DEBEVOISE & LIBERMAN
1200 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036

JAMES B. LIBERMAN
FREDERICK T. SEARLS
JOSEPH B. KNOTTS, JR.
WILLIAM J. MADDEN, JR.
JOHN P. PROCTOR
ROSS O'DONOGHUE
J. MICHAEL McGARRY, III
LEONARD W. BELTER
NICHOLAS S. REYNOLDS
RICHARD C. BROWNE
DONALD K. DANKNER
SHARON L. STEEN
MALCOLM H. PHILIPS, JR.
C. DENNIS AHEARN, JR.
WILLIAM A. KEHOE III
McNEILL WATKINS II
SANFORD L. HARTMAN
WILLIAM A. HORIN
DALE E. HOLLAR
CHERYL LYNN WILLIAMS

JOSEPH B. HOBBS

THOMAS M. DEBEVOISE
COUNSEL

TELEPHONE
(202) 857-9800

DIRECT DIAL
(202) 857-9819

PR-2, 30, 40, 50, 51, 70 + 110 (45 FR 13739) (13)

May 7, 1980

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Attn: Docketing and Service Branch
(Jane R. Mapes, Assistant
Regulations Counsel)

Dear Sir:

Enclosed herewith for filing are "Comments of Edison Electric Institute on Proposed NEPA Regulations".

These comments are being filed after the date set in the March 3, 1980 notice of proposed rulemaking pursuant to a telephone conversation between the undersigned and Ms. Mapes on April 29, 1980. The appropriate executives of EEI were not available to review and sign these Comments the week of May 21, 1980 because of an out-of-town meeting which required their attendance.

Very truly yours,

Richard C. Browne

Richard C. Browne

RCB/klv
Encl: As stated.

5/9/80 mdv

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

Proposed environmental protection regulations for domestic licensing and related regulatory functions and related conforming amendments	)))))	10 CFR Parts 2, 30, 40 50, 51, 70 and 110 (45 Fed. Reg. 13739)

COMMENTS OF EDISON ELECTRIC INSTITUTE ON PROPOSED NEPA REGULATIONS

Edison Electric Institute (EEI) submits the following comments on the Nuclear Regulatory Commission's (NRC or Commission) proposed regulations which were published in the Federal Register on March 3, 1980 and which would revise Part 51 of the Commission's regulations regarding implementation of section 102(2) of the National Environmental Policy Act of 1969, as amended (NEPA).

EEI is the association of the nation's investor-owned electric utilities. Its member companies serve 99.6% of all ultimate customers served by the investor-owned segment of the industry, including 65.5 million electric customers, about 77% of the nation's electricity users. Many members of EEI are NRC licensees which are constructing and/or operating nuclear power reactors.

EEI supports the Commission's proposal to revise its regulations which implement section 102(2) of NEPA (40 CFR §1500 et. seq.). We agree with the Commission's assessment of its relationship as an independent agency,

to CEQ and its responsibility for implementing NEPA Regulations. The Commission's policy decision to take account voluntarily, of CEQ Regulations subject to certain conditions is sound from the perspective of effective NEPA implementation. On balance the NRC has done a commendable job in proposing what are, in our judgment, well-organized and appropriately detailed regulations. In the comments which follow we offer suggestions which we believe will clarify and improve the proposed regulations. The first section of our comments addresses the three issues as to which NRC indicated need for further study and on which it expressly invited comments and suggestions. The second section of this paper addresses suggestions for specific changes to the proposed regulations, which changes would further clarify the Commission's intent on NEPA procedural matters.

I

RECOMMENDATIONS OF CEQ ON WHICH NRC INVITED COMMENTS

In its discussion of the Proposed Rule (45 FR at 13742) the Commission indicated that "additonal study" would be required by the NRC before regulations could be proposed to implement 40 CFR 1502.14(b) Treatment of Alternatives, 40 CFR 1502.22(a) Obtaining Impact Information Which is Not Known, and 40 CFR 1502.22(b) "Worst Case" Analysis contained in the CEQ Regulations.

In these "Comments", EEI offers its suggestions on those considerations which NRC should take into account in its studies or proposals concerning 40 CFR Sections 1502.14(b), 1502.22(a) and 1502.22(b).

A. Treatment of Alternatives

EEI recommends that the NRC adopt, independent of 40 CFR §1502.14(b), a regulation on this issue which is fully consistent with current judicial interpretations of NEPA. Such a regulation should articulate in detail, the categories and quantities of factual material which are to be incorporated in a NEPA record before NRC, and the standards and decisional criteria which will be applied to those materials. Such a regulation will promote a better understanding by applicants and licensees, by the NRC staff and decision makers and by the public at large, of the NEPA process within the Commission. This better understanding will, in turn, tend to promote confidence in the fairness and objectivity of the NRC decisional process under NEPA.

