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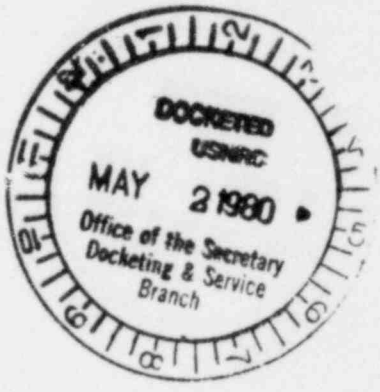

May 2, 1980

Samuel J. Chilk, Secretary
U. S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Dear Mr. Chilk:

By Federal Register Notice dated March 3, 1980 (45 Fed. Reg. 13739), the Nuclear Regulatory Commission requested public comments on proposed revisions to 10 C.F.R. Part 51, its environmental protection regulations for domestic licensing and related functions.

The following comments respond to the proposed revision of Part 51, and are offered on behalf of Boston Edison Co., Combustion Engineering, Inc., Florida Power & Light Co., Houston Lighting & Power Co., Northern Indiana Public Service Co., Portland General Electric Co., and Puget Sound Power & Light Co.

As the Commission's notice states, the proposed new regulations stem from the issuance by the President of Executive Order 11991 of May 24, 1977 (42 Fed. Reg. 26957 (1977).) There the President directed the Council on Environmental Quality (CEQ) to issue regulations to the Federal agencies to implement the National Environmental Policy Act of 1969, as amended (NEPA). He also directed Federal agencies to comply with regulations issued by CEQ "except where such compliance would be inconsistent with statutory requirements." CEQ subsequently published final regulations "to

implement the procedural provisions 1/ of . . . " NEPA, stating that, in accordance with provisions of Executive Order 11991, "the Council's regulations are binding on all Federal agencies . . . ." (43 Fed. Reg. 55978 et seq, (1978).) That statement raises profound and difficult questions concerning the relationship and relative powers in the circumstances of the President, the Congress and the "independent regulatory commissions," such as the NRC. 2/

Apparently in order to minimize or avoid these problems to the extent possible, the NRC undertook to reach an accomodation "between NRC's independent regulatory responsibilities and CEQ's objective of establishing uniform NEPA procedures . . ." by undertaking "to develop regulations to take account of CEQ's NEPA regulations voluntarily . . . ," subject to specified conditions; and the instant notice contains the somewhat unusual statement that issuances of the regulations would reflect NRC policy undertaken voluntarily. 3/ (45 Fed. Reg. 13739 (1980).)

1/ The Supreme Court has recently reiterated its previous statement "that NEPA while establishing 'significant substantive goals for the nation,' imposes upon agencies duties that are 'essentially procedural.'" Strycker's Bay Neighborhood Council, Inc. v. Karlen, 100 S.Ct. 497, 500 (1980), citing Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978). Consequently, it is unclear what agency NEPA responsibilities fall outside the Executive Order and the implementing CEQ regulations by virtue of the purported limitation of the CEQ mandate to "procedural provisions." In fact, the CEQ regulations (e.g. 40 C.F.R. Part 1504) confer upon that agency significant authority to make substantive decisions of other agencies.

2/ See, e.g., Memorandum for Charles H. Warren, Chairman, CEQ from John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, Dated April 4, 1977; Memorandum for Simon Lazarus, Associate Director, Domestic Council, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, dated July 22, 1977; Letter dated July 28, 1978, (and enclosures) from Hon. Abraham Ribicoff, Chairman, Senate Committee on Governmental Affairs, to Nicholas C. Yost, General Counsel, CEQ.

3/ In issuing regulations, Federal agencies rarely find it necessary expressly to refute an implication that their adoption was under duress, a reflex act, or otherwise involuntary.

The following comments address specific proposals either suggested by the CEQ and not incorporated in the proposed regulations or proposed by the NRC.

1. In proposing its regulation, the NRC states that several provisions of the CEQ regulations, referred to below, require further study before implementing regulations can be promulgated. We strongly urge that those provisions not be adopted. For example, 40 C.F.R. § 1502.22(b) would require performance of a "worst case" analysis in certain circumstances, including some whose occurrence is improbable. Such a requirement could substantially modify NRC's current NEPA approach. The AEC, and then the NRC, have long observed the policy that "highly conservative assumptions and calculations used in AEC safety evaluations are not suitable for environmental risk evaluation, because their use would result in a substantial overestimate of the environmental risk." 4/ In determining to reexamine Annex A 5/ (as to class of accidents), the Commission continued to maintain that "NEPA is based on the philosophy that the Federal government should consider all available information about the reasonably likely environmental consequences of its proposed actions . . . ." 6/ The worst case analysis requirement is, moreover, inconsistent with the existing judicial precedent which does not require consideration of events reasonably deemed to be of low probability. Carolina Environmental Study Group v. United States, 510 F.2nd 796, 799 (D.C. Cir. 1975). The Supreme Court has stated pointedly that "every alternative . . . conceivable by the mind of man" need not be considered. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978).

