Washington Public Power Supply System
A JOINT OPERATING AGENCY

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PROPOSED RULE PR-2 et al (5)
(45 FR 13739)

Mr. Samuel J. Chilk, Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Docketing and Service Branch

Dear Mr. Chilk:

Subject: Proposed Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions (45 Fed. Reg. 13739 (March 3, 1980))

I. BACKGROUND

On March 3, 1980, the Nuclear Regulatory Commission published in the Federal Register proposed rules 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). The proposed regulations reflect the Commission's policy to take into account the regulations of the Council on Environmental Quality (CEQ) which are intended to implement section 102(2) of NEPA. The Commission requested that all persons who would like to submit comments on the proposed regulations to do so by May 2, 1980.

The Washington Public Power Supply System ("Supply System") respectfully submits the following comments on NRC's proposed NEPA regulations. The Supply System is currently constructing five nuclear power reactors. Accordingly, these comments are directed toward those provisions of the proposed regulations which concern power reactors.

II. DISCUSSION OF PROPOSED REGULATIONS

A. Introduction

The Supply System believes the Commission has generally done a commendable job in proposing well-organized and appropriately detailed regulations consistent with the CEQ regulations implementing section 102(2) of NEPA. 40 CFR 1500 et seq. We share the Commission's reservations regarding the implementation of certain of the CEQ regulations. 45 Fed. Reg. 13742. In that regard, we believe the NRC is not required to implement

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the provisions of CEQ's NEPA regulations which have an impact on the Commission's performance of its substantive responsibilities as an independent regulatory agency. Accordingly, our comments are directed primarily at three of the CEQ regulations on which the NRC has requested comments prior to issuance of proposed regulations implementing those CEQ provisions.

B. NRC Regulations Concerning Treatment of Alternatives In Environmental Impact Statements Should Not Be Based Upon 40 CFR 1502.14(b)

Section 1502.14(b) of the Council on Environmental Quality regulations governing the treatment of alternatives in an Environmental Impact Statement (EIS) requires that the EIS "[d]evote substantial treatment to each alternative considered in detail...." (Emphasis added). Despite CEQ's argument to the contrary, see, 45 Fed. Reg. 13765, we believe this CEQ regulation is not a restatement of the requirement of NEPA with regard to consideration of alternatives in an EIS. In addition, we note, that as an independent regulatory agency, NRC is not required to implement CEQ regulations concerning NEPA which impact, as we believe this provision would, upon substantive responsibilities and duties of the NRC. Consequently, the Supply System recommends that the NRC adopt a regulation on the treatment of alternatives in an EIS which is consistent with current judicial interpretations of NE. .

The examination of alternatives in an EIS mandated by section 102(2)(E) of NEPA requires consideration of all reasonable alternatives. As was stated by the United States Court of Appeals for the District of Columbia:

> 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) (Emphasis added)].

However, the discussion of alternatives in an EIS is not intended to be unlimited. The Supreme Court has said that:

> the 'detailed statement of alternative' 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.

The Court in NRDC v. Morton, supra, also set forth the rule regarding the detail required in the discussion of alternatives in an EIS, where that 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 835]

This statement of NEPA law has been uniformly accepted by courts interpreting section 102(2)(E) of NEPA. See, e.g. State of Alaska v. Andrus, 566 F.2d 419, 425 (2d Cir. 1977), cert. den'd 435 U.S. 1006 1978; 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).

We do not believe that 40 CFR 1502.14(b) accurately reflects the requirements of NEPA concerning the discussion in an EIS, viz., "information sufficient to permit a reasoned choice of alternatives". Section 1502.14(b) would require that all alternatives considered in detail should receive "substantial treatment". It seems clear that the CEQ regulation could require a discussion of alternatives in greater detail than is mandated by NEPA. We recommend, therefore, that the NRC adopt a regulation concerning the discussion of alternatives in an EIS which is consistent with NEPA.