We note that on April 9, 1980, NRC published a proposed Rule with an extensive statement of considerations (45 Fed. Reg. 24168) which would articulate NRC's requirements for treatment of alternative sites. While we will not offer extended comment here upon that proposal, we cannot pass the opportunity to state that, in general, the April 9

proposal provides the kind of guidelines and criteria which are called for by the CEQ regulations. We would hope this proposal will result in a regulation which articulates in advance both the categories and kinds of information which can be expected to be necessary for a complete NEPA decisional record and the standards for decision making which will apply to the information.

It is obvious to those who have experience in the NEPA decisional process that no regulation or guide can anticipate every kind and category of data which will be needed for all future cases. This is why courts interpreting NEPA have consistently applied a common sense or reasonableness test to the NEPA procedural process. That which is clearly needed, and that which can be done to assure an orderly Commission NEPA process is to provide a clear statement for each action to which NEPA applies about how the process will work and what is expected of each participant in the process.

NEPA's procedural requirements have been interpreted extensively in the courts and a brief summary of the points which apply to selection and analysis of alternatives can be simply drawn.

It is well settled that in an EIS the examination of alternatives mandated by section 102(2)(C) of NEPA requires consideration of all reasonable alternatives to the proposed "major federal action". The United States Court of Appeals for the District of Columbia has said:

> A sound construction of NEPA . . . requires a presentation of the environmental risks incident to reasonable alternative courses of action. [Natural Resources Defense Council v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972)]

This does not mean, however, that the scope of the consideration of alternatives is unbounded. The Supreme Court has said that:

> Common sense . . . teaches us that the 'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. [Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978)]

Stated another way, the consideration of alternatives pursuant to NEPA is subject to a "rule of reason". NRDC v. Morton, supra, 458 F.2d at 834.

Similarly, the detail required in the discussion of alternatives in the EIS is also subject to considerations of reasonableness. It has been stated:

> The detail required in an EIS is that necessary to establish that an agency with good faith objectivity has taken a sufficient look at the environmental consequences of a proposed action and at alternatives to that action. [NRDC v. NRC, 606 F.2d 1261, 1271, n. 37 (D.C. Cir. 1979), citing Save Our Sycamores v. Metropolitan Atlanta Rapid Transit Authority, 576 F.2d 573, 576 (5th Cir. 1978)]

This concept was most succinctly stated in NRDC v. Morton, supra, wherein the Court said:

> We reiterate that the discussion of environmental effects of alternatives need not be exhaustive. What is required is information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned. [NRDC v. Morton, supra, 458 F.2d at 836 (emphasis added)]

This statement of the requirements of NEPA has been roundly accepted by courts interpreting section 102(2)(C) of NEPA. See, e.g. State of Alaska v. Andrus, 580 F.2d 465, 480 (D.C. Cir. 1978); Monroe County Conservation Council v. Andrus, 566 F.2d 419, 425 (2d Cir. 1977), cert. den'd 435 U.S. 1006 (1978); Mason County Medical Association v. Knebel, 563 F.2d 256, 264 (6th Cir. 1977); Coalition for Responsible Regional Development v. Coleman, 555 F.2d 398, 400 (4th Cir. 1977); Robinson v. Knebel, 550 F.2d 422, 425 (8th Cir. 1977); Covington Preservation Committee v. Federal Aviation Administration, 524 F.2d 241, 244 (1st Cir. 1975); Brooks v. Coleman, 518 F.2d 17, 19 (9th Cir. 1975); Sierra Club v. Morton, 510 F.2d 813, 826 (5th Cir. 1975).

It is important, in approaching the task of articulating procedural guides or regulations, to rely upon experience gained through applying this standard of reasonableness or common sense; to prescribe, seriously and objectively, those steps which are known to be required

in all cases; and to account for the unusual case by clear caveat. The caveat would provide that additional steps, as needed, will be taken in the unusual case to assure an adequate decisional record. Such guides must be applied in a way which recognizes that the ultimate decision reached will always be tested by the dictates of common sense.

To prescribe that the decision maker consider information beyond that which is useful for the decision does just as much violence to common sense as to prescribe consideration of too little information.

As a final general matter, the NEPA goal of reducing paperwork and duplication of effort deserves recognition as an important element in the procedure. NRC has already recognized through its approach to generic rulemaking that time, effort and expense can be conserved when decisions of general applicability based upon a single record (the rulemaking record) are applied in all cases. For example, many alternative energy sources which would be considered in an EIS could be dismissed as inappropriate for further consideration for reasons which become evident without detailed evaluation in each case.