4/ Consideration of Accidents in Implementation of the National Environmental Policy Act of 1969, 36 F.R. 22851 (Annex A to Appendix D. Part 50).

5/ Offshore Power Systems (Floating Nuclear Power Plants), CLI-79-9, 10 NRC 257 (1979).

6/ Id., at 261.

CEQ's regulation (40 C.F.R. § 1502.22(a)) requires the gathering of extensive data for alternative sites beyond the type currently required under NRC regulations. This requirement would have a substantive impact on utility siting studies and NRC environmental reviews. It would be expensive and time-consuming to implement and would not lead to better decision-making, since it is fully possible to decide whether an alternative site is "obviously superior" without extensive, detailed information. Moreover, it is likely that, since alternative sites have not undergone the comparable scrutiny that the proposed site has, examination of detailed information for the alternatives would reveal adverse environmental impacts not initially observed. 7/ Thus, thorough examination of the alternate sites would most likely demonstrate the comparative advantages of the proposed site.

40 C.F.R. § 1508.18 defines "major federal action" to include agency inaction where that inaction is reviewable under the Administrative Procedure Act or other applicable law. The impact of the CEQ proposal is unclear: e.g. does it apply to denials of petitions for rulemaking? Such a denial is not now usually accompanied by the issuance of an impact statement. It is also unclear whether mere inaction would trigger a claimed right to the preparation of a statement even prior to a judicial determination that the inaction was justifiable. The provision appears to be susceptible of adding wholly unnecessary complications to the administrative process and to be a possible additional source of unproductive litigation.

2. In addition to the foregoing CEQ regulations, we also suggest that certain of the regulations proposed to be adopted by the NRC be limited. "Scoping" is intended as a means for identification of significant issues early in the NEPA process. We agree that narrowing the issues to be considered in the NEPA review is worthwhile. However, we have serious reservations as to the efficacy of the scoping process as proposed (§§ 51.26-51.29). Notice of intent to issue an EIS (§ 51.27) and a request for comments is useful, but the designation of "participants" (§§ 51.27(a)(4); 51.29) connotes a formal process. We question whether a scoping meeting (§ 51.27(a)(4)) will serve its intended purpose because the likelihood is that such a meeting will be adversary in character. The proposal seems to use

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7/ Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), 5 NRC 503, 529 (1977); New England Coalition v. U.S.N.R.C., 582 F.2nd 87, 95 (1st Cir. 1978).

another overformalization of NEPA procedures. Therefore, we suggest that "scoping be limited to requests for comments, which should serve the informational requirements of § 51.28.

With regard to issuance of operating licenses, §§ 51.53 and 51.95 would provide that a supplement to Applicant's Environmental Report and the FES for the construction permit will be prepared. These sections provide that the supplement "will cover only matters which differ from or which reflect significant new information in addition to those matters discussed in the final environmental impact statement." (§ 51.95, emphasis added.) The underscored language suggests that the supplement not only addresses significant new information subsequent to issuance of the construction permit but also all prior information included in the construction permit FES. We believe §§ 51.53 and 51.95 are intended to implement the principles stated in SECY-79-406 (June 18, 1979): "There is no need, under present regulations, to duplicate the review performed at the construction permit stage and the review at the operating license stage should be merely an update of the earlier stage." (SECY-79-406, p. 3.)

We recommend that §§ 51.53 and 51.95 be changed to reflect the above-quoted language from SECY-79-406. Consistent with this recommendation, certain NEPA issues, e.g. alternate sites, alternate fuel, need for power, should not be considered anew in the review of an already-constructed plant. The Staff has previously suggested consideration of this policy. In NUREG-0499, Supplement 1, 8/ the Staff stated:

> No additional review of alternate sites would be required at the operating license stage unless there is new information which reasonably demonstrates that, considering forward costs, there is a possibility that a cost benefit analysis would show that the plant should be rebuilt on an alternative site. In practice, this means that alternative sites likely will not be rereviewed and that rejection of the proposed site would only be on the demonstration that the proposed site is unsuitable with respect to safety or the environment.

(NUREG-0499, Supplement 1, p. 19.) The Staff's rationale is equally applicable to need for power and alternate fuel

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8/ General Considerations and Issues of Significance on the Evaluation of Alternative Sites for Nuclear Generating Stations under NEPA, December 1978.

issues. We therefore urge the Commission to limit the operating license stage NEPA review of the above issues to consideration of "new information of significance to the ultimate decision on the proposed action." (45 Fed. Reg. 10492 (1980).)

§ 51.103 requires the preparation of a concise record of decision (§ 51.103). Clearly, environmental considerations along with economic, technical and national policy matters must be evaluated in reaching a decision on a major Federal action and the public is entitled to know how these decisions were reached. In fact, however, an initial decision in an adjudicatory licensing proceeding or a statement of consideration for a rulemaking proceeding will accomplish these goals set by CEQ (43 Fed. Reg. 55978 (1978).) Preparation of a separate record of decision will surely involve additional paperwork and could result in delays in decision-making, while producing only duplication.

We appreciate the opportunity to provide these comments.

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By: Frederic S. Gray