In particular, the Supply System believes that the information that would need to be included in an EIS with regard to alternative sites and alternative power sources, if 40 CFR 1502.14(b) would be implemented by the NRC, could significantly affect NRC's performance of its substantive responsibilities. To reach a reasoned decision as required by NEPA, it is not necessary to devote substantial treatment to each alternative, as 40 CFR 1502.14(b) could require. With regard to alternative sites, such sites can generally be adequately evaluated for adverse environmental impacts using only reconnaissance-level information. So long as upon reasonable examination the alternative site does not appear to be obviously superior to the proposed site from an environmental standpoint, NEPA's mandate would be satisfied. See New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 95 (1st Cir. 178). See also, Citizens for Safe Power v. NRC, 524 F.2d 1291, 1301 and n. 18 (D.C. Cir. 1975). (It is appropriate for the environmental analysis only to focus on alternatives which there is reason to believe might provide a significant difference in environmental impact.) As for alternative energy sources considered in an EIS, the detailed evaluation evidently contemplated by the CEQ

provision is obviously unreasonable where for example, alternatives would not be available within the time frame that power will be needed from the proposed facility or would not present obviously superior environmental benefits. See Citizens for Safe Power, supra, 524 F.2d at 1301.

C. The NRC Should Not Require the "Worst Case Analysis" As Set Forth In 40 CFR 1502.22(b).

Section 1502.22(b) of the CEQ NEPA regulations would require that an EIS include a "worst case analysis' if information "relevant" to the consideration of adverse environmental impacts to an alternative is not known and an agency decides, despite this uncertainty, to proceed with the action. Such measures are not required by NEPA and would adversely impact NRC's performance of its substantive responsibilities as an independent regulatory agency.

The requirement that the EIS consider "the environmental risks incident to reasonable alternative courses of action", is subject to a rule of reason. Natural Resources Defense Council v. Morton, supra 458 F.2d at 834. It is well settled that the discussion of alternatives in an EIS need not address improbable consequences. As was stated by the U.S. Court of Appeals for the Eighth Circuit:

> 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)]

Consequently, so far as 40 CFR 1502.22(b) would require discussion of remote and highly speculative consequences by mandating a "worst case analysis" it is inconsistent with the requirements of NEPA as interpreted by the courts. Furthermore, the Supply System does not believe that the Commission's reevaluation of its policy toward consideration of "Class 9" accidents in the environmental reviews of individual licensing proceedings, see Offshore Power Systems (Floating Nuclear Plants), CLI-79-9, 10 NRC 257 (1979); "Accident Considerations Under NEPA", SECY-80-131 (March 1, 1980), alleviates the conflict between 40 CFR 1502.22(b) and the requirements of NEPA. Accordingly, the Supply System recommends that this "worst case analysis" provision of the CEQ regulations not be implemented by the NRC on the basis that it does not reflect the mandate of NEPA.

In any event, 40 CFR 1502.22(b) should not be implemented by the NRC because it does not promote the goals of reducing unnecessary paperwork and delay as set forth by CEQ in promulgating its NEPA regulations. See

43 Fed. Reg. 55978 (Nov. 29, 1979). Requiring a "worst case analysis" would merely serve to needlessly increase the paperwork required to reach a reasoned decision in environmental reviews, viz., it would require more analysis than mandated by NEPA, and produce unnecessary delay as the information required by section 1502.22(b) is prepared and its adequacy subsequently evaluated in licensing proceedings. Section 1502.22(b) is clearly not consistent with the CEQ goals to reduce unnecessary paperwork and delays. On this basis alone that section should not be implemented by the NRC.

Finally, 40 CFR 1502.22(b) is unreasonably vague. There is no guidance with respect to determining what information is "relevant to adverse impacts" and is "essential" to a reasoned choice among alternatives. Most importantly, there is no definition of the "worst case" in the context of a particular proposal and its alternatives. In particular, section 1502.22(b) does not indicate whether a worst case analysis would be made for each alternative. If the provision were implemented, we believe such a comparison would be necessary to assure reasoned decision-making. Also it is not clear whether the Commission would need to include an analysis of the most favorable consequences for a particular alternative in conjunction with its analysis of the worst possible consequences of the proposed action. Also, would the Commission totally disregard the probability that the worst case scenario might actually occur? Section 1502.22(b) is, therefore, not only inconsistent with NEPA law and CEQ's own goals to reduce unnecessary paperwork and delay, but it is unreasonably vague. Accordingly, it should not be implemented by the NRC.