As a further example, most sites offered as alternatives to a proposed site can be evaluated for adverse environmental impacts using readily available information. So long as, upon reasonable examination, an alternative site does

not appear to be distinguishable from an environmental standpoint from the proposed site, then the alternative site is not obviously superior and NEPA's mandate would be satisfied. See New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 95 (1st Cir. 1978); see generally, Natural Resources Defense Council v. S.E.C., 606 F.2d 1031, 1054 (D.C. Cir. 1979); Citizens for Safe Power v. NRC, 524 F.2d 1291, 1301-02 and n. 18 (D.C. Cir. 1975); Iowa Citizens for Environmental Quality, Inc. v. Volpe, 487 F.2d 849, 852-53 (8th Cir. 1973). In none of the decided NEPA cases in the courts does there appear a suggestion that the EIS analyze the proposed site and all alternatives in equal detail.

A regulation which deals with alternative site analysis should prescribe the categories and quantities of data required for the usual case, and couple with that prescription, the reminder that additional data may be called for in those circumstances where common sense or reason requires it. We encourage NRC to adopt a regulation which does recognize the rule of reason and which fully reflects the current status of the decisional law interpreting NEPA.

B. Worst Case Analysis

In its regulations, CEQ calls for two part consideration of environmental impacts essential to a completed decision but for which no information is available [40 CFR 1502.22(b)].

The two steps called for are (1) an indication of the probability of occurence of the impact, and (2) an analysis of the "worst case" impacts upon the environment if the event should occur.

Much of what was said about principles for evaluating alternatives applies equally to the principle that in some cases, absent critical data or information needed for a reasoned decision, hypothetical estimates of environmental consequence may have to be constructed. Reasonableness is again the point of departure for a decision to adopt this surrogate procedure in a NEPA analysis.

While the EIS must consider "environmental risks incident to reasonable alternative courses of action", this requirement is subject to a rule of reason. Natural Resources Defense Council v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972). With respect to the consequences of alternatives discussed in the EIS, it is well settled that:

> An environmental impact statement need not discuss remote and highly speculative consequences.
> [Environmental Defense Fund v. Hoffman, 566 F.2d 1060, 1067 (8th Cir. 1977)]

The surrogate "worst case analysis" procedure is likely rarely to be invoked because it will seldom occur that information about environmental impacts from foreseeable events will be "not known". It seems unlikely that the

procedure will be a cause of concern in NRC proceedings so long as common sense is used, and worst case analysis is applied only to those environmental impacts which may reasonably expect to be encountered in the lifetime of the authorized project.

The Commission has already begun separate consideration of a proposed Interim Policy Statement that would require discussion of "Class 9" accidents in an EIS and in an Applicants' Environmental Report. See, "Accident Considerations Under NEPA", SECY-80-131 (March 11, 1980). Treatment of significant matters by generic rulemaking procedures should always be encouraged in order to avoid the burdens created by case-by-case analysis of such matters.

C. Extent to Which Information Must Be Obtained To Analyze Relevant Adverse Impacts

The CEQ regulations call for the collection of essential but unknown information about environmental impacts if the overall costs (including time, effort, resources and delay costs as well as dollar costs) are not "exhorbitant" [40 CFR 1502.22(a)].

For cases where categories or quantities of information are not available for essential areas of NEPA analysis, the Commission should establish some guide to enable participants in the process to determine the level of effort which may reasonably be demanded to gather such information.

The keys to setting such guidelines are: (a) that the miscing information be truly essential to the decision, and (b) that common sense be applied to the demand that time, effort, money and resources be spent in search of the information. If a "worst case analysis" is available as a bottom line surrogate when essential data cannot reasonably be obtained, common sense should be applied at the point where a choice is made between spending valuable time, effort and money or adopting the surrogate method.

At all costs, it must be clear that the information to be sought is truly essential to the NEPA decision. Too often the impulse to "get more data" in the hope the decision will

be made easier, is irresistable - though reason and common sense dictate that the search for data be ended.

No interpretation of NEPA requires that the decision maker run to the ends of the earth. Few decisions could be made if the record of decision had to remain open until absolutely all information on all alternatives had come in. Information collection in the NEPA process is a rational exercise and must at some time come to an end. The courts have consistently approved agency action based upon reasonably available information. See: Vermont Yankee Nuclear Power Corp. v. NRDC, supra at 551; Cady v. Morton, 527 F.2d 786, 796 (9th Cir. 1975); Sierra Club v. Froehlke, 534 F.2d 1289, 1296 (8th Cir. 1976); NRDC v. Morton 458 F.2d 827, 836 (D.C. Cir. 1972).

