justified in continuing its refusal to analyze core melt accidents, and that the courts will continue to uphold such refusal.

We do not mean to suggest that the Commission should ignore Three Mile Island or even ignore CEQ. The Commission can and should

- explain in greater detail and better prose why it does not require environmental analysis of core melt accidents
- acknowledge the possibility of accidents beyond design basis like Three Mile Island
- explain actions taken since Three Mile Island to avoid recurrence of similar accidents
- analyze the effects of an accident like Three Mile Island at the candidate site
- include liquid pathways, at least to explain in greater detail and better prose why they are not significant at the candidate site.

The future treatment of Class 9 accidents in environmental impact statements is a complicated question that, in our opinion, requires more detailed consideration than is possible in the present notice-and-comment rulemaking. We therefore recommend that it be severed from this docket and made the subject of a new rulemaking based upon CEQ's

March 20, 1980 letter and enclosures, together with an NRC staff report to be developed in response to CEQ. Certainly it would be unfair (and probably unlawful) for the Commission to make any drastic changes in its existing policy and in the rules here proposed without republication.

Sincerely,

Le Boeuf, Lamb, Leiby & MacRae