D. The NRC Should Not Implement 40 CFR 1502.22(a) Concerning The Gathering of "Relevant" Information

The Supply System disagrees with the CEQ's assertion, see 45 Fed. Reg. 13765, that the requirement set forth in section 1502.22(a) that an agency gather all "relevant" information "essential" to a reasoned decision is a restatement of NEPA law. It is well settled that the information required by NEPA for the discussion of the environmental effects of alternatives in an EIS...

> 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.]

If implemented by the Commission, the CEQ provision could require that NRC obtain any information that any person could argue was "essential to a reasoned choice of alternatives", so long as the cost of obtaining the

information is not "exhorbitant". This standard places a burden on the NRC in preparing an EIS that is not required by NEPA. In particular cases the Commission may wish to seek information to the extent the associated costs of gathering it are not exhorbitant, but such a requirement should not be automatically imposed in every case.

Furthermore, 40 CFR 1502.22(a) would be an inefficient means to assure that information necessary to a reasoned decision is available before that decision is made. All relevant information regarding the adverse impact of alternatives need not be known before a decision is reached. See Cady v. Morton, 527 F.2d 786, 796 (9th Cir. 1975). The decision-maker in an environmental review must be informed of uncertain or unknown environmental effects, see, Sierra Club v. Froehlke, 534 F.2d 1289, 1296 (8th cr. 1976), and then determine whether the information available is sufficient to make a reasoned decision. If sufficient information was available, the decision-maker would make a reasoned choice among alternatives, subject of course to review by the Courts. If there was not sufficient information, then the no action alternative could be chosen or more information would be requested. In contrast to this, the CEQ provision appears to require that the EIS not be used as a decision-making document, i.e., does not satisfy the mandate of NEPA, until all "relevant" information is available so long as the costs of obtaining such information are not "exhorbitant". This would be inconsistent with the dictates of NEPA and, if adopted, would adversely impact NRC's performance of its substantive responsibilities as an independent regulatory agency by delaying environmental reviews until the information required by section 1502.22(a) is obtained. Accordingly, the NRC should not implement 40 CFR 1502.22(a).

E. Categorical Exclusions

1. Procedures for requiring an EIS for actions included in the list of categorical exclusions should be established.

Proposed section 51.22(b) states that:

[e]xcept in special circumstances as determined by the Commission... an environmental assessment or environmental impact statement is not required for any action...included in the list of categorical exclusions.... Special circumstances include the circumstance where the proposed action involves unresolved conflicts concerning alternative uses of available resources within the meaning of section 102(2)(E) of NEPA. (Emphasis added).

The proposed regulations provide no further detail as to the meaning of "special circumstances" or to the procedures to be followed by the

Commission in making the determination to require an EIS for an action already included in the list of categorical exclusions. We believe the Commission should provide for notice and an opportunity for affected parties to present their views before a decision is made. It would also be helpful if the Commission would provide other examples of "special circumstances" beside "proposed action[s] involv[ing] unresolved conflicts concerning alternative uses of available resources."

2. The list of categorical exclusions should be more broad.

While the Supply System supports inclusion of each of the items already on the list of categorical exclusions, proposed 10 CFR 51.22, there are some additional items which we believe should be included in the list:

a. 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.

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

c. Any change in a principle 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.

These actions would not involve adverse impacts on the environment that are significant or are not carefully examined during the licensing process. It would be appropriate, therefore, to include these actions on the list of categorical exclusions set forth in proposed 10 CFR 51.22.

F. Terminology With Regard To The Preparation Of Environmental Reports Should Be Clarified

The Supply System recommends that certain aspects of the proposed regulations concerning an Applicant's and Petitioner's Environmental Report (ER), proposed 10 CFR 51.45, should be clarified before promulgation of this rule in final form. These comments are, as follows:

The ER is to discuss "the impact[s] of the proposed action on the environment....in proportion to their significance". Proposed 10 CFR 51.45(b)(1). Also, the environmental impacts of alternatives and the

proposed action are to be "presented in comparative form". Proposed 10 CFR 51.45(b)(3). The practical meaning of these terms is not clear. As stated, these requirements suggest that extensive discussion of each aspect of each alternative could be required by the NRC where a concise presentation would equally serve to convey "sufficient" information "to aid the Commission in its development of an independent analysis". Proposed 10 CFR 51.45(c). The Supply System recommends that these terms be explained or removed from the regulations when promulgated.