Even in the rare case where information truly essential to a decision among alternatives is "not known" reason must be applied to the choice between pursuing the quest for information and relying upon the surrogate "worst case analysis". Though we believe the case will be rare in which the choice would be forced, the Commission should provide advance guidance by regulation so that the rules for choice will be known to the participants. Once again, knowing the rules will promote fairness to all participants. Whatever

adjective (viz. significant, exhorbitant, disproportionate, substantial, etc.) is chosen to describe the costs in effort, money, delay or resources, some detailed and thoughtful statement of policy for Commission proceedings will aid the decision maker in making the choice. Here again the decision maker must be required to use common sense in deciding whether the likelihood or probability of the impact occurring warrants seeking more information. Of equal importance, this statement of policy will allow staff, applicant and the public to know what level of effort will be expected, reasonably to assemble information for decision.

II

PROPOSED NRC REGULATIONS

A. Categorical Exclusions

The actions listed under proposed section 51.22 as categorical exclusions should be broader. While we support inclusion of each of the items on the proposed categorical exclusion list, there are some items which we believe should be included in the list at this time:

a. A general provision should be added such as 10 CFR §51.5(d)(4) of the Commission's present regulations excluding the issuance of a materials license or an amendment or renewal of a materials or facility license other than those covered by the sections specifically requiring environmental impact statements or environmental assessments.

b. Issuance, renewal or amendment of a Part 30, 40 or 70 license to a holder of a construction permit for a power reactor where such a license expires upon issuance of an operating license, including the authorization for storage only of unirradiated reactor fuel prior to issuance of the operating license.

c. The renewal of a construction permit issued to a power reactor, pursuant to 10 CFR §50.55(b).

d.. Any change in a principal environmental protection commitment by the holder of a construction permit or operating license which does not necessitate the issuance of an amendment to such permit or license.

Because these additions would not involve adverse impacts on the environment that are significant or are not carefully examined during the licensing process, we believe it would be appropriate to include these on the list of categorical exclusions.

B. Environmental Reports

There are several instances where the proposed regulations concerning an applicant's and petitioner's environmental report (ER), proposed 10 CFR §51.41, are not clear and should be revised before publication in final form. These instances are as follows:

1. The environmental impacts of alternatives and the proposed action are to be "presented in comparative form". Proposed 10 CFR §51.45(b)(3). The meaning of "comparative form" is not clear, and should be defined or explained,

including a presentation of examples. In any event, we recommend retaining the language, "to the extent possible" in this section as being a reasonable means to clearly accomodate those instances where environmental impacts of alternatives could not meaningfully be presented in any comparative form.

2. With respect to the requirements concerning an Applicant's Environmental Report for the operating license stage (ER-OL), proposed 10 CFR §51.53, does not provide that the Applicant's ER-OL may incorporate by reference information contained in the ER or the Final EIS prepared in connection with the construction permit. This provision is in the present Commission regulations. See 10 CFR §51.21. We recommend it be retained in the new regulation. This provision would reduce paperwork and promote efficiency in the license process.

C. Environmental Impact Statements

Present NRC regulations allow the EIS for operating license review to incorporate by reference, information contained in the final EIS prepared for the construction permit review. 10 CFR §51.23(e). The proposed regulations do not provide for this. See, proposed 10 CFR §51.95. We recommend this provision be retained in order to reduce delay and paperwork in accordance with those goals as set forth by CEQ. See 40 CFR §§1500.4 and 5.

D. Limitations on Actions

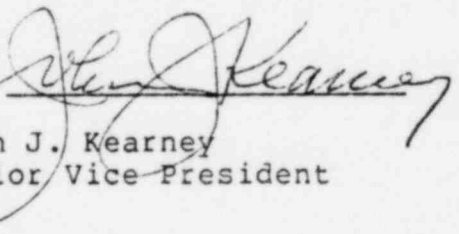
The Commission proposes to require that prior to issuance of the "record of decision" in connection with a proposed action for which an EIS is required, no action may be taken concerning the proposal which would have an adverse environmental impact or limit the choice of reasonable alternatives [Proposed 10 CFR §51.101(a)]. Section 51.101 then authorizes certain actions to be taken by applicants prior to the issuance of a license or permit, i.e., certain activities at the proposed site of a nuclear reactor with de minimis environmental impacts as authorized by 10 CFR §50.10(c). [Proposed 10 CFR §15.101(a)(2)].

EEI suggests that, in addition to those actions already listed in section 51.101 as being exempted from this section's prohibitions, actions which are authorized pursuant to a grant of a "specific exemption" from Commission regulations [10 CFR §50.12], should also be included as exempt from the prohibition of proposed section 51.101. It is possible that proposed §51.101 as written, may be interpreted as repealing 10 CFR §50.12. To avoid the possibility of such confusion, EEI recommends that proposed section 51.101 provide that actions authorized by a specific exemption from

Commission regulations, pursuant to 10 CFR §50.12, will also be exempted from the limitations on actions set forth in proposed 51.101.

Respectfully submitted,

EDISON ELECTRIC INSTITUTE

By: 

John J. Kearney
Senior Vice President