Furthermore, with respect to the requirements concerning an Applicants Environmental Report for the operating license stage (ER-OL), proposed 10 CFR 51.53 does not permit the Applicant to incorporate by reference in the ER-OL information contained in the ER or the Final EIS prepared in connection with the construction permit, as is provided in the present Commission regulations. See 10 CFR 51.21. The Supply System recommends this provision be retained in the new regulations as a means to reduce paperwork and promote efficiency in the license process.

G. "Specific Exemptions" Should Be Clearly Available With Regard To The Limitations On Actions

Proposed section 51.10(a) would require, with regard to a proposed licensing or regulatory action for which an EIS is required, that neither the Commission or Applicant may take any action concerning the proposal which would have an adverse environmental impact or limit the choice of reasonable alternatives until, inter alia, a record of decision is issued. However, actions which may nevertheless be taken by Applicants prior to the issuance of a license or permit are also identified, e.g., certain activities at the proposed site of a nuclear reactor with de minimis environmental impacts as authorized by 50.10(c). Proposed 10 CFR 51.101(a)(2). Because proposed section 51.101 appears to be intended to set forth all circumstances in which actions with the potential for impacting the environment are permitted to be taken in connection with the construction or operation of a power reactor prior to issuance of the applicable permit or license, it is possible that confusion might arise as to the continued effect of 10 CFR 50.12 which sets forth the requirements for obtaining a "specific exemption" from Commission regulations. To avoid the possibility of such confusion, the Supply System recommends that actions authorized by a "specific exemption" from Commission regulations, pursuant to 10 CFR 50.12, also be exempted from the limitations on actions set forth in proposed section 51.101.

H. Certain Procedures Should Be Set Forth Regarding The Scoping Process

The Supply System supports the concept of the scoping process, as set forth in proposed sections 51.28 and 51.29. Generally, we believe the

NRC proposed regulations adequately deal with this topic. We do, however, wish to comment regarding the role of participants in the scoping process.

Proposed section 51.29(a)(5) invites "any person who requests an opportunity to participate in the scoping process" to be afforded such an opportunity to participate. We recommend that the NRC include within proposed section 51.29 a standard to govern the extent of such participation, particularly where a public scoping meeting will be held. The unlimited participation afforded by proposed section 51.29 could result in a burdensome process to the NRC if numerous persons request an opportunity to participate in those meetings. We suggest that participation be limited by a standard such as "to the effect practicable". Inclusion of this standard in the regulations would facilitate conducting public scoping meetings by clearly allowing the NRC to, for example, set time limits on presentations at such meetings.

Also, we specifically urge retention of proposed section 51.29(b) in the final regulations. The procedure and criteria for admitting persons to licensing proceedings either as parties or to make a limited appearance should not be changed in any way by the scoping process.

Finally, with regard to proposed section 51.40 concerning the early consultation of an Applicant with the NRC Staff, the Supply System urges the NRC to use this mechanism as a "scoping process" to aid Applicants in the preparation of environmental reports or other environmental information. In order to reduce unnecessary paperwork and delay for Applicants, it is important to avoid unnecessary environmental assessment that could result if current NRC guidance, e.g., Reg. Guide 4.2, concerning the preparation of an ER is utilized without early NRC Staff guidance. Accordingly, the Supply System urges the Commission to adopt a policy that the NRC Staff seek to achieve the same goals during consultations with Applicants pursuant to proposed 10 CFR 51.40 as are set forth in connection with the scoping process in proposed 10 CFR 51.28, e.g., identification of peripheral or already examined issues.

III. CONCLUSION

The Washington Public Power Supply System appreciates the opportunity to comment on these proposed regulations implementing section 102(2) of NEPA. We urge the Commission to revise those proposed regulations consistent with the foregoing comments.

Very truly yours,

D. L. Renberger
Assistant Director, Technology

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